

**ALBERTA SECURITIES COMMISSION
STAFF NOTICE 46-705**

**Escrow Releases and Amendment:
Certain Old-Form Escrow Agreements**

June 28, 2002

This Staff Notice provides guidance as to how staff of the Alberta Securities Commission (the "ASC") are likely to exercise their discretion in considering certain transfers within escrow or releases from escrow under escrow agreements made before the implementation of National Policy 46-201 *Escrow for Initial Public Offerings* ("NP 46-201").

ASC Escrow Policies and Forms Repealed

In conjunction with the final implementation of NP 46-201, effective on June 30, 2002 the ASC has repealed the following ASC Policies and ASC Forms relating to escrow arrangements:

- ASC Policy 4.2 *Requirements for Escrow of Securities and for Releases from and Transfers within Escrow in Respect of Junior Natural Resource Issuers*
- ASC Policy 4.9 *Escrow Guidelines -- Industrial Issuers*
- ASC Form 16 *Escrow Agreement for a Natural Resource Issuer*
- ASC Form 17 *Escrow Agreement for an Issuer Other Than a Natural Resource Issuer*
- ASC Form 18 *Acknowledgment by Transferee of Securities in Escrow*

Scope of Staff Notice

This Staff Notice deals only with certain amendments to outstanding escrow agreements that were not entered into under NP 46-201, and to certain releases from escrow or transfers within escrow of securities held in escrow under such an agreement. The guidance in this Staff Notice is largely derived from provisions of ASC Policies 4.2 and 4.9 and from ASC Form 18.

This Staff Notice does not apply to amendments to escrow agreements entered into under NP 46-201. Any such amendments will be dealt with under that policy.

NP 46-201 also sets out conditions on which consent is given to amendments to pre-NP 46-201 escrow agreements, to permit the release of escrowed securities on terms consistent with those set out in NP 46-201. This Staff Notice does not deal with amendments of that type.

General Guidance

(a) Requirements for Consent of Other Regulators or Exchanges

If an escrow agreement confers authority both on the ASC or the Executive Director and on one or more other securities regulatory authorities, regulators or exchanges, a consent only by the ASC or the Executive Director to the transfer or release of escrowed securities will not necessarily be sufficient without the consent of each such other securities regulatory authority, regulator or exchange.

If the escrow arrangement was required in connection with a prospectus offering for which a regulator in a jurisdiction other than Alberta was the principal regulator, and the regulator or securities regulatory authority in that other jurisdiction, as well as the ASC or the Executive Director, are named as parties whose consent is required under the escrow agreement, the ASC or the Executive Director is likely to exercise discretion to consent only if:

- (i) the regulator or securities regulatory authority in the principal jurisdiction confirms to the Executive Director that it consents to the release; and
- (ii) in the opinion of the Executive Director it would not be contrary to the public interest in Alberta.

(b) Requirements for Comments of Interested Parties

If an application for an early release of securities from escrow or a transfer within escrow is received from a securityholder, the Executive Director may require that a copy of the application be provided, for comment, to the issuer of the securities and to an exchange on which the securities are listed.

(c) Other Requirements of Securities Laws

A transfer of securities within escrow is likely to be a "trade" that must be made through a registrant or under an exemption from the registration requirements. In some cases a transfer within escrow may also constitute a "distribution" of securities that must be made pursuant to a prospectus, or pursuant to an exemption from the prospectus requirements.

Similarly, a transfer of securities within escrow may trigger provisions of Part 14 of the *Securities Act*, or insider reporting obligations under Part 15 if one or both parties to the transfer is an "insider" of a reporting issuer.

The consent of the Executive Director to the transfer within escrow of escrowed securities neither constitutes nor evidences any determination as to whether the transfer would :

- be a trade subject to the registration requirements of securities legislation;
- be a distribution subject to the prospectus requirements of securities legislation;

- trigger a reporting obligation under Part 14 of the *Securities Act*; or
- be exempt from any registration, prospectus or reporting obligation under securities legislation.

Escrow Agreement in ASC Form 16 or under ASC Policy 4.2

(a) Standard Releases

For the release of securities escrowed under an agreement made in ASC Form 16 or under ASC Policy 4.2, an application for release must be made to the Executive Director. The Executive Director will generally consider a release of 15 percent of the escrowed securities upon satisfactory completion of the distribution of securities offered provided that the application is accompanied by:

- (i) in the case of an underwritten offering, a certificate from the issuer, signed by two senior officers, confirming that the underwriter has paid the take-down amount of the offering to the issuer, or
- (ii) in the case of a best efforts offering, a letter from the trustee (or other depository) addressed to the Executive Director confirming that the minimum subscription was reached.

The Executive Director will generally consider a release of 25 percent of the escrowed securities if the issuer satisfies the Executive Director that it has completed the work program disclosed in the prospectus by submitting to the Executive Director, written confirmation from an independent engineer that the work program has been completed.

If the Executive Director grants the application for release of the initial 25 percent, the Executive Director will generally also provide written consent to the escrow agent in regard to the remaining 60 percent of the securities escrowed. This further consent will typically provide that 15 percent (1/4 of 60 percent) of the remaining escrowed securities may be automatically released by the escrow agent, pro rata, at the end of each of the second, third, fourth and fifth year from the date of the prospectus.

The Executive Director's consent to release of the remaining 60 percent will also generally provide that the consent to this automatic release process stops upon application under the escrow agreement for cancellation of escrowed securities and would not recommence until that application has been dealt with by the Executive Director.

(b) Cancellation

The Executive Director will generally consider an application for cancellation of escrowed securities under the escrow agreement only if the applicant has concurrently advised all parties to the escrow agreement of the application.

In addition, the Executive Director will generally require that the applicant must have advised the escrow agent in writing that the automatic release process, in respect of the balance of the 60 percent of escrowed

securities, stops until the application is dealt with by the Executive Director. The party making the application must advise all parties to the escrow agreement, including the escrow agent, of the application.

(c) Early Release

An application to the Executive Director by an issuer or by an escrowed securityholder for written consent to an early release of escrowed securities should include

- a letter from the applicant(s) requesting the release from escrow and setting out the exceptional circumstances which lead these parties to believe that early release of all or part of the escrowed securities is appropriate, and
- a copy of the escrow agreement.

It is not practical to set forth a single formula which will give effect to all matters which will be considered by the Executive Director in deciding upon an early release. However, the following matters would be considered:

- (i) Consent to an early release of securities from escrow would generally be granted only on a pro rata basis to all holders of the escrowed securities.
- (ii) Factors tending to support an application for early release from escrow can include the following:
 - A. The financial position of the issuer reflects satisfactory improvement since the securities were escrowed.
 - B. The securities are listed and have traded on an exchange for a sustained period of time, in reasonable volumes, at prices approximating or exceeding the offering price in the distribution to which the escrow applied.
 - C. In the case of escrow of securities issued in a distribution for which the proceeds were to be used to explore or develop an oil or gas or mining property, or of securities issued in consideration for oil or gas rights or mining claims:
 - I. the property has been determined to contain commercial quantities of ore or oil and gas capable of profitable production; or
 - II. the value of the property has been enhanced as a result of exploration or development work undertaken as proposed in the distribution prospectus and the issuer has plans, and plans to finance, further exploration or development of the property (see also paragraph (iv)).

(iii) The number of securities eligible for early release from escrow will generally be based on the percentage increase in the value per security over the value per security calculated at the time the securities were escrowed. For this purpose, the increased value per security will be calculated by dividing

A. the net tangible assets of the issuer

by

B. the number of outstanding securities of the issuer.

For the purpose of this formula:

I. The number of outstanding securities should include securities of the same class that can be acquired by escrowed securityholders, at a price below the offering price of the security to the public, on exercise of an option or other right granted to them before they acquired the escrowed securities, or upon exercise of a conversion right.

II. Net tangible assets of the issuer:

x. should include proceeds of issuance of securities included under Item I; and

y. may include, if the issuer is a junior oil and gas issuer:

(1) instead of the book value of an oil or gas property and related deferred exploration and development costs, the net present value of future net revenue attributable to proved and probable reserves in respect of the property, discounted at 15 percent, estimated by a qualified professional independent of the issuer; and

(2) without duplication of item (1), instead of the book value of undeveloped oil or gas acreage, an independent professional's estimate of the fair value of that acreage.

(iv) An application for early release of securities from escrow that relies on factors referred to in item (ii)(C)(II) or on the computation of net tangible assets referred to in item (iii)(II)(y) above should be accompanied by

A. a current report, prepared by a qualified professional independent of the issuer, and satisfying applicable requirements of National Policy Statement No. 2-B *Guide for Engineers and Geologists Submitting Oil and Gas Reports to Canadian Provincial*

Securities Administrators or a successor instrument, National Instrument 43-101 *Standards of Disclosure for Mineral Projects*, and any applicable professional standards, that:

- I. describes the work program performed on the property;
 - II. states the proved and probable reserves, or the proven and probable mineral reserves, if any (or the additions to those categories of reserves since an earlier independently-prepared report on the property) estimated for the property as a result of the work program;
 - III. sets out the recommendations of the qualified professional as to whether or not further exploration or development work on the property is warranted and, if so, the extent thereof;
 - IV. sets out the estimate of the qualified professional as to the cost of performing any such further work; and
 - V. states, if the applicant is relying on the computation of net tangible assets referred to in item (iii)(II)(y)(1), the estimated net present value referred to in that item and the constant or forecast prices (identified appropriately) used in that estimate;
- B. a statement of the issuer's proposed plan for financing further exploration and development programs on the property;
 - C. if the applicant is relying on the computation of net tangible assets referred to in item (iii)(II)(y)(2), the estimate of fair value referred to in that item, satisfying applicable requirements of National Policy Statement No. 2-B *Guide for Engineers and Geologists Submitting Oil and Gas Reports to Canadian Provincial Securities Administrators* or a successor instrument; and
 - D. a copy of the issuer's most recent annual report to its securityholders (including its audited financial statements) and its most recent interim financial statements.

(d) Transfers Within Escrow

Consent to a transfer within escrow will generally be given only if the transfer is:

- (i) shown to be of benefit to the securityholders generally;
- (ii) necessary to settle an estate of a deceased securityholder;

- (iii) for a number of securities less than 1 percent of the issued and outstanding securities of the issuer, and then only if the transferor has not transferred other escrowed securities within the preceding 12 months; or
- (iv) warranted by other circumstances.

The applicant requesting transfer must furnish the Executive Director with full details of the proposed transfer. The Executive Director may request evidence of consent to the transfer on the part of all or a majority of securityholders. If the applicant will be relying on item (i) above, the application should give reasons for the transfer and demonstrate the benefit to securityholders.

The Executive Director will generally require evidence that any transferee agrees to be bound by the terms of the escrow agreement. Submission of a signed "Acknowledgment to be Bound" in the form of the Appendix to this Staff Notice will generally be considered sufficient evidence.

Escrow Agreement in ASC Form 17 or Under ASC Policy 4.9

(a) Early or Different Releases

In exceptional cases, the Executive Director may consent to the early release of securities from escrow under, or the release of securities from escrow on terms different from those set out in, an agreement made in ASC Form 17 or under ASC Policy 4.9. The application should consist of:

- a letter signed by the issuer and affected related securityholders setting out the request for the release from escrow and the unusual circumstances which lead these parties to believe that a release of all or part of the escrowed securities is appropriate, and
- a copy of the escrow agreement.

All releases of securities from escrow will likely be required to be made pro rata among the related securityholders unless the escrow agreement provides otherwise, or all affected securityholders agree in writing.

If the issuer became a reporting issuer upon issuance of a prospectus receipt for the distribution of securities to which the escrow relates, then the escrow continues to apply even if the distribution is not completed (for example, because the underwriter does not purchase the securities or the minimum number of securities to be sold is not sold). The Executive Director may consent to the release of securities from escrow if the ASC by order deems the issuer to cease to be a reporting issuer. In that case, the Executive Director will generally require the applicant to file:

- (i) a copy of the ASC order;
- (ii) a copy of the escrow agreement; and
- (iii) a written request for the release from escrow of all escrowed securities with the Executive Director.

(b) Transfers Within Escrow

Unless an escrow agreement which has been accepted by the Executive Director provides otherwise, escrowed securities may not be sold, assigned, pledged, hypothecated, alienated, transferred within escrow or in any other manner dealt with, without the written consent of the Executive Director being first obtained or except as may be required by reason of the death or bankruptcy of any related securityholder, in which case the escrowed securities are required to be held subject to the escrow agreement for the person or company which is legally entitled to be or to become the registered owner of the securities.

Escrowed securities may only be pledged subject to the terms of the escrow agreement. A pledgee who in the course of realizing upon his security has acquired beneficial ownership of escrowed securities shall hold them subject to the terms of the escrow agreement. Prior to consenting to the transfer within escrow of securities to a pledgee, the Executive Director will generally require:

- (i) a request in writing for such consent addressed to the Executive Director and signed by
 - A. the issuer and the affected related securityholder, or
 - B. if the issuer refuses to sign the request letter, the signature of the affected related securityholder and, in lieu of the signature of the issuer, the related securityholder's explanation as to why the issuer has refused to agree to the request for transfer within escrow; and
- (ii) a copy of the escrow agreement.

The Executive Director will generally require evidence that any transferee agrees to be bound by the terms of the escrow agreement. Submission of a signed "Acknowledgment to be Bound" in the form of the Appendix to this Staff Notice will be generally be considered sufficient evidence.

**APPENDIX
TO
ASC STAFF NOTICE 46-705**

Acknowledgment to be Bound

To: Executive Director of the Alberta Securities Commission

Re: Application for transfer within escrow of outstanding securities in
_____ [insert name of the issuer]

The undersigned acknowledges that the securities listed below are subject to an Escrow Agreement dated _____ and upon being transferred or assigned to the undersigned, the undersigned will be bound by the terms and conditions of the Escrow Agreement as if it were an original signatory to it.

Name of transferor securityholder	Name of transferee	Name of beneficial owner of the securities after transfer (if different from transferee)	Number and description of securities transferred	Security certificate number(s) if any

[signature of transferee]

[if the transferee is not an individual, print the name and position of the individual signing on behalf of the transferee]