SECURITIES REGULATION IN SASKATCHEWAN

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Part 1 Introduction

This paper provides an overview of securities regulation in Saskatchewan under *The Securities Act, 1988* S.S. 1988, C. s-42.2 ("the Act") and related regulatory instruments. It outlines the general structure of the Act, and identify its operative provisions. While the range of material covered is fairly comprehensive, the length of this paper doesn't allow a detailed discussion of the provisions of Saskatchewan securities laws. For more detailed analysis consult reference works on securities law. All references to sections are to *The Securities Act, 1988* unless otherwise indicated. The Act and all of the other regulatory instruments in force are on the Commission's Web site at www.sfsc.gov.sk.ca/ssc/rules.shtml

Part 2 History Of Securities Regulation

The Act was proclaimed in force in the Province of Saskatchewan on November 7, 1988. It is the result of 150 years of evolution of securities regulation.

The key Act of modern regulation is the *English Joint Stock Companies Act* of 1844 that required the filing of a prospectus containing pertinent information about an issuer raising funds from the public. This "full, true and plain disclosure" requirement is still the basis of all securities legislation.

Beginning in the early 1900's securities offerings, in addition to being reviewed for full, true and plain disclosure, were also subjected to merit review. In 1911 legislation was passed by the state of Kansas to deal with slick urban promoters who were selling a piece of the blue sky to Kansas farmers. The legislation, later referred to as "blue sky" regulation, required issuers and other sellers of securities to obtain a license. To acquire a license the issuer had to file information about its finances. If satisfied that the issuer was sound, and that the offering was not "unfair, unjust, inequitable or oppressive to any class of contributors", the regulator would grant a license.

Blue sky regulation was subsequently adopted by most states in the United States. In Canada the first legislation was passed by Manitoba in 1912 followed by Saskatchewan when the *Sale of Shares Act* was passed in 1914. This legislation embodied the principles of full, true and plain disclosure together with merit review of the basic business of the issuer, and the integrity of its promoters.

The stock market crash of 1929 spawned the next stage of securities legislation. Until that time securities regulation in the United States was at the state level. However, the federal government took jurisdiction in the early 1930's when it passed security fraud prevention legislation requiring the registration of individuals selling the securities, and adopting the full disclosure approach without merit review. Today in the United States federal regulation is carried out by the Securities and Exchange Commission that does no review of the fairness of the investment. The states continue to do both blue sky and disclosure reviews.

In Canada the securities industry is regulated by the provinces and territories. All jurisdictions currently regulate on both merit and full disclosure principles.

The next major development in securities law was *The Ontario Securities Act* of 1966. This legislation was a reaction to the Kimber Report of 1965 that recommended changes to securities legislation to prevent further problems like the Windfall Oil and Mines Ltd. and the Atlantic Acceptance Ltd. scandals. The Windfall scandal revolved around improper disclosure of mineral drilling results that caused large fluctuations in the price of Windfall's shares on the Toronto Stock Exchange, and large profits for the promoters of the company. The Atlantic Acceptance scandal involved Atlantic's borrowing money in the money market from large institutional investors using statutory exemptions. The money raised was lent out in a credit financing business that later collapsed amid allegations of fraud and mismanagement.

The provinces west of Ontario followed almost immediately with uniform legislation that practically duplicated the Ontario legislation. These provinces became known as the Uniform Act provinces. In Saskatchewan the legislation was *The Securities Act of 1967* ("the 1967 Act"),

the immediate predecessor to the present Act. Uniform Act legislation introduced, for the first time, rules setting out the procedure on take-over bids, requirements that issuers raising public funds make continuous disclosure about their affairs, and the prohibition against insiders making profits on securities transactions using undisclosed information about an issuer.

In 1978 the Province of Ontario initiated another round of major changes to securities legislation. It introduced what is called the "closed system" which will be discussed later in this paper. The present Act reflects the changes made a decade before in Ontario, and Saskatchewan law is now substantially uniform with the legislation in other jurisdictions in Canada.

Part 3 The Saskatchewan Financial Services Commission

The Securities Act, 1988 is administered by the Saskatchewan Financial Services Commission (the SFSC). The SFSC was established on February 1, 2003 through the amalgamation of the Saskatchewan Securities Commission, the Financial Institutions Section of the Consumer Protection Branch and the Pension Benefits Branch. In addition to regulating the securities industry, the SFSC also regulates the credit union system, insurance, pensions and trust and loan companies. The SFSC is composed of a full time Chairman and six part-time members appointed by Cabinet. The Chairman acts as Chief Executive Officer. The SFSC makes Commission regulations, establishes policy, grants orders and rulings under the Act, functions as a quasi-judicial tribunal in conducting hearings under the Act and acts as an appeal body from decisions of the staff.

Staff in the SFSC's Securities Division carry out the day-to-day regulatory functions under the Act.

Part 4 Canadian Securities Administrators

The Commission works with other provincial securities regulators through the Canadian Securities Administrators (CSA) to increase efficiency in securities regulation in Canada. The CSA has established a national securities regulatory system that operates using a combination of formal and informal agreements among securities regulators. The securities regulators work together to produce a coordinated, harmonized regulatory structure for the supervision of market activities across provincial borders.

Securities regulators through the CSA have combined their resources to develop systems to facilitate supervision of markets and enhance efficiency for business and markets in three major ways.

National rules and policies

Staff of the commissions work together using their collective experience to develop national instruments that deal with regulatory issues. These national instruments reflect regional diversity and result in a national application of rules with uniformity and certainty. The securities regulators with rule-making power adopt these national instruments as rules or regulations; those without rule-making power adopt them as policies. The SFSC adopts national instruments as Commission regulations.

National Instruments contain mandatory provisions that must be complied with. They often have companion policies that give background information to the national instrument and provide interpretive advice. National Instrument 14-101 *Definitions* contains definitions of terms that are commonly used in National Instruments.

National Policies outline how securities regulators interpret provisions of securities legislation, how they might exercise their discretion and the practices and procedures they follow.
CSA Staff Notices set out information of a procedural or administrative nature. They also set out how staff might exercise their discretion on various matters.

The Commission issues Local Instruments and Local Policies, and staff issue Local Staff Notices. These deal with matters that are applicable only in Saskatchewan. Local Instrument 14-501 *Definitions* contains definitions of terms that are used in local instruments.

Saskatchewan Staff Notice 11-701 *Commission Regulatory Instruments* gives more information about the different kinds of regulatory instruments. Saskatchewan Staff Notice 11-702 *Number System for National and Local Regulatory Instruments* describes the numbering system for them.

Mutual Reliance

The CSA instituted the Mutual Reliance Review System (MRRS) that simplifies processes for both market participants and regulators. Where a proposed activity would require action by several securities regulators, such as issuing a receipt for a prospectus or an application for registration as a dealer, or for exemptive relief, this system allows the market participant to deal with only one regulator. All the participating regulators may rely on the review and recommendations performed by the staff of the regulator designated to be the principal regulator. A single order, receipt or registration is issued by the principal regulator on behalf of all participating jurisdictions. Participating jurisdictions still have the opportunity to review the application and to provide comments if they wish. If they do not agree with the position of the principal regulator, may opportunity opt out and deal directly with the filer.

There are currently two MRR Systems in place governed by the following instruments:

- National Policy 12-201 *Mutual Reliance Review System for Exemptive Relief Applications;* and

- National Policy 43-201 *Mutual Reliance Review System for Prospectuses and Annual Information Forms.*

Electronic Filing Systems

The CSA has developed systems using information technology that provide convenient forms of filing required disclosure documents and applications for regulatory approval. SEDAR (System for Electronic Document Analysis and Retrieval) allows public companies to file disclosure documents with commissions, and for the public to access those documents electronically through a central database at SEDAR.com. Insiders can file their reports over the Internet through SEDI (System for Electronic Disclosure by Insiders) and the public can access them at SEDI.com. The National Registration Database (NRD) is a system that allows individuals to apply for registration using electronic forms over the Internet. The public currently has no access to the information in the NRD.

Part 5 Principles of Regulations under *The Securities Act, 1988*

The Act is consumer protection legislation aimed at protecting the investing public. The mandate to protect investors' interests by regulating the securities industry and the capital markets, must be balanced against the business community's requirement to raise capital efficiently. Stringent and time consuming rules enacted in the name of protecting investors, could unnecessarily stifle capital raising initiatives. On the other hand, the system of control must be sufficiently strong to encourage public confidence, for the investment industry will only flourish in such an environment.

The Act embodies four main principles of securities regulation which have evolved over the years:

1. ***Only honest and knowledgeable persons should be able to sell securities.*** Section 27 requires that all persons selling or giving advice about securities or exchange contracts be registered.

2. ***When securities are first offered to the public, potential investors should be provided with and be able to rely on truthful, complete and understandable selling documents.*** Section 58 requires the filing of a prospectus with full, true and plain disclosure of all material facts about a company about to make a distribution of securities.

3. ***All buyers and sellers should have equal access to information about companies whose shares are trading in the secondary market, and an equal opportunity to be well informed.*** The Act and related national instruments set out the requirements for the filing of financial information on a regular basis, plus special filing requirements for material changes, take-over bids, proxy solicitations and insider trading.

4. ***Persons taking undue advantage of purchasers should be held to account.*** The Act gives the Commission enforcement powers, and creates civil liability for issuers and other specified persons for misrepresentations in offering documents.

The Act therefore hinges on two key sections - section 27 which requires registration of anyone selling or giving advice in securities or exchange contracts, and section 58 which requires the filing of a prospectus before securities are sold.

Most of the Act relates to "trading" in securities. The definition of "trade" in clause 2(1)(vv) is any transfer, sale or disposition of a security for a valuable consideration, but does not include a purchase of a security. The Act therefore regulates the sale, not the purchase, of securities.

Part 6 The Closed System And The First Trade Rules

The Act creates the "closed system" which was first adopted by legislation in Ontario in 1978.

Under the 1967 Act, a prospectus was required only where there was a "primary distribution to the public". Under the present Act the concept of "public" and "non-public" has been eliminated, and a prospectus is now required whenever there is a distribution as defined in clause 2(1)(r). A distribution is generally a sale of securities issued from treasury, or the sale of previously issued securities by control persons, promoters, incorporators or underwriters. Because a prospectus is required for almost all transactions it was necessary to greatly expand the types of exemptions available. These are covered in Part 7 of this paper.

First trade rules

Multilateral Instrument 45-102 *Resale of Securities* provides that for some exemptions the "first trade", the next trade after the exempted trade, is also a distribution that requires a prospectus. This is unless another exemption can be found, or unless the first trade rules are complied with. The first trade rules are found in Multilateral Instrument 45-102 *Resale of Securities.* MI 45-102 sets out the conditions that must be met before the shares acquired under an exemption are freely tradeable. The important conditions are:

1. the company must be a reporting issuer for four months;
2. in some cases the security must be held by the first purchaser for a period of at least four months; and
3. the securities must bear a notation indicating the period during which the sale of the securities is restricted.

There are ways to sell securities acquired under an exemption other than complying with the first trade rules. They are:

1. file a prospectus;
2. use another statutory exemption; or
3. obtain a discretionary ruling from the Commission pursuant to section 83.

The general principle behind the closed system is that everyone should have equal opportunity to access information about a company. Companies, insiders of the company, and control persons generally have more information about that company than the general public. When an offering is made under an exemption without a prospectus, the hold periods are intended to allow dissemination of information about the company. This should put purchasers in the general public on an equal footing with the company and its insiders. Different people may make different choices based on the same facts, but it is important that they have the same facts. The hold periods imposed by the closed system also ensure that statutory exemptions cannot be used to avoid using a prospectus for offerings that should be made using a prospectus.

Example of how the closed system operates

The following example demonstrates how the closed system works:

Gerry has been working for years to develop the technology for making alcohol from wheat. He has perfected the procedure and has applied for a patent. His lawyer suggests that he should incorporate. Gerry likes the idea. He decides to take 100% of his own company and issues 100,000 shares to himself. His lawyer looks at the Act and discovers that the transaction comes

within the definition of distribution, because it is an issue of securities from the treasury of the company. The lawyer looks for a prospectus and registration exemption and finds two:

1. A trade to an incorporator under clauses (81)(1) (p) and 39(1)(v); and

2. A trade to a promoter under clauses (81)(1)(q) and 39(1)(w).

The company has no money, and Gerry decides to raise some capital. The bank is not prepared to lend the company money because it has no assets or earnings. Therefore, Gerry decides that he will sell some of his shares and raise $100,000 or so. His lawyer looks at the Act again and discovers that Gerry can't sell any of his shares without a prospectus or another exemption. The definition of distribution includes the sale by an incorporator or promoter.

Since Gerry cannot sell his shares easily Gerry's lawyer looks for an exemption that might allow the company to raise capital by selling its shares directly. He reminds Gerry that his cousin is a doctor. He says that doctors are always looking for investments. If Gerry can get his cousin to invest $150,000 he could use the exemption under clauses 81(1)(d) and 39(1)(e). His cousin buys the shares.

Two years later his cousin decides to buy a new house and to liquidate her investments. Gerry's lawyer looks at the Act again and discovers that she can't sell her shares. Section 2.3 of Multilateral Instrument 45-102 says that a "first trade" of securities purchased under the (81)(1)(d) the $150,000 exemption is a distribution. The sale by the doctor requires a prospectus or a further exemption. However, provided certain conditions are met, there is another way out of the first trade restrictions. The $150,000 invested by the doctor was put to good use, and the company was able to raise further funds 9 months ago by way of a prospectus offering. When the prospectus cleared the Commission, Gerry's company became a "reporting issuer". Under section 2.5 of MI 45-102, the major conditions permitting resale by a purchaser of a security sold to the purchaser under the $150,000 exemption are:

1. the company must be a reporting issuer for four months immediately before the trade; and

2. the purchaser must have held the security for at least four months from the date of the trade.

There are other conditions, but these are the important ones.

Both conditions are met, and Gerry's cousin can sell her shares. If the company were not a reporting issuer, she would have had to either hold the shares or look for someone else to buy them using the same exemption under which the company sold the shares to her.

The first trade rules are aimed in ensuring that there is enough information in the market place to put buyers and sellers on an equal footing. The requirement that the issuer be a reporting issuer means it has to have issued a prospectus during the hold period and filed continuous disclosure material. The prospectus together with hold periods, during which the reporting issuer files continuous disclosure material such as financial statements, means that when securities are issued

after a prospectus, there is enough time for potential investors to hear or find out about ongoing information. In the some cases, analysts may prepare reports about the company.

Part 7 Statutory Exemptions

Because a prospectus is required on a distribution, and because the term "distribution" covers such a wide range of transactions, there are many more statutory exemptions in the present Act than in the 1967 Act. These statutory exemptions are:

1. Registration exemptions related to the type of trade, found in subsection 39(1);

2. Prospectus exemptions related to the type of trade, found in subsection 81(1);

3. Registration exemptions related to the type of security involved in the trade, found in subsection 39(2);

4. Prospectus exemptions related to the type of security involved in the trade, found in section 82;

5. Exemptions from registration as an advisor under section 38.

6. A few minor registration and prospectus exemptions under sections 60, 63, and 98, 99 and 101 of *The Securities Regulations* ("the Regulations").

Pure Registration Exemptions

While most of the statutory exemptions are from both the registration and prospectus requirements, a few exemptions are pure registration exemptions only:

- 39(1)(g) allows a creditor to sell securities which have been pledged as security for a debt;

- 39(1)(h) allows occasional trades by certain employees of a registered firm;

- 39(1)(k) and (l) allow the execution of unsolicited orders given to banks, trust companies or credit unions.

Trade exemptions from both registration and prospectus requirements

Most of the exemptions relating to trades are exempt from both the prospectus and registration requirements. They can be generally categorized as follows:

1. ***The purchasers are institutions.*** The purchasers are governments or large institutions involved in transactions in which the details of the issue are determined by active negotiation between the issuer and the purchaser.

- the purchaser is a financial institution or government - 39(1)(c), 81(1)(a)

- the purchaser is an exempt purchaser recognized by the Commission - 39(1)(d), 81(1)(c)

- the purchase price is $150,000 or more ("private placement") - 39(1)(e), 81(1)(d). Saskatchewan Local Policy 45-603 sets out how the Commission interprets that use of this exemption.

2. ***The trade is an isolated transaction*** - 39(1)(b) and 81(1)(b)

3. ***The securities transaction is part of what is primarily a commercial or business transaction.***

- where administrative officials such as receivers, executors and trustees sell securities in the course of carrying out their duties - 39(1)(a), 81(1)(a.1)

- where securities are pledged for a bona fide debt - 39(1)(f), 81(1)(e)

- where securities are traded as settlement of a debt - 39(1)(m.1), 81(1)(f.1)

- where securities traded are in exchange for assets of over $150,000 - 39(1)(t), 81(1)(m)

- where securities traded are in exchange for mining or oil and gas properties - 39(1)(z), 81(1)(n)

- where the trade by a real estate broker is in all of the securities of a company which has listed real estate and other assets with the broker - 39(1)(aa), 81(1)(w)

4. ***The trade is related to a take-over or issuer bid.*** These transactions are separately regulated under the take-over bid provisions of the Act which require a take-over bid circular, making a prospectus redundant.

- trade by an offeror making a takeover bid - 39(1)(q), 81(1)(j)

- trade to an offeror under an take-over or issuer bid -39(1)(r), 81(1)(k)

- trade to issuer which is buying back its securities - 39(1)(s), 81(1)(l)

5. ***The trades are made to existing shareholders of the issuer.*** Shareholders are thought to already be aware of their company's affairs.

- where securities are issued as stock dividends, incidental to a winding-up or reorganization, or pursuant to a previously granted right to convert, exchange or acquire the securities - 39(1)(m), 81(1)(f)

- where securities of a reporting issuer are issued to shareholders as a dividend in

specie - 39(1)(n), 81(1)(g)

- where existing shareholders are granted the right to acquire more shares under a rights offering - 39(1)(o), 81(1)(h). National Instrument 45-101 *Rights Offerings* supplements this exemption.

- where securities of another company are issued to shareholders pursuant to an amalgamation or merger - 39(1)(p), 81(1)(i). CSA Staff Notice 45-303 provides guidance on how staff interpret the use of this exemption.

- where the securities are issued pursuant to dividend purchase plans where shareholders can elect to receive stock dividends in lieu of cash dividends - 39(1)(ff), 81(1)(cc)

6. ***The trades are to or among those closely associated with the issuer.*** Promoters, incorporators, control persons, and employees are all thought to be knowledgeable about the affairs of an issuer, and do not need the protection of the prospectus and registration requirements of the Act.

- the trade is to not more than five incorporators, for nominal value, and is necessary to facilitate the incorporation of the issuer - 39(1)(v), 81(1)(p)

- the trade is by an issuer, a promoter or an incorporator to a promoter - 39(1)(w), 81(1)(q)

- the trade is among control persons - 39(1)(x), 81(1)(r)

- trades are to senior officers and directors of the issuer, to specified relatives, or close friends and close business associates of a promoter of the issuer. This is known as the "close friends and close business associates" exemption and is a widely used exemptions - 39(1)(cc), 81(1)(z). Local Staff Notice 45-702 sets out a procedure by which staff will pre-clear the names of proposed purchasers under this exemption.

- trades are by the issuer to employees who are not induced to purchase by expectation of continued employment - 39(1)(u), 81(1)(o). Multilateral Instrument 45-105 *Trades to Employees, Senior Officers, Directors and Consultants* provides a similar but broader exemption.

7. ***The trades are to "qualified investors"*** or purchasers who, because of their net worth, income and investment experience or because of advice received, do not need the registration and prospectus protections.

- sales are to investors qualified because of their net worth, income and investment experience or because of advice received. This is known as the "qualified investor exemption". The main conditions for use of this exemption are that an

offering memorandum be approved and used, that no sales commission be paid, and that there be no advertising. Saskatchewan Policy Statement 45-602 *Qualified Investor Exemption* sets out criteria for the qualification of purchasers, and the form of the offering memorandum - 39(1)(y), 81(1)(s)

- trades are between those who have purchased under the "qualified investor" or the "close friends and associates" exemptions - 39(1)(ee), 81(1)(bb)

8. ***The trades are made to or among dealers or underwriters in the normal course of their business***. These exemptions recognize the fact that such registrants often have sources of information available to them which obviate the need for normal disclosure.

- trades to underwriters or among underwriters - 39(1)(i), 81(1)(u)

- trades through dealers acting as agent of the vendor or to dealers acting as principal - 39(1)(t)

There are conditions attached to the use of many of the prospectus exemptions in subsection 81(1). For example, an offering memorandum used in connection with the exemptions listed in subsection 81(3) must be filed with the Commission. Reports of trades made in reliance on the exemptions listed in subsection 81(4) must also be filed.

Securities exemptions from both prospectus and registration requirements

All of the exemptions relating to the nature of the security are dual, that is, exemptions from both the registration and prospectus requirements. The registration exemptions are set out in subsection 39(2), and they are adopted as prospectus exemptions under clause 82(1)(a). The basis for these exemptions is:

1. ***The securities are low risk, in some cases being government guaranteed;***

   - 39(2)(a)(i) & (ii) - debt securities of domestic or certain foreign governments

2. ***The issuers are regulated under other specific legislation;***

   - 39(2)(a)(iii) - securities issued or guaranteed by a bank or a licensed trust company

   - 39(2)(b) - guaranteed investment certificates issued by a licensed trust company

   - 39(2)(d) - units of a mutual fund administered by a licensed trust company

   - 39(2)(i) - securities issued by a co-operative

   - 39(2)(j) - securities issued by a credit union

3. ***The purchasers have adequate knowledge*** either from their present knowledge of the

issuer's affairs, their ability to obtain satisfactory disclosure, or their association with the venture or its promoter.

- 39(2)(f) - a mortgage on real property offered for sale by a licensed mortgage broker

- 39(2)(g) - securities evidencing indebtedness due under a contract for the acquisition of personal property involving the retention of title.

- 39(2)(k) - securities of a private issuer where they are not offered for sale to the public. "Private issuer" is defined by 2(1)(jj) to be a company where the right to transfer its shares is restricted and the number of its security holders is limited to not more than 50.

- 39(2)(e) - negotiable promissory notes or commercial paper which mature in less than one year and have a prescribed rating. General Ruling/Order 45-909 *Short Term Debt Exemption* grants a similar exemption.

4. ***It is expedient for business or social reasons to exempt them.***

- 39(2)(h) - securities of non-profit corporations.

- 39(2)(c) - securities of a "private mutual fund". The term is defined under 2(1)(kk) to mean an investment club.

- 39(2)(l),(m),(n) - securities of prospectors and prospecting syndicates. These exemptions reflect the special concern which legislatures have shown for keeping grass roots mining exploration less encumbered by regulation than other business enterprises.

The Commission's paper "How to Raise Capital Using Exemptions" discusses the exemptions in more detail.

Multilateral Instrument 45-103 Capital Raising Exemptions

Multilateral Instrument 45-103 *Capital Raising Exemptions* contains four new exemptions that companies may use to raise capital. MI 45-103 is in force in all jurisdictions except for Ontario and Quebec. The four exemptions are:

- ***Private issuer exemption.*** A private issuer is a non-reporting issuer whose voting and equity securities are subject to restrictions on transferability and are not owned by more than 50 persons, excluding employees. A private issuer may sell securities to close relatives, close personal friends, close business associates of founders, directors or senior officers of the issuer, to accredited investors and persons who are not the public. No disclosure is required for investors, and there are no reporting requirements.

- ***Family, friends and business associates exemption.*** An issuer that is not a private issuer

may sell securities to close relatives, close personal friends and close business associates of founders, directors or senior officers of the issuer. No disclosure to investors is required, but issuers must file reports of trades under the exemption with the Commission.

- ***Offering memorandum exemption.*** An issuer may raise any amount of money from any person provided the issuer gives the person an offering memorandum containing specified disclosure, and the person signs a clear risk statement. Purchasers who do not meet a prescribed income and asset test may invest up to $10,000 in an offering under this exemption. The issuer must file the offering memorandum and report all distributions under this exemption. Purchasers who do meet the income and asset test are not restricted in the amount they may invest.

- ***Accredited Investor Exemption.*** Under this exemption an issuer may trade to accredited investors that include financial institutions, pension and investment funds, substantial corporations and wealthy individuals. No disclosure is required, but issuers must file reports of trades under the exemption with the Commission.

Part 8 Discretionary Exemptions

The Commission has the power under section 83 of the Act to grant discretionary exemptions from both the prospectus and registration requirements. It also has the general power to waive any provision of the Act or regulations pursuant to section 160. Saskatchewan Policy Statement 12-601 *Applications to the Saskatchewan Securities Commission* sets out in detail how to make an exemption application.

The application itself is a formal document and must be verified by the applicant. Representations made in the application are relied on by the Commission in granting the ruling, and care should be taken that information is accurate and complete. Making a misrepresentation in any written material filed with the Commission is an offence under section 131 of the Act.

National Policy 12-201 *Mutual Reliance Review System for Exemptive Relief Applications* sets out the procedure for making an exemption application in more than one jurisdiction.

Factors considered by the Commission

Before granting a discretionary exemption, the Commission must be satisfied that it is not prejudicial to the public interest to do so. It will consider whether there are factors in place for public protection, which make the prospectus and registration requirements unnecessary. Rulings are often granted where a transaction is very close to an existing statutory exemption, technically does not fall within it for one reason or the other, but the policy considerations behind the exemption are still met. Exemptions are also granted where there is an uncertainty in the application of the Act.

The Commission will grant exemptions where there are special relationships between the parties involved in the transaction, and the purchasers, through this special relationship, have knowledge both about the enterprise and the promoter. The purchasers therefore should not require the disclosure normally made in a prospectus and the protection afforded by registration.

Exemptions are also granted where purchasers are knowledgeable, can fend for themselves and don't require the protection of the Act.

In general terms, the Commission is open minded as to the kind of situations in which it will grant exemptions, as long as it is satisfied that the results will be that there is the same level of public protection as would be provided if the prospectus and registration requirements applied.

The Commission rarely grants an unconditional exemption, and often adds in the requirements that flow from the provision to which the exemption relates as conditions to the ruling. For example, it will often impose the first trade rules that would have applied if the trade had taken place under a statutory exemption. Continuous disclosure requirements are often imposed as well.

General Rulings/Orders

The Commission has granted a number of general rulings pursuant to section 83 and orders pursuant to section 160 ("GROs") that are of general application and don't specifically relate to one person or company. For example GRO 45-901 *Self-Directed Registered Education Savings Plans* exempts registered educational savings plans from the prospectus and registration requirements provided that certain conditions have been met. The Commission's Web site sets out all of the General Rulings/Orders.

Part 9 Registration

Section 27 is the basic registration requirement. It provides that you can't sell a security or an exchange contract, or give advice respecting a security or exchange contract unless you are registered either as a dealer or adviser or as an employee of a dealer or adviser. An exchange contract is defined as a futures contract or an option that trades on an exchange under standardized terms and conditions.

The registration provisions of the Act and the Regulations are intended to ensure that only honest and knowledgeable persons are entitled to sell securities. The Regulations set out the details of the registration requirements for both dealers, advisers and the individuals employed by them. The categories of dealers and advisers are set out in sections 10 and 11 of the Regulations. Part IV of the Regulations has provisions which deal with such matters as capital requirements, bonding, insurance, business records, and business practices. These are intended to ensure that dealers are financially stable, able to withstand business risks and follow proper business practices.

Sections 37 and 38 of the Regulations specify the education and experience individuals must have before of being registered.

Detailed checklists are available on the Commission's Web site for each category of dealer and adviser specifying both the initial registration requirements and ongoing registration requirements.

The following national and local instruments prescribe additional requirements for registrants:

- Multilateral Instrument 31-102 *National Registration Database* requires that certain registration information, including applications for registration by individuals, be submitted to regulators electronically through the National Registration Database.

- National Instrument 33-102 *Regulation of Certain Registrant Activity* requires registrants to provide clients with disclosure about certain products and risks.

- National Instrument 33-109 *Registration Information* prescribes requirements regarding initial submissions of registration information and updating that information.

- Local Instrument 33-502 *Requirements for the Sale of Certain Securities* imposes requirements on registrants selling securities under certain statutory exemptions. It requires sellers of scholarship plan securities to provide disclosure of certain details. It also imposes additional requirements on sellers of labour-sponsored venture capital fund securities.

- National Instrument 81-105 *Mutual Fund Sales Practices* imposes restrictions on certain sales and business practices followed by managers and principal distributors of publicly offered mutual funds, and registered dealers and their sales representatives who sell them.

Part 10 Self Regulatory Organizations and Exchanges

Self-regulatory organizations play an important role in securities regulation in Canada.

Investment Dealers Association

The Investment Dealers Association of Canada ("IDA") regulates over 200 member firms that carry on business as investment dealers. Investment dealers are firms that have an unrestricted license to sell securities. The IDA sets capital and other requirements for these dealers, and business practice rules that they must follow. These standards are generally higher than those established under provincial securities laws. The IDA regularly inspects the offices of each of its members. It also investigates complaints against its members and their staff, and has processes to take disciplinary action against those who are found in breach. The Commission has recognized the IDA as a self-regulatory organization under General Ruling/Order 11-902 dated July 17, 2000. Local Instrument 31-501 requires securities dealers and brokers to be members of the IDA.

Mutual Fund Dealers Association

The Mutual Fund Dealers Association ("MFDA") is a self-regulatory organization that regulates the activities of mutual fund dealers in Canada. The Commission recognized the MFDA as an self-regulatory organization under General Ruling/Order 11-903 on February 13, 2001. Under Saskatchewan Local Instrument 31-502 *SRO Membership for Mutual Fund Dealers*, all mutual fund dealers must be members of the MFDA. Like the IDA, the MFDA has rules that specify capital and other business practices for its members firms. It inspects the operations of its members and has processes for investigating complaints and taking disciplinary action where necessary.

Canadian Investor Protection Fund

The Canadian Investor Protection Fund ("CIPF") is an integral part of the self-regulatory system. The CIPF covers losses of securities, cash balances and certain other property within defined limits that result from the insolvency of a firm which is a member of the IDA. The CIPF is set up and funded by firms who are members of the IDA. Participation in the CIPF is a condition of membership of the IDA. At the present time, there is no contingency fund that covers losses to investors that result from the failure of mutual fund dealers, but the MFDA is developing one.

Exchanges

An exchange is a marketplace that brings together buyers and sellers of securities where prices are established according to the laws of supply and demand. The traditional exchanges operating in Canada are:

- the Toronto Stock Exchange (TSX) trades all senior Canadian equities;
- the Montreal Exchange (ME) is the exclusive exchange for financial futures and options in Canada; and
- the TSX Venture Exchange (TSX Venture) is the national market for junior equities.

In recent years Alternative Trading Systems (ATSs) have begun to operate in Canada. ATSs are privately-owned computerized exchange networks that match orders for securities outside of recognized exchange facilities.

National Instrument 21-101 *Marketplace Operation* contains provisions that regulate all securities marketplaces operating in Canada including exchanges, quotation and trade reporting systems and alternate trading systems.

National Instrument 23-101 *Trading Rules* sets out common trading rules that apply to all trading in securities whether on a marketplace or not.

Part 11 Prospectus Requirements And Review

Section 58, one of the key sections of the Act, provides that no person or company shall trade in a security where the trade would be a distribution unless both a preliminary prospectus and prospectus have been filed with the Commission and receipts issued. Section 58 has very wide application because of the broad definition given to the terms used:

- "Distribution" as defined by clause 2(1)(r) covers sales by promoters, control persons, incorporators and the like, and is not limited to distribution of new shares to the public as in the former Act;

- "Person" as defined by clause 2(1)(hh) includes individuals, partnerships and unincorporated associations;

- "Company" as defined by clause 2(1)(h) includes corporations, incorporated associations, and other incorporated organizations;

- "Trade" as defined by clause 2(1)(vv) is any sale or transfer of a security for valuable consideration, and includes any act, advertisement, solicitation, directly or indirectly in furtherance of a trade;

- "Security" as defined by clause 2(1)(ss) covers a wide category of legal interests and includes "investment contracts". The judicial interpretation of this term by courts in both the United States and Canada has been very broad. This means that a great many legal instruments and interests could come within the definition of security.

A prospectus is a legal document by which securities are offered for sale. Section 61 of the Act provides that a prospectus must contain full, true and plain disclosure of all material facts relating to the securities issued. Its purpose is to provide prospective investors with sufficient information to enable them to make an informed decision about whether or not to purchase any of the securities offered. The Regulations set out the detail as to the form and content of a prospectus. See in particular Part VIII of the Regulations. Forms 13 to 15 under the Regulations specify the content of prospectuses relating to:

1. Industrial companies;
2. Finance companies;
3. Natural resource companies.

The following describes the key provisions of the Act that deal with the form and content of a prospectus:

Certificate as to full, true and plain disclosure

Sections 66 and 67 require principals of the issuer and the underwriter, if there is one, to sign a certificate stating that the prospectus contains full, true and plain disclosure of all material facts. "Material fact" is a defined term under clause 2(1)(z) and means a fact that would significantly affect the market price of a security. Where there is a misrepresentation in the prospectus, section 137 of the Act imposes civil liability on persons signing the certificate

"Misrepresentation" is also a defined term under clause 2(1)(cc). Therefore, preparing and signing a prospectus is not something to be lightly undertaken. The principals of the issuer and the underwriters must look into the affairs of the issuer to ensure that all material facts are properly disclosed. This process is called "due diligence" and those involved can take advantage of the due diligence defense pursuant to section 137.

Statement of rights

Section 69 requires that the prospectus contain a statement that purchasers have a right of withdrawal under section 79, and the right of rescission or damages under section 137 if there is a misrepresentation.

Review of prospectus

Once a prospectus is filed, the Commission must promptly issue a preliminary receipt pursuant to section 60. If the prospectus does not substantially comply with the Act and Regulations the Commission may refuse to issue a preliminary receipt under section 76. Commission staff then begin a detailed review of the prospectus to ensure that it meets the form and content requirements of the Act and Regulations, and also to ensure that it meets the merit requirements as set out in section 70.

Application of section 70 - merit review

Section 70 requires Commission staff to do a merit or "blue sky" review of prospectuses, and specifies that a prospectus receipt can't issue if the Director is of the opinion that it is not in the public interest to do so. Subsection (2) sets out a detailed list of the circumstances in which the Director must not issue a prospectus receipt. Matters that the Director must consider under subsection 70(2) include:

- whether an unconscionable consideration is paid for promotional purposes or acquisition of property. Saskatchewan Policy Statement 43-601 *Unconscionable Consideration* sets out the factors that the Director will consider in determining whether an unconscionable consideration is being paid to promoters;

- whether enough money is being raised from the sale of securities to accomplish the business purpose stated in the prospectus;

- whether there is any evidence to believe, because of the past conduct of the issuer, or an officer or other person associated with the issuer that the business of the issuer will not be conducted with integrity and in the best interests of securities holders; and

- whether an escrow or pooling agreement been put in place. National Policy Statement 46-201 *Escrow for Initial Public Offerings* sets out the circumstances in which an escrow agreement is required, and the terms of that escrow agreement.

Financial statements and forecasts

Section 79 of the Regulations sets out the financial information that is required in a prospectus. Many issuers wish to also include a financial forecast. National Policy 48 - "Future Oriented Financial Information" sets out when a forecast can be used and how it must be prepared.

National and local instruments

There are a number of other local and national instruments that apply to the content of prospectuses. The most important ones are:

- National Instrument 41-101 Prospectus Disclosure Requirements prescribes standard disclosure for prospectuses including disclosure about the underwriter's obligations and statutory rights of withdrawal and rescission.

- National Instrument 43-101 Standards of Disclosure for Mineral Projects regulates all disclosure that an issuer makes concerning mineral projects that is reasonably likely to be made available to the public.

- National Instrument 44-101 Short Form Prospectus allows reporting issuers with a large market capitalization that have filed an Annual Information Form to use an abbreviated form of prospectus streamlining the process and shortening the time frame to make a public offering of securities.

- National Instrument 44-102 Shelf Distributions makes available, for issuers qualified to use the short form prospectus system, an even more streamlined offering process. A company can file a short form prospectus that describes generally various types of securities that the company might sell during a 2-year period. Then, when it decides to make an actual offering, it simply supplements that "base shelf" prospectus with a much shorter document describing the particular offering. The offering can proceed immediately without further regulatory prospectus review or screening.

- National Instrument 44-103 Post-Receipt Pricing provides a mechanism for prospectus offerings in which the actual offering price is decided only at the end of the selling process. The "PREP prospectus" can omit the price. Once the price is determined, it is provided in a supplement to the PREP prospectus.

- National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* sets out the accounting principles and auditing standards that must be used by reporting issuers in preparing any financial information contained in prospectuses.

- National Instrument 71-101 Multijurisdictional Disclosure System sets up a system under which issuers based in the United States can prepare prospectus, continuous disclosure and take-over bid material in accordance with SEC rules, and file it with Canadian securities regulators without complying with Canadian requirements. Canadian regulators will rely on review of the documents by the SEC, and will not do their own review. The SEC has adopted rules which give qualifying Canadian issuers to reciprocal treatment in the U.S.

- Saskatchewan Local Instrument 46-501 Disclosure of Cash Calls specifies special disclosure rules for limited partnership offerings that involve cash calls.

All of the national and local instruments should be reviewed to ensure that all applicable requirements are complied with. There is a complete list on the Commission's Web site at www.sfsc.gov.sk.ca/ssc/listsort

The review process

Commission staff are available for consultation in the preparation of a prospectus, and can provide precedents of prospectuses used in similar offerings in the past. If an offering is unusual or unduly complicated, it is recommended that Commission staff be consulted during the preparation of a prospectus to avoid major changes and delays during the review process.

The initial review of the preliminary prospectus is generally completed within 10 business days of the filing of the document. Commission staff prepare and send a detailed comments letter. The onus is on the issuer and its solicitor to deal with and resolve the comments made by Commission staff. The issuer must be diligent in resolving the comments, because clause 65(2)(b) of the Regulations states that no final receipt will be issued for a prospectus after 75 days has elapsed from the date of the preliminary receipt because of the inaction of the person or company filing the preliminary.

Resolution of the comments can generally be resolved by discussion and negotiation with Commission staff. If the issuer a Saskatchewan based company is raising funds in several provinces, the Commission will be the principal regulator under National Policy 43-201 *Mutual Reliance Review System for Prospectuses and Annual Information Forms.* It will do a detailed review of the prospectus for other participating jurisdictions, and will co-ordinate the resoluation of comments raised by regulators in other jurisdictions.

National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)* requires issuers to file their prospectuses and supporting documents on SEDAR.

Marketing during the waiting period

Once a receipt for a preliminary prospectus has been issued, the provisions of Part XII - "Distribution Generally", apply. Section 73 specifies that during the waiting period, that is the interval between the issuance of the preliminary prospectus receipt and the final receipt, the issuer is restricted to distributing the preliminary prospectus, "tombstone" ads (ads setting out the basic details about the offering) and soliciting expressions of interest from prospective purchasers. Generally, only limited marketing is allowed during the waiting period while the prospectus is being reviewed, and no purchase contracts can be completed until the prospectus is finalized. However General Ruling/Order 47-901 *Testing the Waters* grants a registration and prospectus exemption for certain activity carried out to gauge the interest of investors in a potential distribution of securities.

Distribution after the final receipt

Even after the final prospectus is completed, section 77 limits the material that can be used in marketing to essentially the same material that is used in the waiting period. The rationale behind these provisions is that the prospectus should be the only selling document as only it has been reviewed for full, true and plain disclosure and gives rise to legal liability.

Saskatchewan Local Instrument 47-501 *Marketing Communications* and its Companion Policy specify further requirements for the advertising and marketing of securities.

National Policy 47-201 *Trading in Securities on the Internet* sets out the views of the CSA on a number of matters relating to the use of the Internet and other electronic means of communication in connection with trades and distributions of securities.

Part 12 Mutual Funds

A mutual fund is an issuer of a security that entitles the holder to receive on demand, or within a specified period after demand, a proportionate interest in the net assets of the fund. While the provisions of the Act generally apply to mutual funds, there are a series of national instruments that prescribe specific requirements that govern mutual funds:

- National Instrument 81-101 *Mutual Fund Disclosure* implements a regulatory regime governing the disclosure provided by mutual funds in satisfaction of the prospectus requirements of securities legislation. NI 81-101 requires the preparation and filing of a simplified prospectus and annual information form by all mutual funds in a prescribed form.

- National Instrument 81-102 *Mutual Funds* prescribes rules that govern the operation of mutual funds including investment restrictions, conflicts of interest, custodianship of assets, processes for sales and redemptions, and calculating net asset values.

- National Instrument 81-104 *Commodity Pools* sets out the rules that govern the operation of commodity pools. The rules allow them to invest in commodities and use derivatives in ways not permitted for conventional mutual funds.

- National Instrument 81-105 *Mutual Fund Sales Practices* imposes restrictions on certain sales and business practices followed by managers and principal distributors of publicly offered mutual funds, and registered dealers and their sales representatives who sell them.

Part 13 Continuous Disclosure

Reporting issuer

When a company files a prospectus it becomes a "reporting issuer" or, as more commonly known, a "public company". Clause 2(1)(qq) defines the term "reporting issuer" and sets out the circumstances in which a company becomes a reporting issuer. The filing of a prospectus is the main one. A reporting issuer is subject to the "continuous disclosure" provisions in National Instrument 51-102 *Continuous Disclosure Requirements*. NI 51-102 was adopted by Canadian securities regulatory authorities on March 30, 2004. It is a national, uniform and comprehensive set of rules that replaces the continuous disclosure provisions found in Parts XIV and XV the Act for issuers other than mutual funds. Parts XIV and XV of the Act still apply the mutual funds. Section 92 of the Act sets out the circumstances in which the Commission may order that a reporting issuer cease to be a reporting issuer.

Policy reasons for continuous disclosure requirements

The continuous disclosure provisions are intended to enable the public to have ongoing information about public companies. They were first introduced in the 1967 Act. Before that there was a high standard of information given to investors at the time a company issued new securities by means of a prospectus. The only subsequent information required to be given was to shareholders only, as required by *The Companies Act*. This information was annual financial statements and the proxy information for shareholders' meetings.

Further developments originating in the United States required that certain information be publicly filed and available to everyone. This included reports of securities trading by officers, directors and major shareholders, quarterly financial statements and more elaborate proxy material.

All of the present requirements are aimed at providing sufficient, equal and timely information to both buyers and sellers in the secondary market. The secondary market is where people buy and sell shares already issued by a company either on a stock exchange or through brokers. The theory is that everyone should be able to buy and sell in the secondary market using the same information and that they should have this information as soon as possible.

National Instrument 13-101 *SEDAR* requires reporting issuers to file their continuous disclosure material electronically on SEDAR where it is available to the public at www.SEDAR.com.

National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* sets out the accounting principles and auditing standards that must be used by reporting issuers in preparing any financial information required under National Instrument 51-102 *Continuous Disclosure Requirements.*

Financial Statements - Part 4 of NI 51-102

Part 4 of NI 51-102 deals with a reporting issuer's reporting of its financial information at regular intervals. Key provisions are:

- ***Annual audited financial statements*** - Sections 4.1 and 4.2 require comparative annual audited financial statements to be prepared and filed within 90 days after the issuer's financial year end. Venture issuers, those whose securities are not listed on the Toronto Stock Exchange or a marketplace outside of Canada, have 120 days in which to file.

- ***Interim financial statements*** - Section 4.3 requires reporting issuers to prepare interim quarterly financial statements. The financial statements must disclose whether or not an auditor has reviewed them, and they must be approved by the issuers board of directors. Section 4.4 requires the interim financial statements to be filed within 45 days of the end of the interim period (60 days for venture issuers).

- ***Delivery of financial statements*** - Section 4.6 requires a reporting issuer to annually send a request form to security holders indicating that they may request the financial statements and other material. The issuer must send this material to any security holder who returns the card and requests the information. Otherwise, there is no requirement to deliver financial statements to security holders.

- ***Change of financial year end and change of auditor*** – Section 4.8 contains rules for a reporting issuer changing its financial year end. Section 4.11 states requirements for an issuer to change its auditor.

Management's Discussion and Analysis – Part 5 of NI 51-102

Section 5.1 requires a reporting issuer to file Management Discussion and Analysis ("MD&A") relating to its annual and interim financial statements in accordance with Form 51-102F1. MD&A is a narrative explanation through the eyes of management of how the issuer performed during the period covered by the company's financial statements, and the company's financial condition and future prospects.

Annual Information Forms – Part 6 of NI 51-102

Section 6.1 requires reporting issuers that are not venture issuers to file an Annual Information Form (AIF) within 90 days of their financial yearend. An AIF is a disclosure document intended to provide material information about the company and its business. The AIF describes the company, its operating and prospects, risk and other external factors that may affect the company.

Material Change Reports – Part 7 of NI 51-101

Section 7.1 provides that if a material change occurs in the affairs of a reporting issuer, the issuer must:

- immediately file a new release; and
- within 10 days, file a Material Report in Form 51-102F3.

A "material change" is defined as a change in the business, operations or capital of a reporting issuer that would reasonably be expected to have a significant effect on the market price or value of the issuer's securities.

National Policy 51-201 *Disclosure Standards* provides guidelines on complying with the material change reporting requirement, and provides guidance on the legislative provisions that prohibit selective disclosure. Section 85 prohibits anyone in a special relationship with a reporting issuer with knowledge of an undisclosed material change about the issuer from trading in the issuer's securities. NP 51-201 gives examples of information that is likely to be material, and lists "best disclosure practices".

Business Acquisition Reports – Part 8 of NI 51-102

Section 8.2 requires a reporting issuer to file a business acquisition report within 75 days of completing a significant acquisition. Section 8.3 sets out what a significant acquisition is.

Mandatory proxy solicitation and information circulars - Part 9 of NI 51-102

"Proxy" is a common term ascribed to a written instrument by which a security holder gives their right to vote at a meeting to another person. Section 9(1) requires the management of a reporting issuer to solicit proxies at the same time that they give notice of a meeting. Subsection 9(2) provides that an information circular must accompany proxy solicitations. An information circular must be in Form 51-102F5, and generally sets out information about the directors nominated for election, executive compensation, principal holders of voting securities, and securities to be issued under executive compensation plans.

These provisions are designed to ensure that security holders are given an opportunity to exercise their right to vote at shareholders' meetings, and that they have sufficient information to be able to vote in an informed way.

Delivery of continuous disclosure information

National Instrument 54-101 *Shareholder Communication* sets up a procedure that must be followed to ensure that shareholders who hold their shares through market intermediaries receive this information.

National Policy 11-201 *Delivery of Documents by Electronic Means* states the views of the Canadian Securities Authorities on how obligations to deliver documents under securities legislation can be satisfied by electronic means.

Continuous disclosure for issuers in mining and oil and gas

Mining and oil and gas companies are subject to additional disclosure requirements in additional to the standard continuous disclosure requirements that apply to all issuers.

National Instrument 43-101 *Standards of Disclosure for Mineral Projects* is a rule that governs how issuers disclose scientific and technical information about their mineral projects to the public. It covers oral statements as well as written documents and websites. It requires that all disclosure be based on advice by a “qualified person” (a term defined in NI 43-101) and in some circumstances that the person be independent of the issuer and the property. NI 43-101 also requires issuers to file technical reports at certain times and there is a prescribed format for the technical report. Issuers are required to make disclosure of reserves and resources using definitions approved by the Canadian Institute of Mining, Metallurgy and Petroleum.

National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities* establishes a regime of continuous disclosure for reporting issuers engaged in exploring for, developing or producing oil or gas. It supplements disclosure requirements that apply to reporting issuers generally. NI 51-101 reflects the view of the CSA that information about oil and gas reserves and activities may be as important as financial statement disclosure for investors making an investment decision concerning securities of an upstream oil and gas issuer. It requires:

- annual reporting of independently-verified estimates of reserves volumes and related cash flow (“future net revenue”) and other information about a reporting issuer’s oil and gas activities; and
- adherence to professional- and industry-developed evaluation standards and terminology.

Part 14 Insider Trading

Insider trading first became subject to regulation in 1966 with the introduction of the new Securities Act in Ontario. These changes were adopted in Saskatchewan with the introduction of the 1967 Act. The new legislation implemented the recommendations of the Kimber Report which urged a "free and open market with prices based on the fullest knowledge of all relevant facts among trades".

The two reforms introduced were:

C the institution of compulsory reporting by insiders of every trade made by them in the securities of a company of which they were insiders; and

C the imposition of liability on insiders and certain persons or companies connected with them who use confidential information.

The insider trading provisions in the Act are as follows:

C Clause 2(1)(w) defines "insider" to include:

  C Directors of the issuer and its affiliates and subsidiaries;
  C Senior officers of the issuer, its affiliates and subsidiaries. "Senior officer" is further defined by clause 2(1)(tt); and
  C Any person or company that owns or controls 10% of the voting shares of the issuer.

C Section 116 requires an insider of a reporting issuer to file reports of his trades in the securities of that reporting issuer.

C Section 130 permits the Commission on application to exempt insiders from the reporting requirements of Part XVII.

C Section 85 prohibits the use of undisclosed information by "persons or companies in a special relationship with a reporting issuer" ("special relationship persons"). This term has a special meaning under section 85 and includes a wider category of persons than that within the definition of insider. Section 131 makes contravention of this section an offence and prescribes significant penalties.

C Section 142 imposes civil liability on a special relationship person who either buys or sells securities using undisclosed material information or passes such information on to someone else who uses it. Liability attaches to the person who bought or sold the securities of the reporting issuer, and damages are generally the difference between the trade price and the average market price in the 20 days following disclosure of the material information.

The following national instruments relate to insider trading:

- National Instrument 55-101 Exemption from Insider Trading provides certain exemptions from the obligation to file insider reports under Canadian securities legislation. NI 55-101:

  - provides an exemption from the obligation to file insider reports for certain directors and senior officers of subsidiaries and of affiliates of insiders who neither hold the securities

of a reporting issuer in significant amounts nor are in a position to acquire knowledge of undisclosed material information,

- permits directors and senior officers of a reporting issuer or of a subsidiary of the reporting issuer to report acquisitions of securities of the reporting issuer under automatic securities purchase plans on an annual basis in most circumstances,

- permits issuers conducting normal course issuer bids to report acquisitions of securities under such bids on a monthly basis, and

- permits insiders of a reporting issuer to report changes in direct or indirect beneficial ownership of, or control or direction over securities by, such insiders pursuant to certain issuer events, such as a stock dividend, stock split, consolidation, amalgamation, reorganization or merger, at the time of their next required insider report.

- National Instrument 55-102 System for Electronic Disclosure for Insiders (SEDI) defines SEDI issuers to mean reporting issuers, other than mutual funds, that are required to file disclosure documents in electronic format through SEDAR. NI 55-102 provides that insiders of these SEDI issuers are required to file their insider reports in electronic format through SEDI. SEDI is the System for Electronic Disclosure by Insiders that facilitates filing and public dissemination of insider reports in electronic format through an Internet Web site (www.SEDI.ca).

- National Instrument 55-103 Insider Reporting for Certain Derivative Transactions (Equity Monetization) ensures that insider derivative-based transactions which have a similar effect in economic terms to insider trading activities are fully transparent to the market. It requires that where an insider enters into a transaction which satisfies one or more of the policy rationale for insider reporting, the insider is required to file an insider report, even though the transaction may, for technical reasons, fall outside of the existing rules governing insider reporting.

Part 15 Corporate Governance

The Commission, along with other regulators in the Canadian Securities Administrators, have adopted several instruments that go beyond the disclosure requirements that generally apply to reporting issuers, and impose new requirements that relate to corporate governance. These new requirements are the Canadian response to the *Sarbannes-Oxley Act of 2001*. The *Sarbannes-Oxley Act* that was passed in July, 2001 by the U.S. government in response to corporate scandals such as Enron.

NI 52-108 Auditor Oversight

National Instrument 52-108 *Auditor Oversight* requires that when a reporting issuer files its financial statements accompanied by an auditor's report, the auditor's report must be signed by a public accounting firm that is:

- a participant in the Canadian Public Accountability Board ("CPAB") oversight program for public accounting firms that audit reporting issuers (the "CPAB Oversight Program"), and

- in compliance with any restrictions or sanctions imposed by the CPAB.

The CPAB was established in July 2002 to promote high quality external audits of reporting issuers. It registers and inspects public accounting firms that prepare auditors' reports with respect to the financial statements of reporting issuers.

NI 52-109 Certification of Disclosure in Companies' Annual and Interim Filings

National Instrument 52-109 *Certification of Disclosure in Companies' Annual and Interim Filings* requires chief executive officers (CEOs) and chief financial officers (CFOs) (or persons performing functions similar to a CEO or CFO) of reporting issuers to personally certify annual and interim financial statements, MD&A and annual information forms that:

- their issuers' annual filings and interim filings do not contain any misrepresentations or omit to state any material facts;
- the financial statements and other financial information in the annual filings and interim filings fairly present the financial condition, results of operations and cash flows of their issuers for the relevant time period;
- they have designed disclosure controls and procedures and internal control over financial reporting (or caused them to be designed under their supervision);
- they have evaluated the effectiveness of such disclosure controls and procedures and caused their issuers to disclose their conclusions regarding their evaluation; and
- they have caused their issuers to disclose certain changes in internal control over financial reporting.

***National Instrument 52-110* Audit Committees**

National Instrument 52-110 *Audit Committees* requires that every reporting issuer have an audit committee to which the issuer's external auditor must directly report. Every audit committee must be responsible for:

- overseeing the work of the external auditor engaged for the purpose of preparing or issuing an audit report or related work;
- pre-approving all non-audit services to be provided to the issuer or its subsidiary entities by the issuer's external auditor; and
- reviewing the issuer's financial statements, MD&A, and annual and interim earnings press releases before they are publicly disclosed by the issuer.

Every audit committee must have a minimum of three members, and each member must be financially literate and independent.

Part 16 Take-Over Bids And Issuer Bids

Like many of the provisions relating to continuous disclosure, regulation of take-over bids and issuer bids was first introduced with the Securities Act in Ontario in 1966 to give effect recommendations in the Kimber Report. These changes were adopted in Saskatchewan in the

1967 Securities Act. The rules are to assure that security holders of the target company were all treated equally, that they receive adequate relevant information, and a reasonable time to assess the information.

The present rules for take-over bids in Saskatchewan are found in Part XVI of the Act. They are a separate code unto themselves, and do not have much relationship with the rest of the Act. The rules have a broad application and cover many transactions. They are also very technical and you will have to become very familiar with the provisions of the Act and the Regulations in this area if you become involved in a take-over or issuer bid.

The general rules are:

- Clause 98(1)(j) defines "take-over bid" as an offer to acquire securities made to a Saskatchewan resident where the securities subject to the offer plus the offeror's own securities, constitute 20% of the shares in that class.

- Clause 98(1)(d) defines "issuer bid" as an offer by an issuer to Saskatchewan residents to acquire or redeem its own securities.

- Section 102 provides exemptions from the take-over bid and issuer bid requirements.

- Section 103 imposes restrictions on acquisitions of securities of the target company during a take-over bid.

- Sections 104 to 109 contain the rules that govern how take-over and issuer bids are carried out. The major rules are that bids must made to all Saskatchewan security holders for identical consideration. Offerees have 35 days from the date of the bid in which to decide whether to take up the offer.

- Section 107 requires that every take-over bid must be accompanied by a circular containing detailed information about the bid. The contents of the circular are specified in section 152 of the Regulations and the forms.

- Section 108 requires directors of the target company to prepare and distribute to security holders a circular in which they recommend whether to accept or reject the bid.

- Sections 109 and 109.1 set out provisions for commencing take-over and issuer bids. Bids may generally be commenced by delivering the bid to securities holders. Take-over bids may also be commenced by placing an advertisement in a daily newspaper of general circulation.

- Section 110 requires anyone who acquires securities over a 10% threshold to file a report and issue a press release. This is commonly referred to as the "early warning rule" and is intended to prevent creeping take-overs.

- Section 111 requires a press release by a person, other than the offeror, who acquires

securities of a target company while a bid is outstanding.

- Section 113 gives the Commission power to issue certain orders where it appears that someone is not complying with the take-over and issuer bid rules. The Commission may also vary the rules and grant exemptions from the rules.

- Section 114 gives the Court of Queen's Bench power to make certain orders where the Court is satisfied that someone is not complying with the rules.

National Policy 62-201 *Bids Made Only in Certain Jurisdictions* was put in place to ensure that take-over bids are made to all Canadian shareholders. The policy provides that unless a bid is made to all shareholders in Canada, the Commission in the province where the bid originates will issue a cease trading order.

National Policy 62-202 *Take-over Bids – Defensive Tactics* sets out when defensive tactics by the board of directors of a target company might come under the scrutiny of securities regulators.

National Instrument 62-101*Control Block Distribution Issues* sets out a limited exemption for eligible institutional investors from the prospectus requirements applicable to control block distributions. It also modifies the application of hold periods as they may apply to pledges disposing of securities that form part of a control block.

National Instrument 62-102 *Disclosure of Outstanding Share Data* ensures reliable public dissemination by reporting issuers of the designation and number of principal amount of outstanding securities of the reporting issuer.

National Instrument 62-103 *Early Warning System and Related Take-over and Insider Reporting Issues* provides exemptions from the early warning requirements, the insider reporting requirement, and related provision to certain institutional investors that have a "passive intent" with respect to their ownership or control of securities of reporting issuers.

Part 17 Enforcement

The Act gives the Commission a wide range of powers that it can use to regulate persons and companies participating in the securities industry. The Commission's aim is to deter people from breaking the rules, and to maintain confidence in the capital markets of Saskatchewan.

Investigative Powers

Under section 12 the Commission may appoint an investigator in specified circumstances. The person appointed has wide powers beyond those enjoyed by other peace officers, including the power to summons and compel witnesses to testify.

The Commission may also appoint a person to examine the books and records of either a registrant or a reporting issuer under section 20 of the Act.

Offenses

Section 131 is the general offence provision of the Act. A person or company may be guilty of a summary conviction in three general sets of circumstances:

- for making a misrepresentation or false statement in material given to the Commission or in statements made to the Commission or others in administrative proceedings under the Act;

- for contravention of the Act, Regulations, decisions of the Commission or undertakings made to the Commission; and

- for contravention of a requirement of a recognized self-regulatory organization by a member of that self-regulatory organization and its employees.

The penalties on conviction are significant - a fine of up to $1,000,000 or imprisonment for up to two years or both. Pursuant to subsection 131(5) directors and officers of a company or partnership convicted of an offence under the Act, may also be convicted and are subject to the same penalties.

Enforcement Orders

Section 134 gives the Commission the power to make a number of orders where the Commission considers that such orders are necessary to protect the public interest.

Order Denying Use of Exemptions

Under clause 134(1)(a) the Commission has the power to order that any or all of the exemptions in section 38, 39, 39.1, 81, 82 and 102 do not apply to a person or company. Since the use of an exemption is necessary for any trade unless one is registered and a prospectus receipt has issued, the use of this power has a significant impact. A person subject to an order removing all registration and prospectus exemptions cannot trade in securities in Saskatchewan. The power to deny exemptions is primarily used in disciplining persons or companies who have misused the exemptions or improperly conducted themselves in the market place. The Commission has tended to use this power to discipline where, for various reasons, it is not appropriate to prosecute for contravention of the Act.

Cease Trading Orders

Under clauses 134(1)(b) and (d) the Commission may order that trading in any security or exchange contract cease or that certain persons or companies cease trading in securities or exchange contracts.

The Commission will issue a cease trading order in a wide range of situations, but the main one is to stop trades in securities which are being carried out in breach of the Act.

Before issuing a cease trading order under section 134, the Commission must be of the opinion that "such action is in the public interest". The principal factors that the Commission considers in determining this are:

- Is there, or may there be, a market for the relevant securities? If the securities are not being actively traded and aren't likely to trade in the future, a cease trading order may not be appropriate.

- What harm may result if an order is not issued? Will investors be vulnerable to unscrupulous persons selling unqualified securities?

- What harm may result if an order is issued? A cease trading order affects all security holders who cannot sell their securities, while the actions of only a few may be of concern. An order may also damage the reputations of those subject to it. The business of the issuer may suffer, and the value of its securities may be unduly depressed.

- Is there another means by which the public interest can be protected? In some circumstances a simple media release may be sufficient to alert the public to possible unauthorized trading, or an undertaking from the person or company involved may suffice.

Only after balancing all of these considerations will the Commission decide to issue or not to issue a cease trading order. If an order is issued, every effort is made by the staff to ensure that it becomes public knowledge through the media, and by posting it on the Commission's Web site. A cease trading order has little effect if no one knows about it.

Other Enforcement Orders

The Commission also has the power to make these orders:

- Under clause 134(1)(f) an order that a person or company cease contravening or comply with the Act, regulations or other Commission or self-regulatory requirements;

- Under clause 134(1)(g) an order that a person or company resign as director or officer of a registrant or issuer, or that they are prohibited from so acting; and

- Under clauses 134(1)(i) and (j) order that a registrant be reprimanded or that their registration be suspended or canceled.

Under subsection 134(3) The Commission must have a hearing before it makes any of the orders under section 134. However, the Commission does have the power to issue 15 day temporary orders where it feels the length of time necessary for a hearing would be prejudicial to the public interest.

Other Enforcement Powers

- ***Administrative penalty.*** Under section 135.1 the Commission may, after a hearing, order that a person or company pay an administrative penalty of up to $100,000 in specified circumstances.

- ***Freeze order***. Under section 135.4 the Commission can order that assets of any person or company be frozen in certain circumstances.

- ***Application for receivership order.*** Under section 135.5 the Commission may apply to a Court of Queen's Bench judge for the appointment of a receiver or trustee of the property of a person or company in certain circumstances. The Commission has not used this power, and other securities regulators have used it rarely, and only with respect to registrants. It probably would not be used to take over the business of an issuer.

- ***Application for compliance or restraining orders.*** Section 133 allows the Commission to apply to a Queen's Bench judge to issue an order either directing any person or company to comply with the Act and Regulations or decision of the Commission, or to direct that a person or company cease violating any such provision or decision. The order may issue against directors and senior officers of the person or company who have been responsible for not complying with or violating the provision or decision.

All of these powers are used to regulate participants in the market place. The Commission cannot enforce rights of investors against an issuer or its directors. It generally will not interfere in contractual or legal relationships between parties. In other words, the Commission has no power to get back investors' money for them.

Part 18 Civil Remedies

Investors are given a number of significant civil remedies under the Act by which they can seek redress on their own behalf. These remedies must be enforced by individual investors, because with limited exceptions (derivative actions by the Commission under section 143 on behalf of an issuer against directors who have illegally used insider trading information) the Commission cannot take action on behalf security holders. In summary, the civil remedies are:

- ***Right of withdrawal under sections 79 and 80.3***. A purchaser of securities pursuant either a prospectus or certain offering memoranda may withdraw from the transaction by giving written notice within two business days after receipt of the document. This provision gives the purchaser a cooling off period and some time to reflect on the purchase away from any sales pressure by the seller.

- ***Prospectus misrepresentation under section 137.*** The purchaser of securities offered under a prospectus has a right of action for damages or rescission against specified persons if the prospectus contains a misrepresentation at the time of the purchase. There are a number of defenses specified in section 137, and there is a limitation on the amount of damages that can be recovered.

- ***Misrepresentation in offering memorandum under section 138.*** The purchaser of securities pursuant to an offering memorandum has a similar right of action against a more limited group of persons. "Offering memoranda" is a term defined in clause

2(1)(ff) as a document used in connection with certain specified exemptions or pursuant to a discretionary exemption order. These provisions first appeared in the present Act, and increase the protection given to purchasers of securities traded under exemptions. It moves them closer to the traditional protection afforded to purchasers under a prospectus.

- ***Misrepresentation in advertising and sales literature under section 138.1.*** The purchaser has a right of action for damages or rescission where advertising or sales literature used in connection with a securities offering contains a misrepresentation. This is another new provision and recognizes the key role that promotional material plays in marketing securities. It increases the responsibility of the seller and the issuer to ensure that such material is accurate and not misleading.

- ***Verbal misrepresentation during the sale of a security under section 138.2.*** The purchaser has a right of action for damages where an individual makes a verbal statement relating to a security to a prospective purchaser of that security that contains a misrepresentation.

- ***Misrepresentations in take-over bid circulars, issuer bid circulars under section 139.*** Offerees have civil remedies of rescission or damages where certain take-over bid and issuer bid documents contain misrepresentations.

- ***Right of rescission for breaches of the Act under subsection 141(1).*** A purchaser who buys securities pursuant to a trade by a vendor who is in contravention of the Act, the Regulations or a decision of the Commission may elect to void the contract and recover all the money and consideration paid.

- ***Rescission or damages for failure to deliver certain documents section 141(2).*** A purchaser has a right of action for rescission or damages against certain persons who fail to deliver a prospectus or offering memorandum as required by sections 79 and 80.3, or take-over bid or issuer bid documents as required by section 104 and section 107.

The civil remedies given under this part are subject to the limitation periods specified in section 147.

Part 19 Mineral Lease Brokers

Section 149 requires any person or company acting as a mineral lease broker in Saskatchewan to be registered. Clause 148(b) defines "mineral lease broker" as a person or company who engages in the business of:

1. Purchasing a mineral interest for himself; or
2. Negotiating the purchase of a mineral interest for someone else; or
3. Any act in furtherance of the above.

"Mineral interest" is defined by clause 148(a) to be an interest in oil and gas.

The registration requirements are essentially the same as those for other registrants. Subsection 149(5) provides that the provisions of Part VI of the Act apply to registration of mineral lease brokers.

Pursuant to subsection 149(3), registration is not required in order to acquire a mineral interest from an oil and gas company. It is assumed that such companies can look after their own interests without the protection of the registration requirements of the Act.

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