

## APPENDIX 5D

# TRANSFER, RELEASE AND CANCELLATION OF PERFORMANCE SHARES ISSUED BY FORMER VSE ISSUERS

This Policy applies to applications for transfer, release and cancellation of performance shares pursuant to agreements made under former Local Policy 3-07 and former VSE policies.

### 1. **Defined Terms**

(1) The following terms have the specified meanings in this Policy:

- (a) **"cash flow"** means net income or loss before tax, adjusted to add back the following expenses:
  - (i) depreciation,
  - (ii) amortization of goodwill and deferred research and development costs, excluding general and administrative costs,
  - (iii) expensed research and development costs, excluding general and administrative costs, and
  - (iv) any other amounts permitted or required by the Exchange;
- (b) **"cumulative cash flow"** means, at any time, the aggregate **cash flow** of an Issuer up to that time from a date no earlier than the Issuer's financial year-end immediately preceding, and no later than the Issuer's financial year-end immediately following, the date the issuance of the performance shares is accepted by the Exchange, net of any negative **cash flow**;
- (c) **"earn out factor"** means the number obtained by squaring the **performance share percentage**, expressed as a decimal, and multiplying by four;

- (d) "**earn out price**" means in relation to an IPO, the **IPO price** multiplied by the **earnout factor**; in relation to a Reorganization or other acquisition, the Market Price multiplied by the **earnout factor**; and, in relation to a Reverse Takeover, the average closing price of the Issuer's shares for ten trading days immediately following the date of reinstatement in an Issuer's shares after a trading halt, less the applicable discounts stated in the definition of market price or the price of a **public financing**, (as defined below) undertaken in conjunction with a Reverse Takeover, multiplied by the **earnout factor**;
- (e) "**escrow arrangement**" means any agreement pertaining to shares required to be escrowed pursuant to any policy or requirement of the BC Securities Commission, the Exchange or equivalent regulatory authority having jurisdiction over the Issuer;
- (f) "**IPO price**" means the price per share paid by the public on an Issuer's IPO;
- (g) "**market price**" for the purpose of calculating the **earn out price**, means, in relation to a Reorganization or other acquisition, the closing price of the Issuer's shares on the trading day immediately before an announcement of a Reorganization or acquisition was disseminated (in the event that an Issuer was suspended from trading, the Exchange will have made a determination at the time of the announcement as to the market price that was to be used for the purpose of this Policy) and, in relation to a Reverse Takeover, the weighted average closing price of the Issuer's shares for the ten trading days immediately following the date of the reinstatement of trading in an Issuer's shares after a trading halt less the applicable discounts stated in the definition of Discounted Market Price or the price of a **public financing** undertaken in conjunction with the Reverse Takeover;
- (h) "**percentage determination date**" means the date on which the **performance share percentage** is determined. Ordinarily it is the day the Issuer's shares commence trading on the Exchange. In the case of a Reverse Takeover, it is the date of the reinstatement of trading in an Issuer's shares after a trading halt pending the completion of a Reverse Takeover. Where a **public financing** is done concurrently with the Reverse Takeover then the date is on the completion or termination of the **public financing**;
- (i) "**performance share percentage**" means the percentage, determined as of the **percentage determination date**, that the performance shares of the Issuer plus any other shares subject to an **escrow arrangement**, are of the total issued and outstanding voting securities of the Issuer;
- (j) "**public financing**" means an offering of securities from the Issuer's treasury to the public for cash pursuant to an EOP or a Prospectus; and

- (k) **"valuation opinion"** means, in respect of
- (i) a natural resource Issuer, a written opinion prepared by a qualified expert as to the fair market value of a resource property, determined either through the computation of present value or some other recognized method of valuation acceptable to the Exchange, supported by a Geological Report, feasibility study, or both, and
  - (ii) another Issuer, a written opinion acceptable to the Exchange.

## **2. *Transfer of Performance Shares within Escrow***

### **(1) Permitted Transferees**

Performance shares may only be transferred to:

- (a) other Principals, including incoming Principals;
- (b) the Issuer that issued the performance shares; or
- (c) an offeror under a formal bid (as defined in section 92 of the Securities Act [British Columbia]).

### **2.1 *Request for Consent to Transfer***

- (1) In order to transfer performance shares, the holder of performance shares must deliver to the Exchange a written request for consent to the transfer. The request for consent to the transfer must include:
- (a) the name of the escrow agent and the reference date of the escrow agreement;
  - (b) an explanation of the reason for the transfer;
  - (c) a description of the consideration to be paid for the performance shares;
  - (d) where the performance shares are to be transferred to a Principal, confirmation that the transferee is a Principal or will become a Principal on or before the date of the proposed transfer; and
  - (e) a description of the registration, Prospectus, and Takeover bid exemptions in the Securities Act or the Securities Rules being relied upon to make the transfer.
- (2) Prior to applying to transfer, the escrow agreement should be reviewed to determine if the Issuer has an obligation to cancel the shares or to request the Exchange to consider cancelling the escrowed shares (pre-1990 property share escrow agreements).

## **2.2 Documents to be filed with Consent to Transfer**

- (1) The request for consent to the transfer must be accompanied by the following documents:
  - (a) a copy of the escrow agreement;
  - (b) a copy of the transfer agreement;
  - (c) an acknowledgement and agreement to be bound in the form attached as Schedule A to the escrow agreement, executed by the transferee;
  - (d) where the performance shares are to be transferred to a non-reporting or closely held Issuer, wherever situate, rather than to an individual, an undertaking by the Issuer not to permit the transfer of ownership in the Issuer or allot and issue any further shares of the Issuer without written consent of the Exchange;
  - (e) where applicable, evidence that the proposed Change of Control has been approved by the Shareholders of the Issuer; and
  - (f) the appropriate fee.

## **2.3 Letter of Consent or Objection**

Upon receiving a request for consent to a transfer and accompanying documents that comply with the above paragraphs, the Exchange will issue to the applicant a letter that either consents or objects to the transfer. A letter consenting to the transfer will be copied to the escrow agent.

## **2.4 No Transfer within One Year of Listing**

The Exchange will not consent to a transfer of any of an Issuer's escrowed or performance shares, except in the case of a bona fide transfer of a portion of such shares to a new Principal, within a period of one year after its securities have been fully listed on the Exchange unless all of the specifically allocated amounts disclosed in the Issuer's Prospectus have been expended in the manner disclosed in the Prospectus. The ability to elect to be treated as a Principal is only available in situations where a transfer is proposed to occur as part of a Reverse Takeover or Reorganization.

### **3. Release of Performance Shares From Escrow**

#### **(1) Release of Shares of Natural Resource Companies**

- (a) Holders of performance shares of a natural resource Issuer will be entitled to the pro-rata release of those performance shares on the basis of 15% of the original number of performance shares for every \$100,000 expended on exploration and development of a resource property calculated proportionately after the first \$100,000 expenditure (e.g. A \$150,000 expenditure would result in a release of 22.5% of the original number of performance shares). The expenditures must be undertaken by:
- (i) the Issuer; or
  - (ii) a Person other than the Issuer in order to earn an interest in the resource property, but only in respect of that proportion of the expenditure equal to the Issuer's remaining proportionate interest in the resource property after the Person's interest has been earned;

provided that

- (iii) no more than 50% of the original number of performance shares may be released in any 12 month period; and
  - (iv) no expenditure on exploration and development made prior to the date of the receipt for the Issuer's Prospectus for its IPO may be included.
- (b) Resource property option payments cannot be included as expenditures on exploration and development of a resource property for the purpose of calculating the allowable escrow release.

#### **3.1 Reduction in Release for a Natural Resource Issuer**

Where administrative expenses exceed 33% of total expenditures during the period on which the calculation in paragraph 3(1) is based:

- (a) the pro-rata release factor of 15% will be reduced to 7.5%; and
- (b) the percentage of the original number of performance shares available for release in any 12-month period will be reduced to 25%.

### **3.2 Release of Shares of a Non Natural Resource Issuer**

Holders of performance shares of an Issuer other than a natural resource Issuer will be entitled to the pro-rata release of a number of performance shares equal to the amount of **cumulative cash flow**, not previously applied towards release, divided by the earn out price.

### **3.3 Adjustment of Release Calculation**

On a consolidation, subdivision, amalgamation or reclassification of the Issuer's shares, the release calculation must be adjusted so that the proportion of the outstanding performance shares available for release is unaffected by the consolidation, subdivision, amalgamation or reclassification.

### **3.4 Requirements for Release**

No performance shares may be released from escrow unless, at the time of the application for release:

- (a) the Issuer is meeting its current obligations in the ordinary course of business as they generally become due, as evidenced by a statutory declaration of the president or chief financial officer of the Issuer;
- (b) the Issuer's shares are listed and trading on all stock exchanges having jurisdiction over it, as evidenced by letters from those stock exchanges, if requested by the Exchange;
- (c) the Issuer is not in default of the financial statement and related requirements of the Securities Act (British Columbia), as evidenced by a certificate issued by the BCSC, or a copy of chapter 4 (Issuers in Default) of a recent BCSC Weekly Summary;
- (d) the Issuer is in good standing with respect to its filing of returns with the Registrar of Companies under the Company Act or, if the Issuer is incorporated, organized or continued in a jurisdiction other than British Columbia, with the Registrar of Companies or similar authority in that jurisdiction, as evidenced by a certificate issued by the Registrar of Companies or by that similar authority, or by a recent "company search" of the Registrar of Companies;
- (e) any conditions precedent to release in the escrow agreement are fulfilled. For instance, for some pre-1990 property share escrow agreements, one or more of the escrow Shareholders must satisfy the Exchange that the Issuer is a success and that he or she has contributed to that success. There are a number of decisions of the BCSC regarding the meaning of these words; and

- (f) the Issuer has used its best efforts to determine if any Issuer holding escrowed shares is currently a valid Issuer. If the Issuer has been dissolved, the Issuer or the applicant must make reasonable efforts to obtain consents of the Shareholders for release of the escrowed shares.

### **3.5 Annual Release based on Annual Audited Financial Statements**

Performance shares may be released only once during an Issuer's financial year. The release calculation must be based on the Issuer's annual audited financial statements for the year or years during which the release requirements were met in respect of the performance shares to be released.

### **3.6 Request for Consent to Release**

In order to obtain a release of performance shares, the Issuer must deliver to the Exchange a written request for consent to the release. The request for consent to the release must include the name of the escrow agent and the reference date of the escrow agreement.

### **3.7 Documents to be filed with Request for Consent to Release**

The request for consent to the release must be accompanied by:

- (a) written evidence of compliance with the requirements of paragraph 3.5;
- (b) annual audited financial statements of the Issuer for the financial year or years during which the release requirements were met in respect of the performance shares to be released;
- (c) where expenditures on a resource property were made by a person other than the Issuer, an audited statement of costs;
- (d) a calculation, prepared by the Issuer's auditor of the number of performance shares to be released;
- (e) where the release of escrowed shares is based on the achievement of milestones, evidence that the applicable milestones have been achieved; and
- (f) the prescribed fee.

### **3.8 Letter of Consent or Objection**

Upon receiving a request for consent to a release and accompanying documents that comply with paragraphs 3.6 and 3.7, the Exchange will issue to the Issuer a letter that either consents or objects to the release. A letter consenting to the release will be copied to the escrow agent.

### **3.9 Request by Holder of Performance Shares for Consent to Release**

A holder of performance shares may apply to the Exchange for release where the Issuer is unable or unwilling to do so. If the president or chief financial officer of the Issuer refuses to provide the statutory declaration referred to in sub-paragraph 3.4(a), the Exchange may waive that requirement.

### **3.10 Conflicting Release Provisions**

- (1) In cases where shares are held under an old form of escrow agreement, the following principles will be applied:
  - (a) In the case of an Issuer that has previously issued shares subject to an **escrow arrangement** where the release from escrow is subject to Exchange discretion, the Exchange will apply Part 3 of this Policy.
  - (b) In the case of an Issuer that may have issued shares under more than one form of escrow agreement and one or more of the agreements specify that the release from escrow is to be based on the earning of **cash flow**, then the release of shares must be apportioned between the shares subject to the various forms of escrow agreement on a basis satisfactory to the Exchange. At the time of applying for issuance of performance shares, the manner in which any given amount of **cash flow** is apportioned between escrow agreements must be clearly outlined for review and acceptance by the Exchange.
- (2) Prior to applying for release, the escrow agreement should be reviewed to determine if the Issuer has an obligation to cancel the shares or to request the Exchange to consider cancelling the escrowed shares (pre-1990 property share escrow agreements).

## **4. Amendments to Escrow Agreements**

- (1) The Exchange will only consider amendments to provisions in an escrow agreement in accordance with Exchange Policy 5.4.
- (2) All amendments to an escrow agreement require approval by the majority of the minority Shareholders.



- (3) All applications for amendments must be made such that there is sufficient notice to the market in general by the Issuer and such notice be sufficient to allow any party affected by an amendment to appeal the decision of the Exchange to the BCSC by way of a hearing and review.
- (4) Applications to extend the time period for release from escrow must be made prior to expiry of any term of escrow.

## **5. Surrender of Performance Shares for Cancellation**

### **5.1 Cancellation**

- (1) Performance shares must be surrendered by the Shareholders to an Issuer for cancellation:
  - (a) at the time of a major Reorganization of the Issuer, if required as a condition of the consent to the Reorganization by the Exchange;
  - (b) where the Issuer's shares have been subject to a Cease Trade Order for a period of two consecutive years; and
  - (c) 10 years from the latter of the date of issue of the performance shares and the date of the receipt for the Issuer's Prospectus for its IPO.
- (2) Performance shares must be cancelled by the Issuer:
  - (a) when surrendered by the Shareholder for cancellation;
  - (b) if issued pursuant to a Reorganization and not released before the expiration of ten years from the date the Exchange accepts the escrow agreement governing the performance shares for filing; or
  - (c) where required by the terms of the escrow agreement.
- (3) Cancellation will generally involve a directors' resolution, a reduction in the issued capital, and an instruction to the escrow agent to cancel the share certificates. The Issuer should:
  - (a) request the escrow agent to notify the Exchange of the change(s) to the Issuer's issued share capital so that the Exchange may amend its records; and
  - (b) issue a news release regarding the change(s).
- (4) Section 8 (c) of the escrow agreement attached to former Local Policy Statement 3-07 must specify a 10-year term and must also identify the date of commencement of the term.

## **5.2 Cancellation of Escrowed Shares Not Issued Pursuant to VSE Policy 19 or Local Policy 3-07**

Section 5.1 details circumstances where escrowed performance shares must be surrendered for cancellation. However, there are in existence escrowed shares which do not come within the operation of Section 5.1 because they are not performance shares, as they are held in escrow pursuant to an escrow agreement other than the form prescribed by former Local Policy Statement 3-07 or former VSE Policy 19. This Policy applies to all escrowed shares of Exchange listed Companies which do not come within the operation or ambit of Section 5.1.

## **5.3 Procedure for Requesting Cancellation**

The Exchange derives its authority to cancel escrowed shares from the escrow agreement. Therefore, the terms of the escrow agreement must be reviewed. Generally only pre-1990 "property shares" escrow agreements give the Exchange the authority to cancel escrowed shares in certain circumstances. There are reasons for decisions on such cases and these should be reviewed carefully by the Filing Solicitor prior to commencing the cancellation process.

## **5.4 Directors' Resolution**

The directors must pass a resolution declaring the relevant facts to exist and requesting the Exchange to direct cancellation if the Exchange is so authorized under the terms of the escrow agreement.

## **5.5 Shareholder Consent**

### **Unanimous**

- (1) Where unanimous consent to a cancellation of shares has been obtained from the escrow Shareholders, the directors must, by letter to the Corporate Finance Department, prove the unanimous consent with letters signed by the escrow Shareholders and request the Exchange to proceed with a determination of the shares to be cancelled. The letter should also be accompanied by a certified copy of the directors' resolution, and the applicable fee.
- (2) Any request for a release of escrow shares concurrently with the cancellation must be clearly stated.

### **Not Unanimous**

- (3) Where there is not unanimous consent of the escrow Shareholders, the Issuer or its filing solicitor must forward a letter requesting cancellation to the Corporate Finance Department and all non-consenting escrow Shareholders which must include:
  - (a) a list of the documentation enclosed;

- (b) a certified copy of the directors' resolution and evidence of the facts on which it is based;
  - (c) a description of the escrow agreement (date, parties, etc.);
  - (d) a summary of the numbers of escrowed shares originally issued and the subsequent disposition thereof;
  - (e) a current list of escrow shares held and escrow Shareholders in a letter by the escrow agent;
  - (f) certification that a notice of cancellation complying with the requirements outlined below was sent to all escrow Shareholders. In the event the Issuer is unable to contact any of the escrow Shareholders it shall identify them and explain what efforts have been made to locate those Shareholders and the results thereof. Where an Issuer is holding escrowed shares the Issuer must use its best efforts to determine if the Issuer is currently valid, and has not been dissolved. If the Issuer has been dissolved, the Issuer must make reasonable efforts to obtain consent of the Shareholders of the dissolved Issuer for the cancellation;
  - (g) a copy of the notice of cancellation sent to the escrow Shareholders; and
  - (h) the applicable fee.
- (4) All correspondence to or from the Exchange, Issuer, or escrow Shareholders not consenting to cancellation must be copied to the affected Shareholders and the Issuer throughout the process.

## **5.6 Notice to Escrow Shareholders**

Where unanimous consent of escrow Shareholders has not been obtained, the Issuer must by registered mail send a notice to each escrow Shareholder including a copy of its cancellation application sent to the Exchange and such other material as may be necessary to advise the escrow Shareholders advising:

- (a) of the reason for the notice of cancellation, including reference to the specific provision in the escrow agreement which permits the cancellation;
- (b) that a directors' resolution has been delivered to the Exchange;
- (c) that the shares remaining in escrow must be tendered to the Issuer by way of gift for cancellation;
- (d) if such is the case, that the Exchange required the Issuer to determine the number of shares which shall be subject to cancellation and the number, if any, to be released;

- (e) that the Shareholder has the opportunity to make representations to the Exchange if he or she so desires; and
- (f) that if the Shareholder wishes to make representations he or she should do so by mailing same directly to the Exchange's Corporate Finance Department within 14 days from the date of the mailing of the notice, and copying the Issuer.

### **5.7 Shareholder Objections to Cancellation**

- (1) The Exchange will inform the Issuer of any objections received to the escrow share cancellation by providing a copy of each objection.
  - (2) The Issuer and the Shareholders may file such material as each desires in support of their respective positions, but they must ensure that each other party receives a carbon copy of their submissions.
  - (3) The Exchange will advise the parties of the date of its meeting to consider the matter.
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