



Advisory Bulletin No. 2015-02-01 – Performance based registration and TSL deposit rules

PURPOSE

This bulletin replaces Advisory Bulletin No. 11/20/13.

This bulletin provides information to BC Timber Sales (BCTS) staff and registrants regarding the performance based eligibility and timber sale licence (TSL) deposit rules that came into effect through the BC Timber Sales Regulation October 1, 2012 as amended December 22, 2014.

Performance-based deposit rules

General details

Q1. What does the term “*performance-based deposit*” mean?

A1. A “*performance-based deposit*” links the amount of deposit the successful applicant for a TSL must pay to that person’s past operational and financial performance with BCTS.

Q2. How do “*performance-based deposits*” work?

A2. “*Performance-based deposits*” like a graduated drivers licence or a person’s credit worthiness rating with a bank. Successful applicants for TSLs with good operational and financial performance records (as detailed in Q5) are able to rely on either a standing deposit or pay a base level deposit. Successful applicants for TSLs who are unproven (e.g., a person registered as a BC timber sales enterprise for less than 24 months and who hasn’t successfully completed a TSL yet) or those with poor primary and financial performance records are restricted to the “*pay-as-you-go*” approach and are required to pay a larger deposit before entering into the TSL.

Specific details – “*pay-as-you-go*”

Q3. How does a Timber Sales Manager determine whether a person qualifies for a standing deposit or what “*pay-as-you-go*” deposit level a person must pay?

A3. The Timber Sales Manager makes determination by exercising his or her authority in accordance with the rules set out in the BCTS regulation.



Q4. Could you be more specific about how the “*pay-as-you-go*” deposit rules work?

A4. The “*pay-as-you-go*” security deposit approach has 3 risk-based deposit levels:

- Level 1 = the base deposit amount;
- Level 2 = 2 X the base deposit amount; and,
- Level 3 = 3 X the base deposit amount.

The Timber Sales Manager determines which level applies to the successful applicant for a given TSL or the recipient of a TSL transfer after considering the duration the applicant or TSL transfer recipient has been registered and the extent to which the applicant has met the “*primary performance criteria*” and “*financial performance criteria*”.

Q5. What do the terms “*primary performance criteria*” and “*financial performance criteria*” mean?

A5. “*Primary performance criteria*” refer to criteria set out in the BCTS regulation. For the “*primary performance evaluation period*” this means:

- in the 48-month period immediately preceding the closing date for applications for the TSL, the applicant held one or more TSLs, and
- during the primary performance evaluation period,
 - (i) the applicant did not refuse to enter into a TSL,
 - (ii) no final determinations were made under the *Forest Act* disqualifying the applicant from
 - (A) being registered as a BC timber sales enterprise, or
 - (B) making an application for a TSL,
 - (iii) no final determinations were made under the *Forest Act*
 - (A) suspending a right held by the applicant under a TSL, or
 - (B) cancelling a TSL held by the applicant, and
 - (iv) no deposits paid by the applicant in respect of a TSL were
 - (A) disposed of under section 21 (2) of the BCTS regulation, or
 - (B) forfeited to the government under section 21 (4) of the BCTS regulation.



“*Financial performance criteria*” refer to criteria set out in the BCTS regulation. For the “*financial performance evaluation period*” this means:

- In the case of an applicant that has been registered as a BC timber sales enterprise for less than 24 months, the Timber Sales Manager determines that, of the total amount of money, if any, owed by
 - the applicant, or
 - a person that is not at arm’s length with the applicantnot more than \$100,000 was overdue by more than 28 days at any time during the “*financial performance evaluation period*”.
- In the case of an applicant that has been registered as a BC timber sales enterprise for 24 months or more, the Timber Sales Manager determines that, of the total amount of money, if any, owed by
 - the applicant, or
 - a person that is not at arm’s length with the applicantnot more than \$250,000 was overdue by more than 60 days at any time during the “*financial performance evaluation period*”.

Q6. What do the terms “*primary performance evaluation period*” and “*financial evaluation period* mean”?

A6. The terms establish the period of time for which the “*primary performance criteria*” and “*financial performance criteria*” are assessed. More specifically,

The “*financial performance evaluation period*”, in relation to the successful applicant for a TSL, means:

- the 24-month period immediately preceding the closing date for applications for the TSL;

The “*primary performance evaluation period*”, in relation to the successful applicant for a TSL, means:

- the 48-month period immediately preceding the closing date for applications for the TSL.

Q7. What are the specific requirements for the various deposit levels?

A7. The precise requirements are set out in the BCTS regulation, but are summarised as follows:

Applicant level 1 – base deposit amount

The successful applicant for a TSL is a Level 1 applicant if all of the following apply:

- The applicant meets the applicable “*primary performance*” and “*financial performance criteria*” set out in the regulation; and,



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- In the case of an applicant that has been registered as a BC timber sales enterprise for less than 24 months, the Timber Sales Manager is satisfied that, during the period of time in which the applicant has been registered as a BC timber sales enterprise, the applicant has successfully completed timber harvesting operations under a TSL.

Applicant level 2 – 2 X base deposit amount

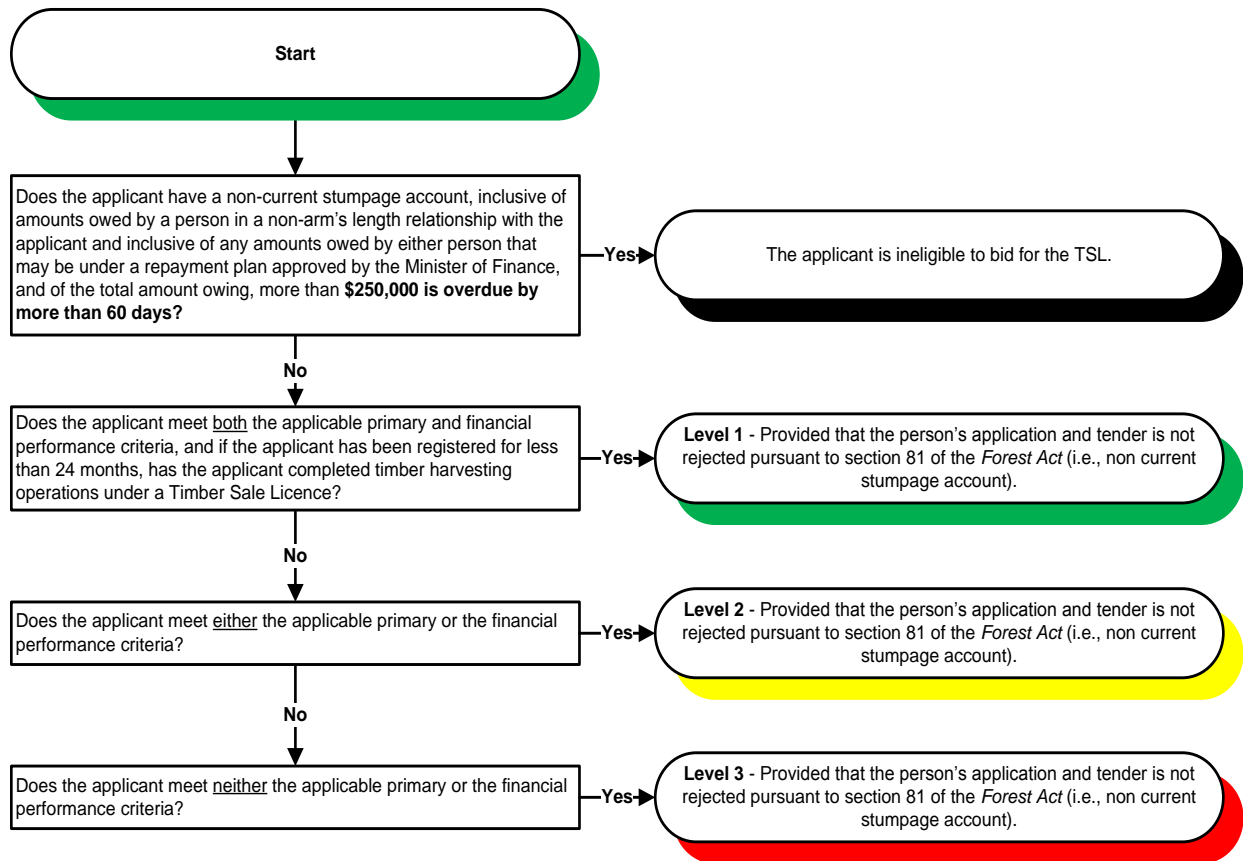
The successful applicant for a TSL is a Level 2 applicant if one of the following applies:

- The applicant meets all of the applicable “*primary performance criteria*” but does not meet all of the applicable “*financial performance criteria*”; or
- The applicant does not meet all of the applicable “*primary performance criteria*” but meets all of the applicable “*financial performance criteria*”.

Applicant level 3 – 3 X base deposit amount

The successful applicant for a TSL is a level 3 applicant if the person does not meet the “*primary performance criteria*” or “*financial performance criteria*”.

Summary Decision Key





Q8. How will the “*pay-as-you-go*” process work?

A8.

- Prior to formulating their bids, BC timber sales enterprises will need to independently estimate which of the 3 deposit levels they believe they will qualify for and understand how this relates to potential deposit requirements should their TSL application be successful.
- Tenders will be opened after the auction deadline as per normal practice and the successful applicant identified.
- The Timber Sales Manager will then determine which deposit level applies to the successful applicant and will then, provided the application and tender isn't refused pursuant to section 81 of the *Forest Act*, calculate the correct deposit amount and issue a deposit demand notice.
- The successful applicant for the TSL will then be required to pay the deposit before entering into the TSL. Failure to pay will be considered as a refusal to enter resulting in bid deposit forfeiture and disqualification as a BC timber sale enterprise.

Standing deposit

Q9. What does the term “*standing deposit*” (SD) mean?

A9. SD is a more cost effective form of deposit that BC timber sales enterprises with good primary and financial performance records can use to reduce their TSL transactional costs and capital demands.

Q10. What is the amount of a SD?

A10. \$100,000.

Q11. Who qualifies for a SD?

A11. Any BC timber sales enterprise that meets all of the Level 1 “*primary performance criteria*” and “*financial performance criteria*” set out in the BCTS Regulation.

Q12. Are there limitations of a SD?

A12. Once established, a SD can be used as a deposit against any number, value and volume of newly acquired TSLs provided the registrant continues to meet the “*primary performance criteria*” and “*financial performance criteria*” (i.e., Level 1 status).

Q13. Can a Timber Sales Manager access a SD to remedy an outstanding obligation in respect of a TSL or a related Road Permit (RP)?

A13. Yes. If the TSL or RP are still validly issued, the Timber Sales Manager can access the SD in accordance with the contractual terms set out in the TSL or the RP and the amount taken would need to be topped up by the TSL holder. If the TSL has expired, the Timber Sales Manager can access the SD in accordance with the mandatory deposit forfeiture rules set out in the BCTS Regulation.



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Q14. What happens if a SD is accessed to remedy an obligation in respect of a TSL or related RP?

A14. If the obligation failure results in the suspension or cancellation of the TSL, the disqualification of the person as a BC timber sales enterprise or the forfeiture of all or a portion of the security pursuant to section 21 (2) or (4) of the BCTS regulation, the person would lose the ability to rely on a SD for any newly acquired TSLs.

Q15. A BCTS registrant currently holds 2 TSLs that were acquired under the old “pay-as-you-go” deposit rules and wants to establish a SD. Can the registrant apply the SD against his existing TSLs and have those TSL-specific deposits returned to him or her?

A15. No. The SD can only be used in respect of TSLs awarded after the SD has been established.

Q16. Can SD be used for any type of TSL?

A16. Yes. A SD can be used in conjunction with scale-based, cruise-based, decked or any eligibility category.

Q17. Is a SD refundable?

A17. Yes. Subject to set off rules, a SD can be refunded no earlier than one year after it's established provided there are no active TSLs linked to the SD.

Deposit Forfeiture

Q18. If a license holder surrenders a TSL in unharvested condition prior to the date of expiry is the deposit subject to forfeiture?

A 18. Yes, the deposit is forfeit. However the license holder may request relief from forfeiture for certain circumstances as specified in *Forest Act s. 58.3*.

Q 19. Does the forfeiture of a deposit resulting from the surrender of a TSL affect the license holder's applicant level?

A 19. No. The only deposit forfeitures which apply to the primary performance criteria, and hence the applicant level are:

- Deposit disposed of under *BCTSR s. 21 (2)* for major obligation default; or
- Deposit forfeiture under *BCTSR s. 21 (4)* for allowing a TSL to expire unharvested.

Q20. If a license holder allows their TSL to expire in an unharvested state instead of surrendering the TSL prior to the expiry date, does the forfeiture of the deposit or standing deposit affect their applicant level?



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A20. Yes. A deposit forfeited pursuant to *BCTSR* s. 21 (4) will downgrade an applicant's level.

Q21. Could a person lose standing as a level 1 or 2 applicant even if they were relieved of a forfeiture made under *BCTSR* s. 21 (2) or (4) of the regulation?

A21. No, if they were granted relief from forfeiture their applicant level is unaffected.

Arm's length relationships

Q22. In the above description of the security deposit risk levels it says that the assessment of the successful applicant's past financial performance will be inclusive of debts owed by persons not at "arm's length" with the applicant. What does the term "arm's length" mean?

A22. The term "arm's length" can be confusing and is meant to imply a business-like relationship or a not overly close relationship; the opposite of "arm's length" would be an intimate relationship typified by mutually beneficial arrangements or familial connections (this is referred to as "not at arm's length" or "non-arm's length"). Timber Sales Managers evaluating a person's application and tender must apply the "arm's length" concept in a manner consistent with how the term is defined in section 251 of the federal *Income Tax Act*. More information in this regard can be found in the following BCTS Advisory Bulletin: <https://gww.for.gov.bc.ca/bcts/memos/bcts/Arms-Length.pdf> or <http://www.for.gov.bc.ca/bcts/bulletins/ab20110623.pdf>.

Q23. Will Ministry of Finance Forest Revenue staff be able to cope with the increased number enquiries from BCTS staff and prospective customers regarding arm's length and repayments plans?

A23. Forest Revenue staff is committed to respond within 2 working days to all BCTS-related enquiries. It is anticipated that many of the enquiries will be received, reviewed and responded to within hours or within a day. More complex enquiries will likely require an additional business day or possibly longer to ensure that all aspects of potential "non arm's length" relationships have been considered.

Q24. Can you provide some non binding examples to illustrate the "arm's length" concept?

A24.

Scenario 1

Bidder A works for Company B as an independent contractor and sells logs to Company B from time to time. Company B currently owes more than \$250,000 for more than 60 days. Would the relationship between Bidder A and Company B and the amount and duration of Company B's debt be suggestive of a "non arm's length"



relationship between Bidder A and Company B resulting in Bidder A being deemed to be not registered?

Likely not, however, if Bidder A always works as an independent contractor for Company B, the evidence may support the view that the two are working for a common purpose which may lead a Timber Sales Manager to conclude that a “*non-arm's length*” relationship exists between Bidder A and Company B.

Scenario 2

Bidder A works for Company B as an independent contractor and sells logs to Company B from time to time. Company B owes more than \$250,000 for more than 60 days. Company B posts the security deposit for the TSL that Bidder A is bidding on. Is this suggestive of a “*non arm's length*” relationship between Bidder A and Company B?

Possibly, but further investigation would likely be warranted to ascertain whether Bidder A and Company B had any fiscal arrangements.

Scenario 3

Bidder A is an employee of Company B. Bidder A is bidding under his own BCTS registration number and sells logs to Company B from time to time. Company B owes more than \$250,000 for more than 60 days. Is this suggestive of a “*non arm's length*” relationship between Bidder A and Company B?

It is likely that Bidder A and Company B would be viewed as being in a “*non arm's length*” relationship.

Scenario 4

Bidder A is an employee of company B. Bidder A is bidding under his BCTS registration number and sells logs to Company B from time to time. Company B owes more than \$250,000 for more than 60 days. Company B posts the security deposit for the TSL Bidder A is bidding on. Is this suggestive of a “*non arm's length relationship*” between Bidder A and Company B?

It is highly likely that Bidder A and Company B would be viewed as being in a non arm's length relationship.

Scenario 5

Bidder A is the son of Registrant B. Registrant B has a non-current forest account that is more than \$250,000 for more than 60 days. Is Bidder A in a non arm's length relationship with Registrant B, and if so, what are the implications?

Pursuant to Section 251 (1)(a) of the Federal *Income Tax Act*, related persons shall be deemed not to deal with each other at arm's length. As such, and pursuant to Section 9 of the BCTS Regulation, Bidder A is ineligible to bid for a TSL auctions until such time as Registrant B brings his account under the thresholds.



Scenario 6

Bidder A is the successful applicant for a TSL auction. Bidder A is the spouse of Registrant B. Bidder A has been registered as a BCTS enterprise for 5 years. 12 months ago Registrant B had a non-current forest account that was more than \$250,000 for more than 60 days. Is Bidder A in a non arm's length relationship with Registrant B, and if so, what are the implications?

Pursuant to Section 251 (1)(a) of the Federal *Income Tax Act*, related persons shall be deemed not to deal with each other at arm's length. As such, and pursuant to Section 16.6 of the BCTS Regulation, Bidder A is a Level 2 applicant (i.e., medium deposit) and must pay 2 X the base level security deposit.

Scenario 7

Bidder A is the successful applicant for a TSL auction. Bidder A is the spouse of a person who controls a corporation registered in Category 2 (Registrant B). Bidder A has been registered as a BCTS enterprise for 5 years. 36 months ago Bidder A did not meet the "*primary performance criteria*" on a TSL. In addition, 12 months ago Registrant B had a non-current forest account that was more than \$250,000 for more than 60 days. Is Bidder A in a non arm's length relationship with Registrant B, and if so, what are the implications?

Pursuant to Section 251 (1)(a) of the Federal *Income Tax Act*, related persons shall be deemed not to deal with each other at arm's length. As such, and pursuant to Section 16.6 of the BCTS Regulation, Bidder A is a level 3 applicant (i.e., high deposit) and must pay 3 X the base level deposit.

Q25. If Bidder A declares that they do not have a non-current account that is more than \$250,000 and 60 days past due and are not in a non-arm's length relationship with someone who does, is that binding on the Timber Sales Manager if other evidence suggests otherwise?

A25. No. The Timber Sales Manager is always able to consider evidence provided (under sworn declaration or not) is wilfully or negligently fraudulent. In the event that the Timber Sales Manager has evidence suggesting that a non-arm's length relationship exists then the manager should present it to the bidder and given them an opportunity to explain after which the manager can makes their own independent decision. It is also worth noting that pursuant to section 78 and 78.1 of the *Forest Act*, material misrepresentation, omission or misstatement of fact in any BCTS application could result in significant penalties (e.g., disqualification as a BCTS enterprise and suspension or cancellation of any TSLs held by the person).

CONTACTS

For further information regarding this bulletin please contact your local timber sales office.