



ASC NOTICE AND REQUEST FOR COMMENT PROPOSED REPEAL AND REPLACEMENT OF ALBERTA SECURITIES COMMISSION RULE *72-501 DISTRIBUTIONS TO PURCHASERS OUTSIDE ALBERTA*

April 17, 2018

Introduction

The Alberta Securities Commission (**ASC** or **we**) is publishing for a 60-day comment period the proposed repeal of the current version of ASC Rule 72-501 *Distributions to Purchasers Outside Alberta* (the **Existing Rule**) and its replacement with proposed ASC Rule 72-501 *Distributions to Purchasers Outside Alberta* (the **Proposed Rule**). We are also publishing for comment the proposed withdrawal of both Alberta Securities Commission Policy 45-601 *Distributions Outside Alberta* (**ASC Policy 45-601**) and the existing Companion Policy 72-501 *Distributions to Purchasers Outside Alberta* (the **Existing CP**) and the replacement of both of them with a proposed new Companion Policy 72-501 *Distributions to Purchasers Outside Alberta* (the **Proposed Companion Policy**). The Proposed Rule and Proposed Companion Policy are attached as Annex A and B to this notice.

Substance and Purpose

The purpose of the Proposed Rule is to reduce regulatory impediments and facilitate offerings by Alberta issuers to investors outside Alberta. The Proposed Rule significantly expands upon the exemptions available to an Alberta issuer. The Proposed Rule principally addresses offerings made to investors outside of Canada, removing the potentially duplicative application of Alberta prospectus and registration requirements where the offering materially complies with the securities laws of the foreign jurisdiction. In addition, the Proposed Rule contains a prospectus exemption to facilitate Alberta issuers using the offering memorandum prospectus exemption to more readily raise capital from investors in other jurisdictions of Canada.

The Proposed Rule also contains prospectus exemptions for the resale of securities outside Canada if the issuer is not a reporting issuer in any jurisdiction of Canada. We see this as benefiting Alberta stakeholders by consolidating all of the primary distribution and resale exemptions applicable in Alberta to cross border activities in one instrument.

Background

Under Alberta securities laws, when an issuer distributes securities from Alberta, it must comply with the prospectus requirement in the *Securities Act* (Alberta) or rely on an exemption from that requirement. ASC Policy 45-601 sets out the views of the ASC on when a distribution to purchasers outside Alberta will be considered a distribution to which Alberta securities laws apply. ASC Policy 45-601 provides that a distribution by an issuer with a “fundamental connection” to Alberta is a distribution from Alberta. A fundamental connection is evidenced by

the issuer's mind and management being in Alberta or its principal business operations being in Alberta.

A distribution by an issuer with a significant connection to Alberta, but not a fundamental connection, may or may not be a distribution, depending on the circumstances. ASC Policy 45-601 indicates that issuers with a significant connection to Alberta should take steps to avoid flow back of the securities into Alberta.

We are not proposing a change to the position set out in ASC Policy 45-601. This is generally consistent with case law in respect of this issue and accordingly similar guidance is contained in the Proposed Companion Policy. However, we are proposing significantly broader prospectus exemptions to help facilitate distributions by issuers located in Alberta to purchasers outside Alberta.

The conditions to the exemptions in the Existing Rule which include:

- that the investor make certain certifications and acknowledgement in the subscription agreement;
- that the issuer has equity securities listed on a recognized market; and
- that the securities are legended with the resale restrictions

have made the exemptions unavailable for prospectus offerings into a foreign jurisdiction and have become unworkable in the private placement context. As a result, the ASC has granted numerous local exemptive relief orders to permit issuers (both reporting and non-reporting) to conduct distributions outside Alberta.

Summary of Prospectus Exemptions

The exemptions in the Proposed Rule are expected to principally be of assistance to issuers with a fundamental connection to Alberta. However, the exemptions are also available to issuers with less than a fundamental connection to Alberta that seek certainty regarding compliance with Alberta securities laws.

The proposed prospectus exemptions in the Proposed Rule are as follows:

- 1) **Eurobond offerings:** We propose to retain the prospectus exemption in the Existing Rule for eurobond offerings with a minor change to update the reference regarding the entity overseeing that market. Securities sold under this exemption would continue to be subject to a 40 day resale restriction.
- 2) **Foreign distributions by reporting issuers:** We propose a new prospectus exemption to allow a distribution to a person or company outside Canada where the issuer has materially complied with applicable foreign securities laws and the issuer is a reporting issuer in a jurisdiction of Canada immediately preceding the distribution.

- 3) **Foreign public offering under prospectus or registration statement in a foreign jurisdiction:** We propose a new prospectus exemption to allow a distribution to a person or company outside Canada where the issuer, including a non-reporting issuer, has filed a U.S. registration statement or an offering document in a specified foreign jurisdiction, under applicable foreign securities law, and any necessary approvals or receipts have been obtained.
- 4) **Foreign public offering with concurrent final prospectus in Alberta:** We propose a new prospectus exemption to allow a distribution to a person or company outside Canada where the issuer or selling security holder has materially complied with applicable foreign securities laws and concurrent with the distribution, the issuer of those securities has filed a prospectus and a receipt has been issued for a final prospectus in accordance with Alberta securities laws.
- 5) **Foreign distributions by non-reporting issuers:** We propose a new exemption to allow a distribution to a person or company outside Canada by an issuer that is not a reporting issuer in a jurisdiction of Canada where the issuer has materially complied with applicable foreign securities laws. Securities sold under this exemption would be subject to resale restrictions.
- 6) **Exemption for pre-marketing activities outside of Canada:** We propose a new prospectus exemption to facilitate solicitations, advertisements and other acts in furtherance of a distribution by an issuer under a foreign prospectus that occur prior to securities being issued pursuant to the foreign prospectus. This exemption would also be available for MJDS offerings.
- 7) **OM Exemption:** We propose a new prospectus exemption to facilitate distributions outside Alberta into other jurisdictions of Canada under the offering memorandum (**OM**) exemption set out in section 2.9 of National Instrument 45-106 *Prospectus Exemptions* as it exists in such other jurisdictions.

Some jurisdictions in Canada have adopted a somewhat different version of the OM exemption than exists in Alberta. While we continue to believe that the OM exemption adopted in Alberta provides appropriate investor protections for investors in Alberta, we think that where another securities regulatory authority in Canada has adopted a somewhat different version of the exemption, allowing Alberta issuers to rely on that other version of the OM exemption when raising funds from investors outside Alberta would reduce regulatory burden and help facilitate access to capital for Alberta issuers.

- 8) **Exemption for first trades in securities of a non-reporting issuer distributed under a prospectus exemption:** This prospectus exemption, substantially similar to existing section 2.14 of National Instrument 45-102 *Resale of Securities (NI 45-102)* allows for the resale of securities (and underlying securities) on an exchange, or a market, outside of Canada or to a person or company outside of Canada where the issuer is not a reporting issuer in any jurisdiction of Canada provided that residents of Canada own not more than 10% of the outstanding securities of the issuer and represent not more than 10% of the total number of security holders.

- 9) **Exemption for first trades in securities of a non-reporting foreign issuer distributed under a prospectus exemption:** We propose a new prospectus exemption, substantially similar to section 2.15 of NI 45-102 which becomes effective on June 12, 2018, for the resale of securities (and underlying securities) on an exchange or market outside of Canada or to a person or company outside of Canada where the issuer is a foreign issuer. A foreign issuer is an issuer that is not incorporated in Canada unless its head office is in Canada or the majority of its executive officers or directors ordinarily reside in Canada.

Anti-avoidance

We propose to add an anti-avoidance provision to the prospectus exemptions that states that the prospectus exemptions are intended only for distributions being made in good faith outside Canada, and, in respect of the OM exemption, for distributions being made in good faith outside Alberta, and not as part of a plan or scheme to conduct an indirect distribution to a person or company in Canada, and in respect of the OM exemption, to a person or company in Alberta. This reflects our intention that the sales and resales must be 'bona fide' and that market participants should not engage in untoward activities or structure transactions to deliberately avoid compliance with Alberta securities law.

Report of exempt distribution

We propose that the new exemptions for foreign distributions by reporting issuers, foreign distributions by non-reporting issuers, distributions under the OM exemption and Eurobond offerings would require the filing of a Form 45-106F1 *Report of Exempt Distribution* (Form 45-106F1). However, except in the case of the OM exemption, we propose exemptions from certain disclosure in the Form 45-106F1.

Registration exemptions

The Proposed Rule contains an exemption from the dealer registration requirement under Alberta securities laws for certain foreign dealers (including dealers acting as underwriters) with respect to distributions to investors outside Canada that are made under a prospectus filed in Alberta or made in reliance on a prospectus exemption available under Alberta securities law. The registration exemption may also be relied on by an entity that has its head office in Canada, is not registered as a dealer in Canada but is registered as a dealer (or exempt from registration) in the U.S. or a specified foreign jurisdiction. The exemption includes entities that have their head office in Canada to address the situation of certain foreign broker-dealer affiliates of Canadian firms that have no foreign offices and share space and personnel with the affiliated Canadian dealer.

Request for Comments

We welcome your comments on the Proposed Rule and the Proposed Companion Policy.

Please submit your comments in writing on or before June 18, 2018 to:

Alberta Securities Commission
Suite 600, 250 - 5th Street SW
Calgary, AB T2P 0R4

Attention:
Tracy Clark
Senior Legal Counsel, Corporate Finance
Email: tracy.clark@asc.ca

Please note that comments received will be made publicly available and will be posted on the ASC website at www.albertasecurities.com. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

PROPOSED ALBERTA SECURITIES COMMISSION RULE 72-501
DISTRIBUTIONS TO PURCHASERS OUTSIDE ALBERTA

Definitions

1. In this Rule

"convertible security" has the same meaning as in National Instrument 45-102 *Resale of Securities*;

"distribution date" has the same meaning as in National Instrument 45-102 *Resale of Securities*;

"Eurobond market" means a market for Eurobonds regulated by the International Capital Market Association;

"exchangeable security" has the same meaning as in National Instrument 45-102 *Resale of Securities*;

"FINRA" means the self-regulatory organization in the United States of America known as the Financial Industry Regulatory Authority;

"foreign prospectus" means a prospectus, registration statement or substantially similar disclosure document required to be filed or furnished with a securities regulatory authority in a foreign jurisdiction in connection with the distribution to the public of securities in that foreign jurisdiction;

"multiple convertible security" has the same meaning as in National Instrument 45-102 *Resale of Securities*;

"SEDAR" has the same meaning as in National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)*;

"specified foreign jurisdiction" means a jurisdiction listed in Appendix A of this Rule; and

"underlying security" has the same meaning as in National Instrument 45-102 *Resale of Securities*.

Foreign public offering under prospectus or registration statement in a foreign jurisdiction

- 2.** The prospectus requirement does not apply to the distribution of a security to a person or company outside Canada if, at the time of the distribution, one or both of the following apply:
- (a) the issuer has filed a registration statement in accordance with the 1933 Act registering the securities in connection with the distribution, and that registration statement is effective;

- (b) the issuer has filed an offering document that qualifies, registers, or permits the public offering of those securities in accordance with the securities laws of a specified foreign jurisdiction and, if required, a receipt or similar acknowledgement of approval or clearance has been obtained for the offering document in the specified foreign jurisdiction.

Foreign public offering with concurrent final prospectus in Alberta

- 3. The prospectus requirement does not apply to a distribution of a security to a person or company outside Canada if both of the following apply:
 - (a) the issuer of the securities or the selling security holder has materially complied with the disclosure requirements applicable to the distribution under the securities law of the jurisdiction outside Canada in which the investor is located, or the distribution is exempt in that jurisdiction from such disclosure requirements;
 - (b) concurrent with the distribution, the issuer of those securities has filed a prospectus with the Executive Director of the Commission, and a receipt has been issued for a final prospectus in accordance with Alberta securities laws.

Foreign distributions by reporting issuers

- 4. The prospectus requirement does not apply to a distribution by an issuer of a security of its own issue to a person or company outside Canada if both of the following apply:
 - (a) the issuer has materially complied with the disclosure requirements applicable to the distribution under the securities law of the jurisdiction outside Canada in which the investor is located, or the distribution is exempt in that jurisdiction from such requirements;
 - (b) the issuer is a reporting issuer in a jurisdiction of Canada immediately preceding the distribution.

Foreign distributions by non-reporting issuers

- 5. The prospectus requirement does not apply to a distribution by an issuer that is not a reporting issuer in a jurisdiction of Canada of a security of its own issue to a person or company outside Canada if, the issuer has materially complied with the disclosure requirements applicable to the distribution under the securities law of the jurisdiction outside Canada in which the investor is located, or the distribution is exempt in that jurisdiction from such requirements.

Eurobond offerings

6. The prospectus requirement does not apply to a distribution by an issuer of a non-convertible debt security to a person or company outside Canada if all of the following apply:
 - (a) the debt has been accepted for listing or quotation on a Eurobond market outside Canada;
 - (b) the issuer has materially complied with the disclosure requirements applicable to the distribution under the securities law of the jurisdiction outside Canada in which the investor is located, or the distribution is exempt in that jurisdiction from such requirements;
 - (c) the securities to be distributed are initially issued in temporary form and are exchangeable for definitive securities only after the 40th day following completion of the distribution and provided that the holder of securities has certified that it does not hold the securities on behalf of a resident of the province.

Distributions under the offering memorandum exemption

7. The prospectus requirement does not apply to a distribution by an issuer of a security of its own issue outside Alberta if all of the following apply:
 - (a) the purchaser is a resident of a jurisdiction of Canada, other than Alberta;
 - (b) the purchaser certifies in the subscription agreement or similar document that the purchaser is not a resident of Alberta and the issuer does not believe, and has no reasonable grounds to believe, that the certification is false;
 - (c) the issuer has materially complied with the terms of the exemption from the prospectus requirement in section 2.9 [*offering memorandum*] of National Instrument 45-106 *Prospectus Exemptions* then in force in the jurisdiction of Canada in which the purchaser is resident.

Exemption for marketing activities outside Canada

8. The prospectus requirement does not apply to a solicitation, advertisement or other act in furtherance of a distribution by an issuer under a foreign prospectus that occur prior to securities being issued pursuant to the foreign prospectus if all of the following apply:
 - (a) no solicitation is made respecting a security of the issuer to a prospective purchaser resident in a jurisdiction of Canada, except pursuant to an exemption from the prospectus requirement;
 - (b) no advertisement respecting a security of the issuer is directed at a resident of a jurisdiction of Canada, except pursuant to an exemption from the prospectus requirement;

- (c) the issuer has materially complied with the disclosure requirements applicable to the distribution under the securities law of the jurisdiction outside Canada, or the distribution is exempt from such requirements.

Exchange or market outside Canada

- 9. For the purposes of sections 2, 3, 4, 5 and 6 a distribution made on or through the facilities of an exchange or market outside Canada is a distribution to a person or company outside Canada if neither the seller nor any person acting on its behalf has reason to believe that the distribution has been pre-arranged with a buyer in Canada.

First Trades in Securities of a Non-Reporting Issuer Distributed under a Prospectus Exemption

- 10. (1) The prospectus requirement does not apply to the first trade of a security distributed under an exemption from the prospectus requirement if all of the following apply:
 - (a) the issuer of the security
 - (i) was not a reporting issuer in any jurisdiction of Canada on the distribution date, or
 - (ii) is not a reporting issuer in any jurisdiction of Canada on the date of the trade;
 - (b) at the distribution date, after giving effect to the issue of the security and any other securities of the same class or series that were issued at the same time or as part of the same distribution as the security, residents of Canada
 - (i) did not own directly or indirectly more than 10 percent of the outstanding securities of the class or series, and
 - (ii) did not represent in number more than 10 percent of the total number of owners directly or indirectly of securities of the class or series;
 - (c) the trade is made
 - (i) through an exchange, or a market, outside of Canada, or
 - (ii) to a person or company outside of Canada.

- (2) The prospectus requirement does not apply to the first trade of an underlying security if all of the following apply:
- (a) the convertible security, exchangeable security or multiple convertible security that, directly or indirectly, entitled or required the holder to acquire the underlying security was distributed under an exemption from the prospectus requirement;
 - (b) the issuer of the underlying security
 - (i) was not a reporting issuer in any jurisdiction of Canada on the distribution date, or
 - (ii) is not a reporting issuer in any jurisdiction of Canada on the date of trade;
 - (c) the conditions in paragraph (1)(b) would have been satisfied for the underlying security at the time of the initial distribution of the convertible security, exchangeable security or multiple convertible security;
 - (d) the condition in paragraph (1)(c) is satisfied.

First Trades in Securities of a Non-Reporting Foreign Issuer Distributed under a Prospectus Exemption

11. (1) In this section

"executive officer" means, for an issuer, an individual who is

- (a) a chair, vice-chair or president,
- (b) a chief executive officer or a chief financial officer, or
- (c) in charge of a principal business unit, division or function including sales, finance or production and that fact is disclosed in any of the following documents:
 - (i) the issuer's most recent disclosure document containing that information that is publicly available in a foreign jurisdiction where its securities are listed or quoted;
 - (ii) the offering document provided by the issuer in connection with the distribution of the security that is the subject of the trade;

"foreign issuer" means an issuer that is not incorporated or organized under the laws of Canada, or a jurisdiction of Canada, unless any of the following applies:

- (a) the issuer has its head office in Canada;

- (b) the majority of the executive officers or directors of the issuer ordinarily reside in Canada.
- (2) The prospectus requirement does not apply to the first trade of a security distributed under an exemption from the prospectus requirement if all of the following apply:
- (a) the issuer of the security was a foreign issuer on the distribution date;
 - (b) the issuer of the security
 - (i) was not a reporting issuer in any jurisdiction of Canada on the distribution date, or
 - (ii) is not a reporting issuer in any jurisdiction of Canada on the date of the trade;
 - (c) the trade is made
 - (i) through an exchange, or a market, outside of Canada, or
 - (ii) to a person or company outside of Canada.
- (3) The prospectus requirement does not apply to the first trade of an underlying security if all of the following apply:
- (a) the convertible security, exchangeable security or multiple convertible security that, directly or indirectly, entitled or required the holder to acquire the underlying security was distributed under an exemption from the prospectus requirement;
 - (b) the issuer of the underlying security was a foreign issuer on the distribution date;
 - (c) the issuer of the underlying security
 - (i) was not a reporting issuer in any jurisdiction of Canada on the distribution date, or
 - (ii) is not a reporting issuer in any jurisdiction of Canada on the date of trade;
 - (d) the trade is made
 - (i) through an exchange, or a market, outside of Canada, or
 - (ii) to a person or company outside of Canada.

Anti-avoidance

12. (1) The prospectus exemptions in sections 2, 3, 4, 5, 6 and subsections 10(1), 10(2), 11(2) and 11(3) are not available with respect to any transaction or series of transactions that is part of a plan or scheme to avoid the prospectus requirement in connection with a distribution or other trade to a person or company in Canada.
- (2) The prospectus exemption in section 7 is not available with respect to any transaction or series of transactions that is part of a plan or scheme to avoid the prospectus requirement in connection with a distribution to a person or company in Alberta.

Exemption from the dealer registration requirement

13. The dealer registration requirement does not apply to a person or company in connection with a distribution of a security to a person or company outside Canada if all of the following apply:
 - (a) the distribution is qualified by a prospectus filed in a jurisdiction of Canada or is exempt from the prospectus requirement under this Rule or by another exemption from the prospectus requirement under Alberta securities laws;
 - (b) the head office or principal place of business of the person or company is in the United States of America, a specified foreign jurisdiction or a jurisdiction of Canada;
 - (c) if the distribution is made to a purchaser located in the United States of America,
 - (i) the person or company is registered as a broker-dealer with the SEC, is a member of FINRA and materially complies with all applicable conduct and other regulatory requirements of U.S. federal securities law, state securities law of the United States of America and FINRA rules in connection with the distribution, or
 - (ii) the person or company is exempt from registration as a broker-dealer with the SEC and materially complies with all applicable regulatory requirements of U.S. federal securities law in connection with the distribution;
 - (d) if the distribution is made to a purchaser located in a specified foreign jurisdiction,
 - (i) the person or company
 - (A) is registered under the securities legislation of the specified foreign jurisdiction in a category of registration that permits it to carry on the activities in that jurisdiction that registration as a dealer would permit it to carry on in Alberta, and
 - (B) materially complies with all applicable dealer registration requirements and other broker-dealer regulatory requirements of the specified foreign jurisdiction in connection with the distribution, or

- (ii) the person or company is exempt from registration in the specified foreign jurisdiction and materially complies with all applicable securities regulatory requirements of the specified foreign jurisdiction in connection with the distribution;
- (e) the person or company does not carry on business as a dealer or underwriter from an office or place of business in Alberta except in accordance with Alberta Blanket Order 31-530 *Trades and Advice to US-Resident Clients: Dealer and Adviser Registration Exemptions*, an exemption from the registration requirement under this Rule or another exemption from the registration requirement under Alberta securities laws;
- (f) the person or company is not registered in any jurisdiction of Canada in the category of dealer.

Issuer exemption from the dealer registration requirement

14. The dealer registration requirement does not apply to an issuer in connection with a distribution of securities to a person or company outside Canada that is qualified by a prospectus filed in any jurisdiction of Canada or that is exempt from the prospectus requirement under this Rule or another exemption from the prospectus requirement under Alberta securities laws if one or both of the following apply:
- (a) the trade is made through or to a person or company that is relying on an exemption from the registration requirement under this Rule or another exemption from registration requirement under Alberta securities laws;
 - (b) the trade is made in accordance with the dealer and underwriter registration requirements of the investor's jurisdiction and the issuer is not otherwise registered in any jurisdiction in Canada in the category of dealer.

Resale restrictions

15. (1) The first trade in a security issued pursuant to section 5 or section 7 of this Rule is a distribution unless the conditions specified in section 2.5 of National Instruments 45-102 *Resale of Securities* are satisfied.
- (2) The first trade in a security issued pursuant to section 6 of this Rule is a distribution unless at least 40 days have elapsed from the date of issue of the security

Report of exempt distribution

16. (1) An issuer, other than an investment fund, that relies on the exemptions in any of sections 4, 5, 6 or 7 of this Rule must file a Form 45-106F1 *Report of Exempt Distribution* no later than 10 days after the distribution.
- (2) An issuer that is an investment fund must file the report required under subsection (1) not later than 30 days after the end of the calendar year in which the distribution occurred.

- (3) Despite subsection (1), a report in Form 45-106F1 *Report of Exempt Distribution* filed in respect of a distribution under section 4, 5 or 6 of this Rule is not required to contain the information required by any of the following;
- (a) Schedule 1 to Form 45-106F1 (CONFIDENTIAL PURCHASER INFORMATION);
 - (b) Schedule 2 to Form 45-106F1 (DIRECTOR, EXECUTIVE OFFICER, PROMOTER AND CONTROL PERSON INFORMATION);
 - (c) Items 7(f), (g), and (h) to Form 45-106F1;
 - (d) Item 8 to Form 45-106F1;
 - (e) Item 9 to Form 45-106F1.

Exemption

17. The Commission or Executive Director may grant an exemption from this Rule, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

Repeal

18. Alberta Securities Commission Rule 72-501 *Distributions to Purchasers Outside Alberta* is repealed.

Effective date

19. This Rule comes into force on • 2018.

APPENDIX A
SPECIFIED FOREIGN JURISDICTIONS

1. Australia
2. France
3. Germany
4. Hong Kong
5. Italy
6. Japan
7. Mexico
8. The Netherlands
9. New Zealand
10. Singapore
11. South Africa
12. Spain
13. Sweden
14. Switzerland
15. United Kingdom of Great Britain and Northern Ireland
16. Any other member country of the European Union

PROPOSED COMPANION POLICY 72-501
DISTRIBUTIONS TO PURCHASERS OUTSIDE ALBERTA

Purpose

Alberta Securities Commission Rule 72-501 *Distributions to Purchasers Outside Alberta* (the Rule) is a rule adopted by the Alberta Securities Commission (the Commission or we) that provides exemptions from the prospectus and registration requirements available in connection with distributions that occur outside Alberta and with one exception, outside Canada.

The purpose of this Companion Policy is to

- (a) help users understand how we interpret or apply the prospectus and registration requirements where an issuer
 - (i) distributes securities to a purchaser outside Alberta; and
 - (ii) indirectly distributes securities into Alberta.
- (b) outline precautions that an issuer outside of Alberta, but with certain ties to Alberta, may take to reduce the likelihood that we would consider a securities transaction to which the issuer is a party to be a distribution to which Alberta securities laws apply; and
- (c) provide guidance on the use of certain of the exemptions set out in the Rule.

General principles relating to prospectus requirement

A distribution of securities by an issuer with connections to Alberta may, depending on the facts and circumstances surrounding the transaction, be subject to the prospectus requirement under Alberta securities laws even if the initial purchaser is not located in Alberta. There are two primary circumstances where an issuer must comply with the prospectus requirement in making a distribution to a purchaser outside Alberta. These are as follows:

- (a) A distribution from Alberta – If an issuer distributes securities from Alberta, it must comply with the prospectus requirement or rely on exemptions from that requirement.
- (b) An indirect distribution into Alberta - If an issuer located outside Alberta distributes securities to a purchaser outside Alberta and the securities are resold in Alberta, or resold through a market in Alberta, in a manner that indicates the securities did not come to rest outside Alberta, the resale will be considered to be a continuation of the distribution by the issuer. In these circumstances, the issuer must comply with the prospectus requirement or rely on exemptions from such requirement.

Where a distribution is made under a prospectus exemption, the subsequent trade of those securities in Alberta will often be deemed to be a distribution under National Instrument 45-102 *Resale of Securities* (NI 45-102) unless all of the conditions as to resale under that instrument are met.

A distribution may occur in more than one jurisdiction, for example, if an issuer with a fundamental connection to Alberta distributes securities to a purchaser in the U.S., the securities legislation of both jurisdictions will apply. An issuer is required to comply with the securities legislation in each jurisdiction in which the distribution occurs.

Terms used in this Companion Policy have the meanings ascribed to them under the Act, the Rule or National Instrument 14-101 *Definitions*.

Distribution from Alberta

The onus is on an issuer to determine, having regard to the facts and circumstances of the particular transaction, whether a distribution of securities to a purchaser outside Alberta is made from Alberta such that the prospectus requirement under securities legislation in Alberta applies to it.

(a) Issuers with a fundamental connection to Alberta

We are of the view that a trade in a security by an issuer with a fundamental connection to Alberta will constitute a distribution under securities legislation in Alberta. We will generally consider an issuer to have a fundamental connection to Alberta if

- (i) mind and management is primarily located in Alberta, as indicated by
 - (A) the location of the issuer's head or executive office, or
 - (B) the residence of the majority of the issuer's executive officers, or
- (ii) the business of the issuer is primarily administered from, and the operations of the issuer are primarily conducted in, Alberta.

Acts, advertising, solicitations, conduct or negotiations, including underwriting or investor relations activities, that take place in Alberta in furtherance of a trade outside Alberta are strong indicators of a distribution occurring from Alberta.

We do not consider every act that is related to or incidental to a distribution to indicate that there is a distribution from Alberta. For example, we would not generally consider that the presence of a single director in Alberta, participating in a conference call about a distribution, nor the presence of the issuer's counsel or transfer agent in Alberta, to be sufficient in themselves to make the distribution a distribution from Alberta. However, if there was active advertising or solicitations being conducted from Alberta, that would generally be sufficient for us to consider that the distribution was occurring from Alberta.

The above examples are indicative of the types of factors that should be considered by an issuer in determining whether it is making a distribution from Alberta and should not be viewed as an exhaustive list.

If an issuer makes a distribution from Alberta, it may file a prospectus with the Executive Director of the Commission to qualify the distribution of securities or rely on any available prospectus exemption including, for example, those available under National Instrument 45-106 *Prospectus Exemptions* and the exemptions in the Rule. An issuer that is not able to rely on any of these exemptions may apply for a discretionary exemption from the prospectus requirement.

(b) Issuers with a significant connection to Alberta

Where an issuer does not have a fundamental connection to Alberta but has a significant connection to Alberta or its capital markets, it may, depending on the connection, be a distribution under securities legislation in Alberta.

Factors that should be considered in determining whether an issuer that is not located in Alberta has a significant connection to Alberta or its capital markets include

- the majority of trading in the issuer's securities takes place in Alberta,
- the majority of the issuer's security holders are in Alberta,
- the issuer is a reporting issuer in Alberta,
- a significant number of the issuer's directors or executive officers are in Alberta,
- a significant portion of the issuer's assets are located in Alberta,
- a significant portion of the issuer's revenues are derived from operations in Alberta,
- a significant proportion of the issuer's security holders are in Alberta and
- the issuer is incorporated or organized in Alberta.

These factors are not all of equal weight.

An issuer with a significant connection to Alberta that concludes that it is or may be conducting a distribution from Alberta may file a prospectus with the Executive Director of the Commission to qualify the distribution of securities or rely on any available prospectus exemption, including the exemptions in the Rule. An issuer that is not able to rely on any of these exemptions may apply for a discretionary exemption from the prospectus requirement.

Indirect distributions into Alberta

The definition of “distribution” under Alberta securities laws includes “a transaction or series of transactions involving a purchase and sale or a repurchase and resale in the course of or incidental to a distribution”. The term “distribution” can include both a direct, single-step transaction and, depending on the circumstances, an indirect or multi-step transaction.

An indirect distribution into Alberta may occur, for example, where an issuer distributes securities from outside Alberta to a purchaser outside Alberta and shortly afterwards that purchaser, directly or indirectly, resells the securities to a purchaser in Alberta or through a market in Alberta. In that case, the distribution may be considered to have not been completed until the purchaser outside Alberta resold the securities in Alberta. Consequently, the prospectus requirement may apply to the issuer in respect of that subsequent purchaser. This conclusion is more likely if the issuer knows or could reasonably foresee that the securities will be resold in or through a market in Alberta.

Steps and precautions to be taken

Depending on the connecting factors to Alberta, it may be prudent for an issuer and its underwriter, if any, to take precautions to ensure that any distribution it makes to a purchaser outside Alberta is not subsequently resold to a purchaser in Alberta or through a market in Alberta. This will reduce the likelihood that the distribution will be considered an “indirect distribution into Alberta”. Generally, it would be appropriate for these precautions to continue for as long as resale restrictions would apply under NI 45-102 if the issuer had distributed securities to a purchaser resident in Canada.

Where the issuer’s mind and management is located outside Alberta and the offering is being made solely in another jurisdiction such as the U.S., that has comparable disclosure requirements for public offerings and equivalent or longer resale restrictions or hold periods for private placements applicable to the offering, these additional steps need not be taken.

Where the purchaser is resident in a jurisdiction without comparable disclosure and comparable resale restrictions, some or all of the following steps or precautions will often be advisable:

- (a) a restriction in the underwriting agreement prohibiting the underwriters from selling the securities being offered to any resident of Alberta;
- (b) a restriction in the banking group or selling group agreement prohibiting the members of the banking group or selling group from selling the securities being offered to any resident of Alberta;
- (c) a clear and prominent statement on the front page of any record concerning the distribution provided to the purchaser stating that the offered securities are not qualified for sale in Alberta and may not be offered and sold in Alberta, directly or indirectly, on behalf of the issuer;

- (d) a restriction in the subscription agreement against any of the offered securities being acquired by a resident of Alberta or by a purchaser for subsequent resale, during the resale time restriction period, to a resident of Alberta;
- (e) an “all sold” certificate provided to the issuer by the underwriters or members of the selling group or banking group, on completion of an offering, to the effect that they have not, to the best of their knowledge, sold any securities to a resident of Alberta;
- (f) a statement provided in the confirmation slip sent by the underwriters to purchasers of the offered securities that it is the underwriter’s understanding the purchaser is not a resident of Alberta;
- (g) a provision in the transfer agency agreement between the transfer agent and the issuer requiring the transfer agent not to register securities in the name of any security holder with an address in Alberta for the period during which a resident of Alberta would be required to hold the securities;
- (h) a legend on the certificate representing the security stating that the security may not be traded in Alberta until the expiry of the period during which a resident of Alberta would be required to hold the security, except as otherwise permitted by Alberta securities laws.

Application

The Rule provides prospectus and registration exemptions that are in addition to those otherwise available that can be relied on in connection with a distribution outside Alberta and that, in most cases, is also outside Canada. An issuer that does not have a fundamental connection to Alberta will, nonetheless, need to consider whether it is conducting a distribution from Alberta having regard to its connecting factors to Alberta. If an issuer that does not have a fundamental connection to Alberta concludes that it is not conducting a distribution from Alberta, the issuer should consider steps to prevent flow back into Alberta.

The exemptions in the Rule are principally for issuers with a fundamental connection to Alberta. However, the exemptions are available to issuers with less than a fundamental connection that seek clarity regarding compliance with Alberta securities laws.

The Rule only provides prospectus and registration exemptions under Alberta securities laws and only in respect of distributions to purchasers outside Alberta. Other aspects of Alberta securities laws will continue to apply, as applicable, for example:

- the statutory provisions prohibiting misleading statements, fraud, and unfair practices;
- the statutory secondary market civil liability provisions which apply both to reporting issuers and other issuers “with a real and substantial connection to Alberta, any of whose securities are publicly traded”;

- the statutory provisions prohibiting persons or companies in a special relationship with an issuer from purchasing or selling securities of that issuer or “tipping” others with knowledge of a material fact or material change that has not been generally disclosed; and
- Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-The-Counter Markets*.

Issuers must, of course, also comply with the laws of the jurisdiction in which the purchaser resides. In addition, if the issuer’s securities trade on a regulated market, the rules or policies of that market may also apply.

Prospectus exemptions- General

Most of the prospectus exemptions in the Rule are intended to facilitate cross-border offerings to investors outside of Canada by removing the potentially duplicative application of Alberta prospectus requirements where such offering materially complies with the securities laws of the foreign jurisdiction.

We will generally consider an issuer or selling security holder to meet the requirement to sell to "a person or company outside Canada" if the issuer or selling security holder has no knowledge, and no reason to believe, that the purchaser is a person or company in Canada. Further, section 9 of the Rule provides that a distribution made through the facilities of an exchange or market outside Canada will qualify as a distribution outside Canada if neither the seller, nor any person acting on its behalf, has reason to believe the distribution has been pre-arranged with a buyer in Canada. Where the transaction has been pre-arranged, the exemption from the prospectus requirement will only be available if the pre-arranged buyer is in fact a person or company outside Canada.

We will generally consider an issuer or selling security holder to have "materially complied with the disclosure requirements applicable to the distribution under the securities law of the jurisdiction" if the issuer or selling security holder has taken reasonable steps to ensure the distribution is effected in accordance with the securities laws of the foreign jurisdiction.

Anti-avoidance provision

The anti-avoidance provisions in section 12 of the Rule address concerns with respect to distributions outside the jurisdiction. These provisions ensure overall consistency in Alberta’s cross-border regime for both: (i) primary distributions outside Canada; and (ii) resale of securities outside Canada. These provisions are not intended to limit the authority or jurisdiction of the Commission under its public interest powers in any way.

Foreign public offering with concurrent final prospectus in Alberta

An issuer or selling security holder distributing securities to an investor outside Canada may concurrently distribute securities to purchasers in Alberta provided that the issuer of those securities has filed a prospectus under the Act, or the distribution is conducted in reliance on an exemption from the prospectus requirement. A prospectus filed under section 3 of the Rule may be qualifying securities for distribution or may be a non-offering prospectus. The prospectus

exemption in section 3 of the Rule may only be relied on for the distribution to an investor outside Canada.

An issuer may choose to file a prospectus in Alberta to qualify the distribution of securities to an investor outside Canada rather than rely on the exemption in section 3 of the Rule. A prospectus should clearly state whether or not it qualifies the distribution of securities to an investor outside Canada, recognizing that purchasers of Alberta prospectus-qualified securities may be entitled to certain rights and investor protections under the Act even if the investor is outside Canada.

Resales of securities under Section 10 of the rule

For the purposes of section 10 of the Rule, in determining the percentage of the outstanding securities of the class or series that are directly or indirectly owned by residents of Canada and the number of owners directly or indirectly that are residents of Canada, an issuer should use reasonable efforts to

- (a) determine securities held of record by a broker, dealer, bank, trust company or nominee for any of them for the accounts of customers resident in Canada;
- (b) count securities beneficially owned by residents of Canada as reported on reports of beneficial ownership; and
- (c) assume that a customer is a resident of the jurisdiction or foreign jurisdiction in which the nominee has its principal place of business if, after reasonable inquiry, information regarding the jurisdiction or foreign jurisdiction of residence of the customer is unavailable.

Lists of beneficial owners of securities maintained by intermediaries under SEC Rule 14a-13 under the 1934 Act or other securities law analogous to National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* may be useful in determining the percentages referred to in the above paragraph.

There is no requirement to place a legend on the securities in order to rely on the exemption in section 10 of the Rule.

The exemptions in subsections 10(1) and 10(2) of the Rule permit the resale of securities of an issuer in a *bona fide* trade outside of Canada. The exemptions are each subject to a condition that the trade is made through an exchange or a market outside of Canada, or to a person or company outside of Canada.

In the Commission's view, selling security holders who wish to rely on the exemption may not take steps to sell in Canada by either

- (1) pre-arranging with a buyer that is a resident of Canada and settling on an exchange or a market outside of Canada, or

- (2) selling securities to a person or company outside of Canada who the selling security holder has reason to believe is acquiring the securities on behalf of a Canadian investor.

A selling security holder engaged in activities to sell or create a demand for the security in Canada would not be able to rely on the exemptions in section 10 of the Rule. This view is reinforced by the anti-avoidance provision in section 12 of the Rule.

As with all prospectus exemptions, a person relying on an exemption has to satisfy itself that the conditions to the exemption are met.

Resales of securities under Section 11 of the rule

The definition of “foreign issuer” in section 11 of the Rule uses the terms “directors” and “executive officers”. The term “director” is defined in the *Securities Act* (Alberta) and generally means a director of a company or an individual performing a similar function or acting in a similar capacity for any non-corporate issuer.

For a non-corporate issuer, an executive officer is a person who is acting in a capacity with the non-corporate issuer that is similar to that of an executive officer of a company.

In order to rely on section 11, a selling security holder will have to determine if the issuer is a foreign issuer on the distribution date. In some cases, the issuer will provide that information to investors at the time of the offering, perhaps in representations in subscription agreements or in offering materials. If the issuer does not provide that information, a security holder can determine whether an issuer is a foreign issuer by using the information disclosed in the issuer’s most recent disclosure document containing that information that is publicly available in a foreign jurisdiction or the offering document provided by the issuer in connection with the distribution of the security that is the subject of the resale. A security holder may rely on this information unless the security holder has reason to believe that it is not accurate.

The term “ordinarily reside” is used to clarify that when an executive officer or director has a temporary residence outside of Canada, such as a vacation home, the executive officer or director would not generally be considered to reside outside of Canada for the purposes of the definition of foreign issuer.

There is no requirement to place a legend on the securities in order to rely on the exemptions in section 11 of the Rule.

The exemptions in subsections 11(2) and 11(3) of the Rule permit the resale of securities of an issuer in a *bona fide* trade outside of Canada. The exemptions are each subject to a condition that the trade is made through an exchange or a market outside of Canada, or to a person or company outside of Canada.

In the Commission's view, selling security holders who wish to rely on the exemptions may not take steps to sell in Canada by either

- (1) pre-arranging with a buyer that is a resident of Canada and settling on an exchange or a market outside of Canada or
- (2) selling securities to a person or company outside of Canada who the selling security holder has reason to believe is acquiring the securities on behalf of a Canadian investor.

A selling security holder engaged in activities to sell or create a demand for the security in Canada would not be able to rely on the exemptions in section 11 of the Rule. This view is reinforced by the anti-avoidance rule in section 12 of the Rule.

As with all prospectus exemptions, a person relying on an exemption has to satisfy itself that the conditions to the exemption are met.

The Multijurisdictional Disclosure System

Nothing in the Rule is intended to affect the guidance in section 4.3 of Companion Policy 71-101 to National Instrument 71-101 *The Multijurisdictional Disclosure System*. An issuer relying on an exemption from the prospectus requirement in subsection 2(a) of the Rule may file a Form F-10 in connection with a distribution solely in the U.S. under the multijurisdictional disclosure system adopted by the SEC, select Alberta as the review jurisdiction, file the registration statement filed with the SEC with the Executive Director of the Commission contemporaneously with the filing of the registration statement with the SEC, obtain notification of clearance from the Executive Director and advise the SEC of the issuance of the notification of clearance. In this situation, the exemption in subsection 2(a) of the Rule will be available once the Form F-10 has become effective.

Registration exemptions

Section 75 of the Act and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) set out the general requirements for registration as well as certain exemptions from these requirements. The Companion Policy to NI 31-103 provides guidance to issuers and intermediaries on how to apply the triggers for registration as well as interpret the exemptions from these requirements.

Section 13 of the Rule provides an exemption from the dealer registration requirement in Alberta securities law for certain foreign dealers with respect to distributions to investors outside Canada that are made under a prospectus filed in Alberta or made in reliance on a prospectus exemption available under Alberta securities law, including the prospectus exemptions in the Rule. The registration exemption in section 13 of the Rule may also be relied on by an entity that has its head office in Canada, is not registered as a dealer in Canada but is registered as a dealer (or exempt from registration) in the U.S. or a specified foreign jurisdiction. The exemption includes entities that have their head office in Canada to address the situation of certain foreign broker-dealer

affiliates of Canadian firms that have no foreign offices and share space and personnel with the affiliated Canadian dealer.

Registration in Alberta is generally required (unless an exemption is otherwise available) if registerable services are provided to investors in Alberta or where registerable activities are otherwise conducted within Alberta, regardless of the location of the investors.

We recognize that, in the case of a distribution of securities by an Alberta issuer to purchasers outside Canada, there may be a question as to whether foreign dealers or underwriters that participate in the distribution are subject to the dealer registration requirement of Alberta securities laws. The exemption in section 13 of the Rule is intended to provide greater certainty to market participants and to help address the challenges that foreign dealers and underwriters may face in determining whether the dealer and underwriter registration requirements apply to their activities. The provision of these exemptions is not determinative of whether Alberta securities law would otherwise apply to the activities of the foreign dealer or underwriter related to the distribution. Foreign dealers and advisers may also wish to consider the registration exemptions in ASC Blanket Order 31-530 *Trades and Advice for US-Resident Clients: Dealer and Adviser Registration Exemptions*.

The dealer registration exemption in section 14 of the Rule is intended to parallel the existing registration exemption in section 8.5 of NI 31-103 [Trades to or through a registered dealer], but broaden it to apply in circumstances where that exemption may not be available because it requires the trades to occur through a dealer that is registered (rather than relying on an exemption from registration). Issuers that distribute securities with regularity and for a business purpose may in certain circumstances be required to be registered. The Companion Policy to NI 31-103 provides guidance to issuers on how to apply the registration business trigger.

Discretionary relief

We are prepared to consider applications for exemptive relief in respect of distributions in a jurisdiction outside Canada that is not listed as a specified foreign jurisdiction in Appendix A of the Rule.