



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

May 23, 2019

Introduction

The Alberta Securities Commission (**ASC** or **we**) is publishing for a 30-day comment period the proposed amendments to ASC Rule 72-501 *Distributions to Purchasers Outside Alberta* (the **Rule**) and an amended and restated Companion Policy 72-501 *Distributions to Purchasers Outside Alberta* (the **Companion Policy**) attached as Annexes A and B to this notice, respectively (together, the **Proposed Amendments**).

Substance and Purpose

The purpose of the Rule is to reduce regulatory impediments and facilitate offerings by Alberta issuers to investors outside Alberta.

The Proposed Amendments as they relate to the Rule consist of: (1) a new exemption from the underwriter certificate requirement for a foreign public offering under a prospectus (the **New Exemption**); and (2) the reintroduction of the requirement for an issuer to provide the information required by item 7(f) of Form 45-106F1 *Report of Exempt Distribution* (**Form 45-106F1**) in the Form 45-106F1 required to be filed in respect of certain specified exemptions in the Rule.

The Proposed Amendments as they relate to the amended and restated Companion Policy: (1) provide additional information and clarification with respect to the application of Alberta securities laws to distributions by Alberta issuers outside of Alberta; (2) clarify our guidance with respect to the use of the foreign public offering with concurrent final prospectus in Alberta exemption in section 3 of the Rule; and (3) provide guidance with respect to the New Exemption.

The Proposed Amendments are intended to achieve the following purposes: (1) to further facilitate offerings by Alberta issuers to purchasers outside of Canada; (2) to permit ASC staff to efficiently process reports on Form 45-106F1 filed in connection with certain specified exemptions in the Rule; and (3) to provide further clarification and guidance with respect to the background to, and interpretation of, the Rule.

Background

On August 10, 2018, the ASC published a notice (the **August Notice**) announcing the repeal and replacement of the predecessor to the Rule, as well as the withdrawal of ASC Policy 45-601 *Distributions Outside Alberta* and the predecessor to the Companion Policy and their

replacement with the new Companion Policy, all effective August 31, 2018. The August Notice indicated that we had received no comment letters in response to our request for comment on the Rule and Companion Policy. However, we subsequently learned that one comment letter (the **Comment Letter**) had been submitted in response to the request for comment, which had not previously come to the attention of staff due to a technical issue. A summary of the commenter's comments and staff's responses thereto is attached as Annex C to this notice. The Comment Letter is attached as Annex D. We thank the commenter for its Comment Letter.

Summary of Proposed Amendments

Briefly, we are proposing the following:

- (1) **Exemption from the underwriter certificate requirement for foreign underwriters:** We propose an exemption from the underwriter certificate requirement for foreign underwriters of prospectus qualified securities being offered outside Canada, provided that such foreign underwriters do not take part in the distribution of securities to purchasers in Canada.
- (2) **Requirement to provide exemption relied upon in the 45-106F1:** We propose to re-impose a requirement for an issuer to provide the information required by item 7(f) of Form 45-106F1 in a Form 45-106F1 required to be filed in respect of certain specified exemptions in the Rule. This requirement was eliminated at the time of the adoption of the Rule, however based on our experience since the introduction of the Rule we have concluded that the information specified by item 7(f) is required for the efficient processing of the form, and valuable to staff seeking to assess the usefulness of the exemptions contained in the Rule for Alberta issuers. We anticipate that the reintroduction of this requirement will result in minimal additional burden for reporting issuers.
- (3) **Application of Alberta securities laws to distributions outside of Alberta:** We propose to amend the Companion Policy to provide additional background with respect to the ASC's views regarding the application of Alberta securities laws to distributions by Alberta issuers to purchasers outside of the province, and the origins of those views in Canadian securities law jurisprudence. We are also proposing to clarify the "fundamental connection" and "significant connection" tests for determining whether an issuer has a real and substantial connection to Alberta which may trigger the application of Alberta securities laws.
- (4) **Clarification of guidance with respect to the foreign public offering with concurrent final prospectus exemption:** We propose to clarify the guidance in the Companion Policy with respect to the intended use of the foreign distribution with concurrent final prospectus in Alberta exemption in section 3 of the Rule.
- (5) **New guidance with respect to the exemption from the underwriter certificate requirement:** We propose to amend the Companion Policy to add staff guidance with respect to the New Exemption.

Annexes

This Notice contains the following Annexes:

- Annex A – Proposed Amendments to the Rule
- Annex B – Proposed Companion Policy
- Annex C – Summary of comments and responses with respect to the proposed repeal and replacement of the predecessor to the Rule.
- Annex D – Comment Letter

Request for Comments

We welcome your comments on the Proposed Amendments.

Please submit your comments in writing on or before June 24, 2019 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.

ANNEX A

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

1. *Alberta Securities Commission Rule 72-501 Distributions to Purchasers Outside Alberta is amended by this Instrument.*

2. *Section 1 is amended by*

(a) *adding the following definition:*

“foreign underwriter” means a person qualified under the laws of a jurisdiction outside of Canada to act as an underwriter;,

(b) *in the definition of “specified foreign jurisdiction” deleting “and”,*

(c) *in the definition of “underlying security” replacing “.” with “; and”, and*

(d) *adding the following definition:*

“underwriter certificate requirement” means the requirement to include a certificate of an underwriter in a prospectus, as set out in each of the following, as applicable:

(a) subsection 5.9(1) of National Instrument 41-101 *General Prospectus Requirements*;

(b) item 21.1 of Form 44-101 F1 *Short Form Prospectus*;

(c) item 8 of section 5.5 of National Instrument 44-102 *Shelf Distributions*;

(d) item 7 of subsection 3.2(1) of National Instrument 44-103 *Post Receipt Pricing*..

3. *Section 8 is amended by adding the following section:*

Underwriter certificate requirement for foreign public offering under prospectus

8.1 The underwriter certificate requirement does not apply to a foreign underwriter of a distribution of securities by prospectus if all of the following apply:

(a) the securities are distributed to purchasers resident outside of Canada;

(b) either

- (i) each purchaser of the securities represents in writing to the issuer or the foreign underwriter that the purchaser is not resident in Canada, or
- (ii) the foreign underwriter has agreed with the issuer in writing that it will not, to the best of the foreign underwriter's knowledge, after reasonable inquiry, distribute securities to a purchaser resident in Canada;
- (c) no advertisement or solicitation in furtherance of the distribution is undertaken by the foreign underwriter in Canada;
- (d) the foreign underwriter has agreed with the issuer in writing that it will distribute the securities in compliance with the securities law of the jurisdiction outside Canada applicable to the foreign underwriter and each purchaser of the securities distributed by it..

4. ***Subparagraph 16(3) is amended by adding “and (2)” after subsection (1).***

5. ***Subparagraph 16(3)(b) is replaced with the following:***

(b) Item 7(g) to Form 45-106F1;

5. This Instrument comes into force on •.

INCLUDES COMMENT LETTERS RECEIVED

ANNEX B

PROPOSED COMPANION POLICY 72-501 *DISTRIBUTIONS TO PURCHASERS OUTSIDE ALBERTA*

Purpose

This Companion Policy is divided into two parts. Part I of this Companion Policy is intended to help users understand how staff of the Alberta Securities Commission (the **Commission** or **we**) interpret or apply the prospectus and registration requirements of Alberta securities laws when:

- (a) an issuer with a real and substantial connection to Alberta distributes securities to a purchaser outside Alberta; and
- (b) an issuer outside of Alberta indirectly distributes securities into Alberta.

Part I also outlines precautions that an issuer outside 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.

Part II of this Companion Policy provides guidance on the use of certain of the exemptions set out in Alberta Securities Commission Rule 72-501 *Distributions to Purchasers Outside Alberta* (**Rule 72-501**).

Definitions

Terms used in this Companion Policy have the meanings ascribed to them under the Act, Rule 72-501 or National Instrument 14-101 *Definitions*.

Part I

Application of Alberta Securities Laws to Distributions Outside of Alberta

General principles relating to prospectus requirement

It is well established in Canadian jurisprudence that the securities laws of a province may apply to a distribution or other trade of securities to a person or company outside of the province where there is a “sufficient,” “meaningful”, “real and substantial” or similar connection between the transaction and the province. This principle has been reaffirmed by the Supreme Court of Canada and other Canadian courts on a number of occasions, including *Gregory & Co. v. Quebec (Securities Commission)*, [1961] S.C.R. 584 and *Reference Re Securities Act*, 2011 SCC 66, [2013] 3 S.C.R. 837. In the latter case, the court stated that the provincial power over securities extends to impacts on market intermediaries or investors outside a particular province.

Accordingly, 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 real and substantial 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.

Distributions from Alberta

In this Companion Policy, we use the term “fundamental” to describe the type of connection between an issuer and Alberta which in our view will, in all cases, constitute a “real and substantial” connection resulting in the application of Alberta securities laws to a distribution by that issuer. We use the term “significant” to describe the type of connection between an issuer and Alberta which in our view may be indicative of a “real and substantial” connection.

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.

- (a) We will generally consider an issuer to have a fundamental connection to Alberta if
 - (i) its 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.

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.

- (a) 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
 - (i) the majority of trading in the issuer's securities takes place in Alberta,
 - (ii) the issuer is a reporting issuer in Alberta,
 - (iii) a significant number of the issuer's directors or executive officers are in Alberta,
 - (iv) a significant portion of the issuer's assets are located in Alberta,
 - (v) a significant portion of the issuer's revenues are derived from operations in Alberta,
 - (vi) a significant proportion of the issuer's security holders are in Alberta and
 - (vii) the issuer is incorporated or organized in Alberta.
- (b) These factors are not all of equal weight. 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.
- (c) 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.
- (d) 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 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.

If an issuer concludes that it is or may be conducting 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 Rule 72-501. 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 securities it distributes to a purchaser outside Alberta are 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 the 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.

Part II

Guidance with respect to Rule 72-501

Application of Rule 72-501

Rule 72-501 provides exemptions from the prospectus and registration requirements that are in addition to those otherwise available in connection with a distribution to a purchaser that is outside Alberta and that, in the case of all but one of the exemptions, is also outside Canada.

Rule 72-501 only provides prospectus and registration exemptions under Alberta securities laws and only in respect of distributions to purchasers outside Alberta or Canada, as applicable. To the extent that other aspects of Alberta securities laws are applicable to a distribution, they will continue to apply, including, for example, each of the following:

- (a) the statutory provisions prohibiting misleading statements, fraud, and unfair practices;
- (b) 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”;
- (c) 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;

- (d) 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.

General comments regarding the prospectus exemptions in Rule 72-501

Most of the prospectus exemptions in Rule 72-501 are intended to facilitate cross-border offerings to purchasers outside of Canada by removing the potentially duplicative application of Alberta prospectus requirements where such offering materially complies with the disclosure requirements applicable to the distribution under 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 Rule 72-501 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.

Foreign distribution with concurrent final prospectus in Alberta

Section 3 of Rule 72-501 provides an exemption from the prospectus requirement for the distribution of securities to a purchaser outside of Canada, if the issuer of the securities has materially complied with, or is exempt from, the applicable disclosure requirements of the jurisdiction in which the purchaser resides, and has concurrently filed a prospectus in Alberta. The prospectus referenced in section 3 of Rule 72-501 may qualify securities for distribution in Canada, or it may be a non-offering prospectus. The prospectus exemption in section 3 of Rule 72-501 may only be relied on for a distribution to a purchaser outside Canada.

The exemption in section 3 of Rule 72-501 is intended to be used when the issuer or selling security holder does not wish to qualify securities distributed to a purchaser outside of Canada under the concurrently filed prospectus. If an issuer or selling security holder qualifies such securities under the prospectus, no prospectus exemption is required, however it is important to note that the qualification of securities under an Alberta prospectus may entitle a purchaser of such securities to certain rights and investor protections under the Act even if the purchaser is outside Canada. A prospectus should therefore clearly state whether or not it qualifies the distribution of securities to a purchaser outside Canada.

Underwriter certificate requirement for foreign public offering under prospectus

Under section 5.9(1) of National Instrument 41-101 *General Prospectus Requirements*, a prospectus must contain a certificate signed by each underwriter who, with respect to the securities offered by the prospectus, is in a contractual relationship with the issuer or a securityholder whose securities are being offered by the prospectus. In practice, this provision has the effect of requiring every underwriter who enters into such a contractual relationship to sign an underwriter's certificate, even if the underwriter is a foreign underwriter who sells prospectus-qualified securities to a foreign purchaser under a private placement, and does not participate in the distribution of securities to purchasers in Canada.

Section 8.1 of Rule 72-501 provides an exemption from the underwriter certificate requirement for a foreign underwriter of an offering of prospectus-qualified securities, if its participation in the offering is limited to the distribution of securities to purchasers outside of Canada.

Unlike the exemption in section 3 of Rule 72-501, this exemption is intended to be relied on in circumstances where the securities being distributed outside of Canada are being qualified under an Alberta prospectus. It may, for example, be used by a foreign underwriter engaged in respect of the non-Canadian portion of a prospectus offering to purchasers inside and outside of Canada, provided that the foreign underwriter complies with the conditions of the exemption.

A similar exemption is provided by section 3(1)(a) of ASC Rule 71-801 *Implementing the Multijurisdictional Disclosure System* for prospectuses in connection with southbound offerings under the multijurisdictional disclosure system.

Resales of securities under Section 10 of Rule 72-501

For the purposes of section 10 of Rule 72-501, 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 Rule 72-501.

The exemptions in subsections 10(1) and 10(2) of Rule 72-501 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 purchaser that is a resident of Canada.

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 Rule 72-501. This view is reinforced by the anti-avoidance provision in section 12 of Rule 72-501.

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 Rule 72-501

The definition of "foreign issuer" in section 11 of Rule 72-501 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 purchasers 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 Rule 72-501.

The exemptions in subsections 11(2) and 11(3) of Rule 72-501 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 purchaser that is a resident of Canada.

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 Rule 72-501. This view is reinforced by the anti-avoidance rule in section 12 of Rule 72-501.

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

Anti-avoidance provision

The anti-avoidance provisions in section 12 of Rule 72-501 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.

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 Rule 72-501 provides an exemption from the dealer registration requirement in Alberta securities law for certain foreign dealers with respect to distributions to purchasers 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 Rule 72-501. The registration exemption in section 13 of Rule 72-501 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 purchasers in Alberta or where registerable activities are otherwise conducted within Alberta, regardless of the location of the purchasers.

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 Rule 72-501 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 Rule 72-501 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.

The Multijurisdictional Disclosure System

Nothing in Rule 72-501 is intended to affect the guidance in section 4.2 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 Rule 72-501 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 Rule 72-501 will be available once the Form F-10 has become effective.

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 Rule 72-501.

INCLUDES COMMENT LETTERS RECEIVED

ANNEX C

SUMMARY OF COMMENTS AND RESPONSES

Commenter	Date
Blake, Cassels & Graydon LLP	June 28, 2018

No.	Subject	Summarized Comment	Response
1.	<i>Animating principles</i>	The Commenter expressed concern that the Companion Policy imports the historic position that an outbound distribution of securities by an issuer with a fundamental or significant connection to Alberta may be subject to the prospectus requirement under Alberta securities laws. The Commenter suggested that including this historic position in the Companion Policy is unnecessary and it could lead to problems and uncertainties in the future.	<p>The ASC's position in this regard acknowledges the well-established principle in Canadian jurisprudence that the securities laws of a province may apply to a distribution or other trade of securities to a person or company outside of the province where there is a "real and substantial" connection between the transaction and the province. That principle has been reaffirmed by Canadian courts on a number of occasions over the years, including the decisions of the Supreme Court of Canada in <i>Re Gregory & Co. v. Quebec (Securities Commission)</i>, [1961] S.C.R. 584 and the <i>Reference Re Securities Act</i>, 2011 SCC 66, [2011] 3 S.C.R. 837, the Divisional Court of Ontario in <i>Crowe v. Ontario Securities Commission</i>, 2011 ONSC 6918 and the British Columbia Court of Appeal in <i>McCabe v. British Columbia (Securities Commission)</i>, 2016 BCCA 7.</p> <p>In framing the Companion Policy and its predecessors, ASC staff considered this line of jurisprudence in providing guidance as to when a "real and substantial" connection might exist between an issuer and Alberta. In our view, the connections we have described in the Companion Policy as "fundamental" will always</p>

			<p>constitute a real and substantial connection, while the connections we have described as “significant” may constitute a real and substantial connection, depending on the circumstances.</p> <p>We acknowledge that the application of Alberta’s securities laws to distributions to purchasers outside of the province can be burdensome to Alberta issuers seeking to raise capital. The exemptions provided by the Rule are intended to alleviate that burden in circumstances where the purchasers of securities enjoy adequate protections under the securities legislation of their home jurisdictions. In our view, however, the burden would be exacerbated by considerable uncertainty if we were to exercise our regulatory jurisdiction over distributions by Alberta issuers on a case-by-case basis.</p> <p>We have proposed amendments to the Companion Policy to clarify the ASC’s position in this regard and its origins in Canadian securities law jurisprudence.</p>
2.	<i>Further application of Alberta securities laws</i>	The Commenter noted its principal concern that, over time, in applying the Companion Policy, the ASC will come across new situations in which it determines that the extraterritorial application of Alberta securities laws is warranted and therefore exemptive relief needs to be applied for, thereby undermining the efficiencies gained under the Rule.	While we acknowledge the Commenter’s concern regarding the potential for regulatory burden resulting from novel circumstances or new regulatory initiatives, we note that in our view, the ASC cannot effectively fulfil its mandate to foster a fair and efficient capital market and protect investors unless it retains the ability to respond to new developments in the Alberta capital markets in a proactive way.

3.	<i>First Trades of Securities</i>	<p>The Commenter noted that the Rule does not contemplate a circumstance where a non-reporting issuer in Alberta distributes its securities pursuant to an exemption from the prospectus requirement (including under an exemption provided for in the Rule) to an investor in a foreign jurisdiction and that investor then trades that security to an investor in the foreign jurisdiction or in another foreign jurisdiction. The Commenter expressed the concern that unless the ASC adopts the view that the prospectus requirements under Alberta securities laws do not apply to distributions of securities outside of Alberta, it could foresee that the ASC might take the position that the first trade of the security in the scenario above is subject to the resale restrictions under Alberta securities laws, notwithstanding that that first trade is made outside of Canada. The Commenter therefore suggested that we include a further exemption providing that the first trade of a security distributed to a foreign investor pursuant to an exemption from the prospectus requirement is not subject to the prospectus requirement provided that the trade is made through an exchange, or a market, or to a person or company outside of Canada.</p>	<p>In our view, no such exemption is necessary, because a trade in securities of an Alberta issuer by a security holder outside of Canada to a purchaser outside of Canada or through an exchange or market outside of Canada would generally lack the real and substantial connection to Alberta which is a precondition to the application of Alberta securities laws. The first trade exemptions in sections 10 and 11 of the Rule are intended to enable an Alberta security holder to dispose of securities of an issuer with a minimal connection to Canada to a purchaser outside of Canada.</p>
4.	<i>Extraterritorial application of Statutory Rights</i>	<p>The Commenter expressed concern regarding the suggestion in the Companion Policy that purchasers of Alberta prospectus-qualified securities may be entitled to certain rights and investor protections under the <i>Securities Act</i> (Alberta) (the Act) even if the investor is outside Canada. While noting that the Companion Policy seems to suggest that this would be the case only in the circumstance where an issuer</p>	<p>We acknowledge that the Companion Policy was somewhat unclear in this regard, and have proposed clarifying amendments.</p> <p>While the Rule exempts an issuer or selling security holder from the requirement to qualify an offering to foreign purchasers under an Alberta prospectus, it does not prevent them from doing so. An issuer or selling security holder may choose to file a prospectus in</p>

		<p>qualifies the distribution of securities to an investor outside of Canada without relying on the exemption provided for in Section 3 of the Rule, the Commenter noted that this point was unclear.</p> <p>The Commenter also objected to the suggestion that foreign investors may be entitled to certain rights and investor protections on the basis that this would constitute an extraterritorial application of Alberta's securities laws that is inconsistent with the scope of such statutory rights and protections and the purpose of the Act, generally.</p>	<p>Alberta to qualify such a distribution and provide the statutory protections of Alberta securities law to foreign investors.</p> <p>An investor should be able to readily ascertain at the time of purchase whether they are acquiring securities under the prospectus and therefore may be entitled to statutory rights for the purposes of Alberta securities law. Accordingly, if an issuer does not intend the prospectus to qualify the distribution of securities to purchasers outside Canada, the prospectus should include a statement to this effect.</p>
5.	<i>Underwriter Certificate Requirement</i>	<p>The Commenter noted that the Rule does not indicate whether the underwriter of a concurrent private placement outside of Canada under section 3 of the Rule is required to execute the certificate page in the prospectus concurrently filed with the ASC. Accordingly, the Commenter recommended that we align the Rule with the exemption available to issuers under the multijurisdictional disclosure system by providing an exemption from the underwriter certificate requirement in section 3 of the Rule, or providing guidance in the Companion Policy to the effect that the underwriter of a private placement outside of Canada under section 3 of the Rule is not required to execute the certificate page in the prospectus concurrently filed with the ASC.</p>	<p>We agree with this recommendation and are proposing an exemption from the underwriter certificate requirement for foreign underwriters of prospectus qualified securities being offered outside Canada, provided that such foreign underwriters do not take part in the distribution of securities to purchasers in Canada.</p>



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June 18, 2018

VIA EMAIL

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RE: **Alberta Securities Commission – ASC Notice and Request for Comment – Proposed Repeal and Replacement of Alberta Securities Commission Rule 72-501 – *Distributions to Purchasers Outside Alberta***

Ladies and Gentlemen,

We appreciate the opportunity to submit the below comments regarding the notice published by the Alberta Securities Commission (the "**ASC**") in response to the proposed repeal of ASC Rule 72-501 – *Distributions to Purchasers Outside Alberta* (the "**Existing Rule**") and the replacement thereof with a new rule set forth in the notice (the "**Proposed ASC Rule**"). We also appreciate the opportunity to comment on the proposed withdrawal of ASC Policy 45-601 – *Distributions Outside Alberta* ("**ASC Policy 45-601**") and the existing Companion Policy 72-501 – *Distributions to Purchasers Outside Alberta* and the replacement of both of them with a new Companion Policy 72-501 – *Distributions to Purchasers Outside Alberta* (the "**Proposed Companion Policy**").

We note that the Ontario Securities Commission (the "**OSC**") recently adopted OSC Rule 72-503 – *Distributions Outside Canada* (the "**Initial OSC Rule 72-503**") and concurrently therewith, adopted OSC Companion Policy 72-503 – *Distributions Outside Canada* (the "**Initial OSC Companion Policy**"). The OSC made certain amendments to each of the Initial OSC Rule 72-503 (together, with the Initial OSC Rule 72-503, "**OSC Rule 72-503**") and the Initial OSC Companion Policy (together, with the Initial OSC Companion Policy, the "**OSC Companion Policy**") on June 12, 2018.

We generally welcome this endeavour by the ASC to reduce regulatory impediments and to facilitate offerings by Alberta issuers to investors outside of Canada and to provide clarity around the prospectus requirement for outbound distributions. We also welcome the substantive harmonization of the Proposed Rule with OSC Rule 72-503; however, one of our overriding concerns is where the Proposed Companion Policy derogates from the OSC Companion Policy by including the ASC's historic position under ASC Policy 45-601 in the Proposed Companion Policy. It is our view that this policy confuses the overriding purpose of the Proposed Rule and creates uncertainty in the new regime.



We also note that recent amendments were made to National Instrument 45-102 – *Resale of Securities* on June 12, 2018 (the "**45-102 Amendments**"), which exclude the application of the sections of NI 45-102 in Alberta and Ontario that concern the exemptions to the resale restrictions on first trades of securities distributed under a prospectus exemption outside of Canada. We note that substantively similar sections to the excepted sections in the 45-102 Amendments are, in turn, included in the Proposed Rule and currently reside in the recently amended ASC Blanket Order 45-519 (the "**ASC Blanket Order**"). We assume that if the Proposed Rule is adopted, the ASC will repeal the Blanket Order so as not have duplicative provisions outstanding. In the discussion below we suggest that the first trade regime would be clearer if the Proposed Rule included an additional exemption from the prospectus requirement in respect of securities of a non-reporting issuer distributed pursuant to an exemption from the prospectus requirements under Alberta securities laws (be it under the Proposed Rule or under National Instrument 45-106 – *Prospectus Exemptions* ("**NI 45-106**") if that trade is made between persons or companies or on exchanges or markets, outside of Canada (without any additional conditions to such exemption).

We have also outlined our concerns with the ASC's suggestion in the Proposed Companion Policy that certain statutory rights and protections are applicable to foreign investors in circumstances where an issuer files a prospectus that qualifies the securities for distribution. We note that the language in the Proposed Companion Policy is unclear, and, generally, that this suggestion is inconsistent with general market understandings of the scope of such statutory rights and protections.

In addition to the foregoing, we have outlined certain further recommendations to address perceived gaps in the Proposed Rule and that align the Proposed Rule with recent amendments made to MJDS offerings.

Animating Principles

The Proposed Companion Policy imports the ASC's historic position, as set out in ASC Policy 45-601, that an outbound distribution of securities by an issuer with a fundamental or significant connection to Alberta, may be subject to the prospectus requirement under Alberta securities laws. We believe that including this historic position in the Proposed Companion Policy is unnecessary, and that it could lead to problems and uncertainties in the future. It also seems problematic that the ASC would propose to adopt a regime so substantively similar to that outlined in OSC Rule 72-503 and then not similarly adopt the statement of principle outlined in the OSC Companion Policy (the "**Statement of Principle**").

The general tenor of the Proposed Rule recognizes that requiring compliance with, at once, the prospectus requirement or the conditions of a prospectus exemption pursuant to Alberta's securities laws and similar requirements in the foreign jurisdiction in which the investor is located is unnecessarily duplicative. The Proposed Rule espouses a clear position that the prospectus requirements are not applicable to a distribution outside of Canada made in compliance with the securities laws of the foreign jurisdiction in which the investor is located. The Proposed Rule relies on the availability of sufficient acceptable disclosure to substitute for a Canadian prospectus. The Proposed Rule accounts for the sophistication of the international capital markets, including the overall integration of capital market practice and regulation in Canada and the United States, the growing importance of European and Asian capital markets and the sophistication of the regulation of markets outside Canada, the United States and the United Kingdom.



The Statement of Principle in the OSC Companion Policy, in turn, emphasizes that the OSC does not view reliance or purported reliance on an exemption, itself, as determinative that the Ontario prospectus requirement would otherwise apply to a distribution outside Canada or to activities related to the distribution, reaffirming the OSC's view that where an issuer and its intermediaries take reasonable precautions to ensure the securities distributed outside Ontario "come to rest" with investors outside of Ontario and will not "flow back" into Ontario, neither a prospectus nor reliance on an exemption from the prospectus is required under Ontario law.

By contrast, the Proposed Companion Policy muddies the waters by expressly stating that issuers with fundamental or significant connection to Alberta may file a prospectus to qualify the distribution or rely on any available prospectus exemption, including the enumerated exemptions in the Proposed Rule, or otherwise apply for a discretionary exemption from the prospectus requirement. It goes on to provide that issuers are required to comply with the securities laws in Alberta and in the foreign jurisdiction in which the investor is located, insisting here on the extraterritorial application of Alberta's securities laws. As drafted, the Proposed Companion Policy leaves the door open to circumstances that do not expressly fall within the Proposed Rule, where an issuer with a fundamental or significant connection to Alberta, as the case may be, is then required to concurrently comply with the prospectus requirement in Alberta or rely on one of the traditional exemptions from the prospectus requirement and with the securities legislation in the foreign jurisdiction. This, in our view, runs counter to the purpose of the Proposed Rule to "reduce regulatory impediments and facilitate offerings by Alberta issuers to investors outside Alberta."

Our principal concern is that, over time, in applying the Proposed Companion Policy, the ASC will come across new situations in which it determines that the extraterritorial application of Alberta securities laws is warranted, and therefore that exemptive relief needs to be applied for (as has happened over time in the ASC's application of the Existing Rule, for example, with ever increasing requirements for exemptive relief from the underwriter certificate page requirement) thereby undermining the efficiencies gained under the Proposed Rule.

We respectfully submit that the ASC should align the Proposed Rule with the Proposed Companion Policy and generally move past its historic policy position on the extraterritorial application of Alberta's securities law. It would be our recommendation that the ASC include a statement of principle in the Proposed Companion Policy that substantially mirrors that outlined in the OSC Companion Policy such that Alberta issuers and underwriters can rely on the fall-back position that Alberta securities laws do not apply to a distribution of securities outside of Canada.

First Trades of Securities

The provisions in sections 10 and 11 of the Proposed ASC Rule concerning first trades in securities distributed pursuant to prospectus exemption indicate that the ASC is not concerned with first trades of securities insofar as such trades are made through an exchange, or a market, or to a person or company outside of Canada. Sections 10 and 11 are however limited to issuers with a minimal connection to Canada (i.e. a non-reporting issuer with a limited investor base in Canada or a non-reporting foreign issuer) and that such security will not flow-back into Canada. The Proposed Rule does not contemplate a circumstance where a non-reporting issuer in Alberta distributes its securities pursuant to an exemption from the prospectus requirement (including under an exemption provided for in the Proposed Rule) to an investor in a



foreign jurisdiction and that investor then trades that security to an investor in the foreign jurisdiction or in another foreign jurisdiction.

Absent a shift in Alberta's historic position (as discussed above) to a position that generally reflects that the prospectus requirements under Alberta securities laws do not apply to distributions of securities outside of Alberta, we could foresee that the ASC might take the position that the first trade of the security in the scenario above is subject to the resale restrictions under Alberta securities laws, notwithstanding that that first trade is made outside of Canada. In order to facilitate the ability of non-reporting issuers in Alberta to access foreign investors (notwithstanding that the issuer may be incorporated in Alberta or have a broad investor base in Canada), we submit that the ASC should include a further exemption that provides that the first trade of a security distributed to a foreign investor pursuant to an exemption from the prospectus requirement is not subject to the prospectus requirement provided that the trade is made through an exchange, or a market, or to a person or company outside of Canada. In other words, provide some assurance that securities distributed to foreign investors are freely tradeable insofar as those securities are not traded into Canada, and relying on the general anti-avoidance provision to address any potential abuses of this exemption.

We also submit that the ASC should consider pursuing an amendment to NI 45-102 specifying the exemptions under the Proposed Rule that are subject to the resale restrictions under NI 45-102 by including a specific reference to the applicable exemptions in the applicable appendix of NI 45-102.

Extraterritorial application of statutory rights

Section 3 of the Proposed ASC Rule provides that the prospectus requirement would not apply to a distribution to a person outside of Canada if the issuer complies with the applicable disclosure requirements of the securities laws of the jurisdiction in which the investor is located, or the distribution is exempt in that jurisdiction, and the issuer concurrently files a prospectus with the ASC (the "**Concurrent Canadian Prospectus Exemption**").

The Proposed Companion Policy suggests that purchasers of Alberta prospectus-qualified securities may be entitled to certain rights and investor protections under the *Securities Act* (Alberta) (the "**Act**") even if the investor is outside Canada. The Proposed Companion Policy seems to suggest that this would be the case only in the circumstance where an issuer qualifies the distribution of securities to an investor outside of Canada without relying on the exemption provided for in Section 3 of the Proposed Rule, but this point is arguably not clear. If an issuer does rely on the Concurrent Canadian Prospectus Exemption, is a foreign investor entitled to the statutory rights and protections outlined in the concurrently filed prospectus in Alberta? If an issuer expressly disclaims the application of Alberta securities law to investors outside of Canada in the prospectus, is this sufficient to also disclaim the application any statutory rights of withdrawal or rescission? The Proposed Companion Policy is unclear on this point as well.

Generally, we find the suggestion that foreign investors may be entitled to certain rights and investor protections, which would include any statutory rights of withdrawal or rescission, to be an extraterritorial application of Alberta's securities laws that is inconsistent with the scope of such statutory rights and protections and the purpose of the Act, generally. To this end, we note that the disclosure prescribed by Form 44-101F1 – *Short Form Prospectus* ("**Form 44-101**") instructs purchasers to refer to the applicable



provisions of the securities legislation of the purchaser's province for the particulars of a given statutory right. This prescribed disclosure supports our position that such rights are only applicable to purchasers resident in the province where the securities are qualified and not to purchasers resident outside of Canada. Accordingly, suggesting in the Proposed Companion Policy that investors located outside of Alberta have the benefits of certain statutory rights and protections is wholly inconsistent with the scope of such disclosure prescribed by Form 44-101, overreaches and conspicuously exports Alberta's securities laws.

We submit that the ASC remove should remove the suggestion from the Proposed Companion Policy that investors outside of Canada may be entitled to certain rights and investor protections under the Act, as such is generally against the general idea behind the Proposed Rule, namely that foreign investors should be sufficiently protected by their local securities law regimes, and therefore could place unnecessary burdens on Alberta issuers.

Underwriter Certificate Page Requirement

We acknowledge that the ASC has historically taken the position that, notwithstanding that an underwriter is not a registered dealer in Canada and will not conduct any sales activities in Canada (a "**Specified Underwriter**"), underwriters in a contractual relationship with an issuer, whether pursuant to an underwriting agreement or otherwise, are required to sign the underwriter certificate pursuant to the requirement set out any of subsection 5.9(1) of National Instrument 41-101 – *General Prospectus Requirements*, item 2.1 of Form 44-101F1 – *Short Form Prospectus*, item 8 of section 5.5 of NI 44-102 – *Shelf Distributions* and item 7 of subsection 3.2(1) of NI 44-103 – *Post Receipt Pricing* (the "**Underwriter Certificate Page Requirement**"), or apply to the ASC for an exemption from such requirement.

The ASC recently made certain amendments to ASC Rule 72-801 – *Implementing the Multijurisdictional Disclosure System* (the "**72-801 Amendments**") which provide for an exemption from Underwriter Certificate Page Requirement when an issuer files a prospectus in respect of a distribution of securities to purchasers resident outside of Canada (exclusively or partially) to be made pursuant to an applicable registration statement under the multijurisdictional disclosure system ("**MJDS**") adopted by the Securities and Exchange Commission. The 72-801 Amendments are however, exclusive to an offering conducted pursuant to the MJDS.

The Proposed Rule does not, however, address whether a Specified Underwriter (who might, for example, sign an underwriting agreement in respect an offering under which securities are being distributed in Canada under a prospectus and outside of Canada under local exempt distribution rules, and in respect of which the Specified Underwriter would only be selling securities in those foreign jurisdictions) is required to execute the certificate page in the prospectus concurrently filed with the ASC.

So as to address this gap and to alleviate any requirement that an issuer apply for exemptive relief from the Underwriter Certificate Requirement when distributing securities pursuant to the Concurrent Canadian Prospectus Exemption and to align the Proposed Rule with the exemption from the Underwriter Certificate Requirement provided in the context of an MJDS offering, we would recommend that the ASC include an exemption to the Underwriter Certificate Requirement for Specified Underwriters in Section 3 of the Proposed Rule, or otherwise specify that the Underwriter Certificate Requirement does not apply to a Specified Dealer in the Proposed Companion Policy.

INCLUDES COMMENT LETTERS RECEIVED

Blakes

If you have any questions regarding this submission please contact Nicole L. Cargill at nicole.cargill@blakes.com or 403-260-9653 or Trevor Rowles at trevor.rowles@blakes.com or 403-260-9750.

Yours truly,

(signed) Nicole L. Cargill

(signed) Trevor Rowles

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June 24, 2019

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Attention: Tracy Clark, Senior Legal Counsel, Corporate Finance

Dear Sirs and Mesdames:

**ASC Notice-Proposed Amendments to
Alberta Securities Commission Rule 72-501 *Distributions to Purchasers Outside
Alberta***

Thank you for the opportunity to provide comments on the proposed amendments (the "**Proposed Amendments**") to ASC Rule 72-501 *Distributions to Purchasers Outside Alberta* (the "**Rule**") and an amended and restated Companion Policy 72-501 *Distributions to Purchasers Outside Alberta* (the "**Companion Policy**").

We are generally very supportive of the Proposed Amendments and wish to thank the Alberta Securities Commission (the "**ASC**") for its continuing efforts to pursue initiatives that will reduce regulatory impediments without compromising investor protections or the integrity of the capital markets.

Please consider the following two comments on the Proposed Amendments:

***Proposed Reintroduction of Application of Item 7(l) of Form 45-106F1 to Reports
Required Under the Rule***

While we appreciate that certain of the information requirements for Form 45-106F1 being reintroduced by the Proposed Amendments will be helpful to the ASC in discharging its regulatory oversight function, we would ask that the ASC consider balancing the benefit of the information that would be made available by the "Number of Purchasers" column in Item 7(f) against the burden that it will impose on market participants in certain circumstances. Where the offering being made under the Rule is a broad-based public distribution, such as a registered offering in the United States, it will be burdensome for the underwriters involved to determine the precise number of unique purchasers involved. The purchasers could number in the thousands, will include institutions as well as individuals, and the broker-dealers making the sales may include not only the bookrunner

on behalf of the underwriting syndicate, but also other underwriters making sales "away" from the syndicate. While we appreciate that the Rule would not require identifying each of the purchasers in Schedule 1, even coming to a total headcount under such circumstances could be a daunting task.

We would ask that the ASC consider introducing an alternative reporting approach, such as the ability to insert "BPD" (meaning broad public distribution), or a similar code, in the "Number of Purchasers" column in lieu of a precise total in such circumstances.

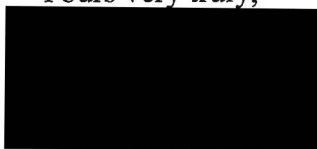
The Multijurisdictional Disclosure System

The Companion Policy refers to the ability of an issuer relying on the Rule to utilize the "notification of clearance" procedures discussed in section 4.2 of Companion Policy 71-101 to National Instrument 71-101 *The Multijurisdictional Disclosure System* ("CP 71-101"). However, CP 71-101 distinguishes the filing procedures available in British Columbia, Alberta and Quebec, which are addressed in Section 4.2, from the filing procedures that are available in Saskatchewan, Manitoba, Ontario and Nova Scotia, which are addressed in Section 4.3. The "notification of clearance" procedure is in fact discussed in section 4.3 of CP 71-101, and has not historically been available in the Province of Alberta.

We propose that the ASC either clarify that the "notification of clearance" procedure in CP 71-101 is now being made available in the Province of Alberta despite the provisions of CP 71-101 which say it is not, or revise the discussion of The Multijurisdictional Disclosure System in the Companion Policy to conform to section 4.2 of CP 71-101 (which would include deleting the inapplicable reference to a notification of clearance).

Thank you for your consideration of our comments. Should you wish to discuss them, please feel free to contact the undersigned at the telephone number or e-mail address noted above.

Yours very truly,



Rob Lando
Partner

RCL:

June 21, 2019

VIA EMAIL

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RE: Alberta Securities Commission – ASC Notice and Request for Comment – Proposed Amendments to Alberta Securities Commission Rule 72-501 – *Distributions to Purchasers Outside Alberta*

Ladies and Gentlemen,

We appreciate the opportunity to submit the below comments in response to the notice published by the Alberta Securities Commission (the “**ASC**”) on May 23, 2019 regarding the proposed amendments to current ASC Rule 72-501 – *Distributions to Purchasers Outside Alberta* (together with such proposed amendments, “**Proposed Rule 72-501**”) and the amended and restated Companion Policy 72-501 – *Distributions to Purchasers Outside Alberta* (“**Proposed CP 72-501**” and together with Proposed Rule 72-501, “**Proposed 72-501**”) included therein. This letter represents the general comments of its signatories (and not those of the firm generally or of any client of the firm) and are submitted without prejudice to any position taken or that might be taken by our firm on its own behalf or on behalf of any client.

We very much welcome the initiative by the ASC to reduce regulatory impediments and to facilitate offerings by Alberta issuers to investors outside of Canada and to provide clarity around the prospectus requirements for outbound distributions.

We are concerned that Proposed 72-501 does not adequately address or provide sufficient guidance in respect of certain situations where distributions of securities of Alberta issuers outside of Alberta are effected by “control persons” (as defined in the *Securities Act* (Alberta)) and submit this letter to clarify the intended treatment in such situations.

Treatment of Distributions Effected by Control Persons

The “Purpose” section of Proposed CP 72-501 stipulates that Part I of Proposed CP 72-501 is intended to help users understand how staff of the ASC interpret or apply the prospectus and registration requirements of Alberta securities laws when: (a) an issuer with a real and substantial connection to Alberta distributes securities to a purchaser outside of Alberta; and (b) an issuer outside of Alberta indirectly distributes securities into Alberta. It further stipulates that Part I of Proposed CP 72-501 also outlines precautions that an issuer outside Alberta, but with certain ties to Alberta, may take to reduce the likelihood that the ASC would consider a securities transaction to which the issuer is a party to be a distribution to which Alberta securities laws may apply.

Despite the aforementioned focus on distributions by an issuer, Proposed 72-501 also seeks to address situations where a distribution may be effected by a “selling security holder” as such term is used in Proposed 72-501 (and which would most commonly be anticipated to be impactful of control distributions). There are various references to a “selling security holder” throughout Proposed 72-501 (notably in Proposed CP 72-501) and Proposed Rule 72-501 clearly distinguishes between situations where there is a “distribution of a security” (e.g. Sections 2, 3, 13 and 16), which would capture a

distribution by either the issuer itself or a selling security holder, and where there is a “distribution by an issuer of a security” (e.g. Sections 4, 5, 6 and 7).

Although we understand why a distinction between a situation involving a “distribution of a security” and a “distribution by an issuer of a security” is required in certain instances (such as in connection with Section 7 of Proposed Rule 72-501 given the related exemption under Section 2.9 of National Instrument 45-106 – *Prospectus Exemptions* is only available to an issuer of securities), we are uncertain as to why only issuers of a security are able to avail themselves of the exemptions from the prospectus requirements contemplated in Section 4 and Section 5 of Proposed Rule 72-501 in connection with a distribution outside of Canada which is completed in material compliance with the disclosure requirements applicable to such distribution under the securities laws of the jurisdiction outside of Canada in which the investor is located, or the distribution is exempt in that jurisdiction from such requirements (the “**Non-Prospectus Foreign Distribution Exemption**”).

We respectfully submit that the policy rationale to afford issuers of securities with a Non-Prospectus Foreign Distribution Exemption applies equally to selling security holders. We further respectfully submit that the policy rationale to afford selling security holders an exemption from the prospectus requirements to effect distributions in connection with a prospectus as contemplated in Section 2 and Section 3 of Proposed Rule 72-501 is no different in connection with a Non-Prospectus Foreign Distribution Exemption effected by a selling security holder and that Proposed Rule 72-501 should be amended accordingly.

Absent such amendment, inconsistencies and unintended distinctions between issuer and selling security holder distributions may arise. For example, a scenario could materialize where an Alberta issuer seeks to effect a distribution of its securities outside of Canada by way of private placement and in conjunction with such private placement a control person of such Alberta issuer to which Proposed 72-501 applies, could exercise certain typical “piggy back” rights and seek to have its securities of the Alberta issuer sold to potential purchasers in connection with the private placement. The outcome of Proposed 72-501 in such a scenario would be that the Alberta issuer would be able to avail itself of the prospectus requirement exemptions contemplated in Section 4 or 5 of Proposed Rule 72-501 while such control person would not be able to avail itself of a prospectus exemption under Proposed Rule 72-501 to complete the transaction. As mentioned above, we respectfully submit that no policy rationale exists to justify such a distinction.

In connection with the foregoing, it would also be beneficial to address the commentary in Proposed CP 72-501 towards the circumstances pursuant to which a selling security holder would be obligated to comply with the prospectus exemptions contemplated by Proposed 72-501. At present, and while Proposed 72-501 and its associated commentary is exclusively devoted to articulating the manner by which an issuer is to determine whether Alberta securities laws are applicable to it by virtue of a fundamental or significant connection to Alberta, given the implications of Sections 2 and 3 of Proposed Rule 72-501 (and, if our suggestions with respect to the extension of those exemptions to Sections 4 and 5 are agreeable, to those sections as well), it is unclear whether the application to selling security holders would be measured simply by residency or some similar measure of connectivity to the Alberta capital markets. We would respectfully submit that its application should be limited to the former, which would provide much needed clarity to selling security holders confused by the implications of Proposed 72-501.

If the ASC agrees with the submissions described herein, we recommend that Proposed Rule 72-501 be amended to provide for a Non-Prospectus Foreign Distribution Exemption in respect of selling security holder distributions as described above and that Proposed CP 72-501 be amended to provide greater emphasis and guidance regarding the circumstances in which selling security holders would be required to comply with Proposed Rule 72-501 and the situations where a selling security holder may effect an exempt distribution under Proposed Rule 72-501.

Stikeman Elliott

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If you have any questions regarding this submission please contact Patrick McNally at pmcnally@stikeman.com or (403) 266-9080 or Kayla Zachariassen at kzachariassen@stikeman.com or (403) 508-9252.

Yours truly,

Stikeman Elliott LLP

(signed) "*Patrick McNally*"

(signed) "*Kayla Zachariassen*"

(signed) "*Christopher Nixon*"

(signed) "*Keith Chatwin*"

(signed) "*Benjamin Hudy*"

(signed) "*Janel Young*"

(signed) "*Rhonda Parhar*"