

Ontario Securities Commission

Companion Policy 72-503

Unofficial consolidation current to 2018-10-05.

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Any forms referenced in this document are available separately on the Ontario Securities Commission website.

**COMPANION POLICY 72-503
DISTRIBUTIONS OUTSIDE CANADA**

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PART 1 APPLICATION AND PURPOSE

This Policy sets out how the Ontario Securities Commission (the **Commission** or the **OSC**) interprets and applies section 53 of the *Securities Act* (Ontario) (the **Act**), the provisions of OSC Rule 72-503 *Distributions of Securities Outside Canada* (the **Rule**) and section 25 of the Act in the context of distributions outside Canada.

Statement of Principle

The Commission takes the view that an investor outside Canada will ordinarily expect to rely on the prospectus, registration statement or similar protections of the securities laws of the foreign jurisdiction in which the investor is located. The Commission recognizes that compliance with the prospectus requirement or conditions of a prospectus exemption under Ontario securities law may be unnecessarily duplicative of these protections and will generally not be necessary to fulfill the purposes of the Act.

Accordingly, the Commission does not interpret the Ontario prospectus requirement as applying to a distribution of securities outside Canada that is made in compliance with the securities laws of the foreign jurisdiction in which the investor is located. However, the Commission would expect the issuer, a selling security holder, an underwriter and other participants in the distribution to take sufficient measures in the circumstances of the distribution to make it reasonable to conclude that the offered securities come to rest outside Canada, meaning that it is unlikely that they will be redistributed back into Canada by an original purchaser outside Canada that has acquired the securities with a view to distribution, rather than with investment intent. The following are examples of measures they may take in support of their reliance on this Statement of Principle:

- (1) A restriction in the underwriting, banking group, selling group, or agency agreement that prohibits the sale of securities to any person or company in Canada, except pursuant to a Canadian prospectus or prospectus exemption;
- (2) Clear statements in the offering document that the securities: (i) have not been qualified for distribution by prospectus in Canada, and (ii) may not be offered or sold in Canada during the course of their distribution except pursuant to a Canadian prospectus or prospectus exemption;
- (3) The class or series of securities being distributed have an existing trading market outside Canada that would not be materially less advantageous for investors outside Canada than making resales on any exchange or market in Canada on which the securities may also be traded;
- (4) The distribution is conducted as a broad-based public offering in one or more countries outside Canada and, if there is no existing trading market outside of Canada, it is reasonable to expect that a trading market for the offered securities outside Canada will develop;
- (5) Purchasers outside Canada provide representations and warranties, or are given notice that their purchase of the securities will be deemed to constitute a representation and warranty, that they are purchasing the securities with investment intent and not with a view to distribution, and such representations and warranties are reasonable in the circumstances, having regard to the nature of the purchaser, the number of securities purchased, the purchaser's investment strategy, and any other facts or circumstances that a reasonable person would consider relevant in determining whether a purchaser is purchasing with investment intent and not with a view to distribution.

This list of examples of measures that may be taken is provided for illustrative purposes, and is not intended to be a definitive list of any or all of the measures or other factors that participants may take into account in order to reasonably conclude that securities have come to rest outside Canada. Furthermore, the list is intended to assist in determining whether the prospectus requirement applies to a distribution, and is not intended to have a bearing on the ability of market participants to rely on the Rule's exemptions. As the Rule's exemptions are intended to provide greater certainty for market participants, the Commission would 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.

The Integrity of the Ontario Capital Markets and the Jurisdiction of the Commission

The Rule's exemptions are intended only for distributions being made in good faith outside Canada, and not as part of a plan or scheme to conduct an indirect distribution to a person or company in Canada.

Neither the Rule nor this Policy impacts the jurisdiction of the Commission. Where the Commission becomes aware of conduct that may bring the reputation of Ontario's capital markets into disrepute or otherwise impair its mandate, the Commission may assert its jurisdiction and exercise its powers to take appropriate action against issuers, underwriters and other persons, including in connection with distributions of securities to an investor outside Canada. The Commission may exercise its discretionary authority to cease trade securities, make orders to prevent conduct contrary to the public interest, and make regulations to foster fair and efficient capital markets and confidence in capital markets irrespective of whether there is a "distribution" in Ontario in breach of section 53 of the Act.

PART 2 EXEMPTIONS FROM THE PROSPECTUS REQUIREMENT

General

The prospectus exemptions under Part 2 of the Rule are intended to facilitate cross-border offerings by removing the potentially duplicative application of Ontario prospectus requirements where offerings to an investor outside Canada are made in material compliance with the securities laws of the foreign jurisdiction.

An issuer or selling security holder meets 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 2.5 of the Rule provides that a distribution made through the facilities of an exchange or market outside Canada will qualify as a distribution outside Canada if neither the seller, nor any person acting on its behalf, has reason to believe the distribution has been pre-arranged with a buyer in Canada. Where the transaction has been pre-arranged, the exemption from the prospectus requirement will only be available if the pre-arranged buyer is in fact a person or company outside Canada.

An issuer or selling security holder will 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.

Concurrent Distribution under Final Prospectus in Ontario

An issuer or selling security holder distributing securities to an investor outside Canada may concurrently distribute securities to purchasers in Ontario provided that the distribution of

securities to an investor in Ontario is qualified by a prospectus filed under the Act, or is conducted in reliance on an exemption from the prospectus requirement. The condition under paragraph 2.2(b) of the Rule therefore requires the filing of a prospectus in Ontario in connection with a concurrent distribution in Ontario. The prospectus exemption under section 2.2 of the Rule may be relied on for purposes of the distribution to an investor outside Canada only.

If an issuer or selling security holder files a prospectus to qualify a concurrent distribution to a person or company in Ontario, the issuer may choose to file a prospectus in Ontario to qualify the distribution of securities to an investor outside Canada, rather than rely on the exemption in section 2.2 of the Rule. Any prospectus filed in such circumstances should clearly state whether or not it also qualifies the distribution of securities to an investor outside Canada, recognizing that purchasers of Ontario prospectus-qualified securities may be entitled to certain rights and investor protections under the Act even if the investor is outside Canada.

If there is no concurrent distribution in Ontario but the issuer files an Ontario prospectus in connection with the distribution of securities to an investor outside Canada, the securities being distributed outside Canada will be qualified by the Ontario prospectus. In this case, the issuer or selling security holder would not be relying on the exemption from the prospectus requirement in section 2.2 of the Rule because a prospectus in Ontario is qualifying the distribution.

Resales subject to Restricted Period

Securities distributed under an exemption from the prospectus requirement in section 2.1, 2.2, or 2.3 of the Rule are free trading.

The first trade of securities distributed under an exemption from the prospectus requirement in section 2.4 of the Rule is subject to a restricted period on resale. Refer to Appendix D of National Instrument 45-102 *Resale of Securities*.

Resales of Securities under Section 2.7 of the Rule

For the purposes of section 2.7 of the Rule, in determining the percentage of the outstanding securities of the class or series that are directly or indirectly owned by residents of Canada and the number of owners directly or indirectly that are residents of Canada, an issuer should use reasonable efforts to

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

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

There is no requirement to place a legend on the securities in order to rely on the exemption in section 2.7 of the Rule.

The exemptions in subsections 2.7(1) and 2.7(2) of the Rule permit the resale of securities of an issuer in a bona fide trade outside of Canada. The exemptions are each subject to a condition that the trade is made through an exchange or a market outside of Canada, or to a person or company outside of Canada.

In the Commission's view, selling security holders who wish to rely on the exemption may not take steps to sell in Canada by either (1) pre-arranging with a buyer that is a resident of Canada and settling on an exchange or a market outside of Canada or (2) selling securities to a person or company outside of Canada who the selling security holder has reason to believe is acquiring the securities on behalf of a Canadian investor. A selling security holder engaged in activities to sell or create a demand for the security in Canada would not be able to rely on the exemptions in section 2.7 of the Rule. This view is reinforced by the anti-avoidance provision in section 2.9 of the Rule.

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

Resales of Securities under Section 2.8 of the Rule

The definition of "foreign issuer" in section 2.8 of the Rule uses the terms "directors" and "executive officers". The term "director" is defined in the *Securities Act* (Ontario) 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 2.8, a selling security holder will have to determine if the issuer is a foreign issuer on the distribution date. In some cases, the issuer will provide that information to investors at the time of the offering, perhaps in representations in subscription agreements or in offering materials. If the issuer doesn't 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 2.8 of the Rule.

The exemptions in subsections 2.8(2) and 2.8(3) of the Rule permit the resale of securities of an issuer in a *bona fide* trade outside of Canada. The exemptions are each subject to a condition that the trade is made through an exchange or a market outside of Canada, or to a person or company outside of Canada.

In the Commission's view, selling security holders who wish to rely on the exemptions may not take steps to sell in Canada by either (1) pre-arranging with a buyer that is a resident of Canada and settling on an exchange or a market outside of Canada or (2) selling securities to a person or company outside of Canada who the selling security holder has reason to believe is acquiring the securities on behalf of a Canadian investor. A selling security holder engaged in activities to sell or create a demand for the security in Canada would not be able to rely on the exemptions in section 2.8 of the Rule. This view is reinforced by the anti-avoidance rule in section 2.9 of the Rule.

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

The Multijurisdictional Disclosure System

Nothing in the Rule is intended to affect the guidance in section 4.3 of Companion Policy 71-101CP To National Instrument 71-101 *The Multijurisdictional Disclosure System*. An issuer relying on an exemption from the prospectus requirement in paragraph 2.1(a) of the Rule may file a Form F-10 in connection with a distribution solely in the United States of America under the multijurisdictional disclosure system adopted by the SEC, select Ontario as the review jurisdiction, file the registration statement filed with the SEC with the Commission contemporaneously with the filing of the registration statement with the SEC, obtain notification of clearance from the Commission and advise the SEC of the issuance of the notification of clearance. In this situation, the exemption in paragraph 2.1(a) of the Rule will be available once the Form F-10 has become effective.

PART 3 EXEMPTIONS FROM THE REGISTRATION REQUIREMENT

Section 25 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.

Part 3 of the Rule provides an exemption from the dealer and underwriter registration requirements in Ontario securities law for certain foreign dealers (including dealers acting as underwriters) with respect to distributions to investors outside Canada that are made under a prospectus filed in Ontario or made in reliance on a prospectus exemption available under Ontario securities law, including the exemptions in Part 2 of the Rule. The registration exemption in section 3.1 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 United States of America 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.

The Commission reminds market participants that registration in Ontario is generally required (unless an exemption is otherwise available) where registerable services are provided to investors in Ontario or where registerable activities are otherwise conducted within Ontario, regardless of the location of the investors.

The Commission recognizes that, in the case of a distribution of securities by an Ontario 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 and underwriter registration requirements of Ontario securities law. The Commission has introduced the exemption in section 3.1 of the Rule 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 Ontario 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 OSC Rule 32-505 *Conditional Exemption from Registration for United States Broker-Dealers and Advisers Servicing U.S. Clients from Ontario*.

The registration exemption in section 3.2 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.

PART 4 FORM 72-503F

Issuers are required to file the information required by Form 72-503F *Report of Distributions Outside Canada* (the **Form**) electronically through the Commission's Electronic Filing Portal. The electronic filing requirement applies to all issuers that are subject to the Form's disclosure requirements. Please see OSC Rule 11-501 *Electronic Delivery of Documents to the Ontario Securities Commission* for further information.

In certain circumstances, two or more issuers distribute a single security. In these circumstances, only one Form is required to be filed for the distribution, which may be completed and filed by any one of the co-issuers.

APPENDIX A

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