

Chapter 5

Rules and Policies

5.1.1 Notice of National Policy 46-201, Escrow for Initial Public Offerings and Form 46-201F1, Escrow Agreement and Notice of Rescission of OSC Policy 5.9, Escrow Guidelines - Industrial Issuers

NOTICE OF NATIONAL POLICY 46-201 ESCROW FOR INITIAL PUBLIC OFFERINGS AND FORM 46-201F1 ESCROW AGREEMENT AND NOTICE OF RESCISSION OF ONTARIO SECURITIES COMMISSION POLICY 5.9 - ESCROW GUIDELINES - INDUSTRIAL ISSUERS

The Commission, together with the other members of the Canadian Securities Administrators (CSA) other than Quebec, has, effective June 30, 2002, adopted National Policy 46-201 *Escrow for Initial Public Offerings* (National Policy) and Form 46-201F1 Escrow Agreement. In addition, the Commission has rescinded Ontario Securities Commission Policy 5.9 - Escrow Guidelines - Industrial Issuers effective the same date. The Commission des Valeurs Mobilières du Québec is currently reviewing a regulation that parallels the National Policy.

Background

The CSA believes that a simplified, uniform national approach to escrow promotes greater efficiency and places issuers, principals and public investors in different jurisdictions on a more level footing. As such, we determined to develop a national escrow policy that would apply to initial public offerings by prospectus (IPOs). To achieve its objective, the policy would have to appropriately balance the regulatory objectives of facilitating capital formation in Canada and protecting investors. Further, it would have to be clear, consistent, understandable and administratively efficient.

We considered the objectives and role of escrow requirements in the context of IPOs. The fundamental objective of escrow requirements is to encourage continued interest and involvement in an issuer, for a reasonable period after its IPO, by those principals whose continuing role would be reasonably considered relevant to an investor's decision to subscribe to the issuer's IPO. We determined that many of the factors and assessments often associated with escrow such as controlling cheap stock are more properly addressed by underwriters appropriately exercising their responsibilities related to IPO pricing and timing.

In May 1998, we published for comment a proposal for uniform terms of escrow applicable to IPOs ((1998), 21 OSCB 2927). After that time, issuers conducting IPOs could choose to follow either the proposed uniform escrow regime or the escrow policy in effect in their own jurisdictions.

On March 17, 2000, we published CSA Notice 46-301 Proposal for Uniform Terms of Escrow Applicable to Initial Public Distributions ((2000), 23 OSCB 1936) describing a revised proposal for an IPO escrow regime and permitting issuers to use it at their option. The 2000 proposal encompassed several fundamental changes to the 1998 proposal in response to comments that we received. The changes were identified in the Notice.

After publishing the 1998 and 2000 proposals, we received requests to approve amendments to existing escrow agreements to permit the release of escrow securities on the terms in those proposals. On June 15, 2001, we published CSA Notice 46-302 Consent to Amend Existing Escrow Agreements ((2001), 24 OSCB 3583) permitting, on certain conditions, escrow agreements that predate the 2000 proposal to be amended to reflect the release terms contained in that proposal.

On September 21, 2001, we published for comment proposed National Policy 46-201 Escrow for Initial Public Offerings and Form 46-201F Escrow Agreement ((2001), 24 OSCB 5677). The Commission also published for comment at that time a notice of Rescission of Ontario Securities Commission Policy 5.9 - Escrow Guidelines - Industrial Issuers. Issuers were permitted to use the proposed National Policy, which replaced CSA Notices 46-301 and 46-302, pending its finalization.

Summary of Changes to the National Policy

The National Policy contains substantially the same terms as the proposed National Policy that was published for comment on September 21, 2001. The proposed National Policy, in turn, contained substantially the same terms as the 2000 proposal. A limited number of changes were made to the proposed National Policy in response to comments we received on the 1998 proposal and on the basis of additional research which had been conducted since that time. The more important changes were identified in the notice that accompanied the proposed National Policy. Three changes have been made to the National Policy in further response to previously received comments and in response to four comments received on the proposed National Policy. These changes are set out below.

- With the exception of provisions related to the resignation of the escrow agent, prescribed contractual arrangements have been removed from Form 46-201F1, the escrow agreement. The parties to the agreement may now insert into the agreement any other contractual arrangements they wish to govern responsibilities, remuneration, liabilities, and indemnities for the duties of the escrow agent or any other matter, provided that the terms are not inconsistent with the National Policy and the terms of the agreement. This change was made in response to numerous, and often contradictory, comments regarding the contractual terms that were previously included in the agreement.
- A clause has been added to the National Policy to confirm that reference to “any share certificates or other evidence...” should not be construed to require a paper share certificate or other paper evidence of ownership for securities registered electronically, if the terms of the National Policy and Form 46-201F1 are otherwise met. This clarification was inserted in order to ensure that the National Policy is not construed as being inconsistent with the objectives of the T+1 project being conducted by the Canadian Capital Markets Association.
- The release provisions in the National Policy and agreement have been redrafted to reflect the fraction of the then remaining escrow securities that are releasable on a given release date. This change was made in response to a commenter seeking to clarify and simplify the administration of escrow agreements. No change has been made to the underlying release schedules.

Regulations to be Revoked

The Commission has requested the Lieutenant Governor in Council to revoke section 79 and Forms 17,18 and 19 of the Regulation made under the Securities Act. In the interim, staff of the Commission will take a no action approach where there is noncompliance with these provisions.

Rescission of Ontario Securities Commission Policy 5.9

The Commission has rescinded Ontario Securities Commission Policy 5.9 - Escrow Guidelines - Industrial Issuers effective June 30, 2002 as follows:

“Policy 5.9 is hereby rescinded.”

Questions

Questions may be referred to any of:

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June 28, 2002.