

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 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 short form prospectus in connection with a distribution solely in the U.S. under the multijurisdictional disclosure system adopted by the SEC. In this situation, the exemption in subsection 2(a) of Rule 72-501 will be available once the Form F-9 or F-10 registration statement in connection with the offering under the multijurisdictional disclosure system 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.