

ALBERTA SECURITIES COMMISSION

NOTICE

PROPOSED MULTILATERAL INSTRUMENT 72-101, COMPANION POLICY 72-101CP AND FORM 72-101F1 DISTRIBUTIONS OUTSIDE OF THE LOCAL JURISDICTION

The Commission, together with other members of the Canadian Securities Administrators (the “CSA”), is publishing for comment proposed Multilateral Instrument 72-101 Distributions Outside of the Local Jurisdiction (the “Instrument”), Form 72-101F1 (the “Form”), and Companion Policy 72-101CP (the “Policy”).

The Instrument, Form and Policy are initiatives of the CSA. The Instrument and Form are expected to be adopted as a rule in each of British Columbia, Alberta, Ontario, Manitoba, Newfoundland and Nova Scotia, as a Commission regulation in Saskatchewan, as a policy in New Brunswick, Prince Edward Island and the Yukon Territory, and as a code in the Northwest Territories and Nunavut. It is expected that the Policy will be implemented as a policy in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island, the Yukon Territory, the Northwest Territories, and Nunavut (the “adopting jurisdictions”). The Instrument, Form and Policy will not be adopted in Québec.

Substance and Purpose of the Instrument and Policy

The Instrument harmonizes the approach of Canadian securities regulatory authorities to distributions of securities to purchasers outside of the local jurisdiction. The Instrument provides exemptions from the registration and prospectus requirements under securities legislation in Canada to permit these distributions to be made, provided the conditions to the exemptions are made. The Policy provides guidance to issuers and selling security holders regarding the application of securities legislation to a distribution of securities to purchasers outside the local jurisdiction.

Background

In October, 1998, the Commission issued ASC Policy 45-601 Distributions Outside Alberta, which provides guidance regarding the application of the Securities Act (Alberta) (the “Act”) when an issuer distributes securities to a person outside of the province. The underlying premise is that 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 Act even if the initial purchaser is not located in Alberta. ASC Policy 45-601 advised that an issuer must be aware that a trade may occur in more than one jurisdiction and satisfy itself that it is in compliance with the applicable laws of each relevant jurisdiction. The Commission concurrently implemented Alberta Rule 72-501 Distributions to Purchasers Outside Alberta which effectively granted an exemption from the prospectus requirement for a private placement of securities to purchasers outside Alberta, on certain conditions.

The British Columbia Securities Commission adopted substantively the same approach to distributions of securities to persons outside British Columbia in NIN#97/48 *Distributions of Securities to Persons Outside British Columbia* and a corresponding exemption in Blanket Order#98/11.

The Ontario Securities Commission stated its views on the application of the Securities Act (Ontario) to distributions of securities outside of Ontario in Interpretation Note No. 1. The Ontario Securities Commission commented that a distribution outside Ontario by an Ontario or non-Ontario issuer, might also, depending on the connecting factors with Ontario, be a distribution in the province. However, if reasonable steps are taken

by the issuer, underwriter and other participants effecting such distribution to ensure that such securities come to rest outside Ontario, the Ontario Securities Commission takes the view that a prospectus is not required under the Securities Act (Ontario), nor is an exemption from the prospectus requirement necessary. The Interpretation Note does not grant exemptions from the registration requirement and prospectus requirement but, in effect, outlines safe harbours in which a distribution is not subject to Ontario securities laws.

These divergent approaches have created uncertainty and inefficiency for issuers and market participants seeking to raise capital by way of extraterritorial distributions. Consequently, the Instrument and Policy have been developed to provide for a common approach to distributions of securities outside the local jurisdiction.

Summary of the Instrument, Form and Policy

Characterization as Distribution

The Policy provides guidance to assist issuers and control block sellers in determining whether a trade outside of the local jurisdiction would be a distribution under local securities legislation. A distribution of securities of an issuer with a connection to a local jurisdiction may be subject to the prospectus requirement of securities legislation of the local jurisdiction even if none of the purchasers are in the local jurisdiction. If the distribution is subject to local securities legislation, either a prospectus will have to be filed in the local jurisdiction or a prospectus exemption relied upon.

The Policy sets out the connecting factors to be considered when determining if a trade would be subject to the local securities legislation. The connecting factors include

- where the mind and management of the issuer are primarily located
- whether a significant percentage of the outstanding securities of the class of securities being distributed are directly or indirectly held of record by residents of the local jurisdiction
- the location of the principal register of the equity securities of the issuer
- where the operations of the issuer are principally conducted

Not all of the connecting factors are of equal weight. The Canadian securities regulatory authorities recognize that if the jurisdictional connection of the distribution to the local jurisdiction is merely incidental, the distribution would not be subject to local securities legislation. The Manitoba Securities Commission does not agree that the percentage of the outstanding securities of the class being distributed that are held of record by residents of the local jurisdiction is a relevant connecting factor.

Exemptions from the Registration Requirement and Prospectus Requirement

If the connecting factors are sufficient for a trade to constitute a distribution in the local jurisdiction, an issuer or selling security holder would then evaluate whether the exemptions provided by the Instrument would be available.

The Instrument provides an exemption from the registration requirement and prospectus requirement for a distribution outside of the local jurisdiction in two situations

- a distribution made under a public offering document
- a distribution made other than under a public offering document.

The restrictions that must be taken to ensure the securities come to rest outside of the jurisdiction differ depending upon whether the distribution outside the local jurisdiction is a public offering or a private placement. The objective of the restrictions is to ensure that the out of jurisdiction transaction is bona fide and is not a backdoor underwriting (a transaction that is really intended for investors in the local jurisdiction but has been structured to avoid the requirements of the local jurisdiction).

A “public offering document” is defined as a prospectus filed and receipted in any jurisdiction in Canada, a U.K. prospectus or a U.S. prospectus. U.S. and U.K. public offering documents were included because of historical acceptance of these documents by Canadian securities regulatory authorities and the level of regulatory oversight in those foreign jurisdictions.

The prospectus exemptions may be relied upon for distributions outside of the local jurisdiction under a public offering document, and other than under a public offering document if the following conditions are met

- all purchasers of the securities are outside of the local jurisdiction
- any underwriting agreement prohibits the distributors from distributing the securities to any person or company in the local jurisdiction
- neither the issuer, the selling security holder nor a distributor takes any actions to prepare the market or create a demand in the local jurisdiction for the securities being distributed

The Policy provides guidance as to which activities would be considered preparing the market.

In the case of an offering of securities other than under a public offering document, the additional conditions are that the securities are legended, and any offering document contains a statement describing the resale restrictions to which the securities are subject. The certificate representing the securities must carry a legend stating that, subject to securities legislation, the holder shall not trade the securities before the expiry of the restricted period.

Resale of Securities Distributed Other than Under a Public Offering Document

The Instrument provides that a trade of securities distributed in reliance on the exemption for distributions other than under a public offering document, is a distribution unless, among other conditions, the issuer of the securities is a reporting issuer and the restricted period has expired.

Resale of securities distributed other than under a public offering document would be restricted for

- 40 days if the securities are sold in the Eurobond Market
- four months if the issuer is a qualifying issuer
- 12 months if the issuer is not a qualifying issuer

A qualifying issuer is an issuer that

- is a reporting issuer in any of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec or Nova Scotia
- is an electronic filer under SEDAR, has filed a current AIF

- either has a class of equity securities listed or quoted on certain specified exchanges or markets or has outstanding securities that have received an approval rating.

The resale provisions in the Instrument do not apply in Manitoba, New Brunswick, Prince Edward Island and the Yukon Territory. These jurisdictions do not impose resale restrictions on securities distributed under a prospectus exemption.

In addition, no restrictions are imposed on resale of securities distributed under a public offering document. The rationale for not imposing a restricted period is that given that the securities were distributed under a public offering document, there should be appropriate disclosure in the marketplace concerning the securities.

Summary of the Policy and Form

The Policy outlines that an issuer or a selling security holder may concurrently rely in the local jurisdiction on the exemption under the Instrument and in the jurisdiction of the purchasers of the securities being distributed, on a prospectus or registration exemption under securities legislation of that jurisdiction.

The Policy clarifies that an issuer or selling security holder may make a concurrent private placement in the local jurisdiction and a distribution outside of the local jurisdiction under the exemption in the Instrument. The Policy also clarifies that the Instrument is not intended to restrict the ability of a purchaser to resell securities during the restricted period in reliance upon a prospectus or an exemption from the prospectus requirement.

The Policy also explains that “tacking” of a hold period under proposed Multilateral Instrument 45-102 *Resale of Securities* (“MI 45-102”) and a restricted period under the Instrument is permitted.

Form 72-101F1 provides notice to the market of a distribution of securities outside of the local jurisdiction, other than under a public offering document.

Related Instruments

The CSA, other than the Commission des valeurs mobilières du Québec, will be publishing MI 45-102 concurrently with the Instrument, Form and Policy. MI 45-102 imposes resale restrictions on securities initially distributed under an exemption from the prospectus requirement. In addition, the CSA has published for further comment proposed National Instrument 54-101 Communication with Beneficial Owners of Securities of a Reporting Issuer (“NI 54-101”). To the extent that NI 54-101 bears on the determination of the number of securities and of holders that are directly or indirectly held of record in a local jurisdiction, it is related to the Policy.

Rules to be Repealed or Amended

In Alberta, the following instruments will be repealed concurrently with the implementation of the Instrument, Policy and Form.

- Alberta Rule 72-501 Distributions to Purchasers Outside Alberta and Companion Policy 72-501CP
- ASC Policy 45-601 Distributions Outside Alberta

Specific Request for Comment

In addition to welcoming submissions on any provision in the Instrument, Form, and Policy, the adopting jurisdictions seek comment on the specific matters referred to below.

1. *Connecting Factors*

The Policy provides that a distribution of securities to a purchaser outside of the local jurisdiction may constitute a distribution in the local jurisdiction if one or more connecting factors to the local jurisdiction exists. Comment is sought as to whether the connecting factors listed in section 2.2(1) are the most relevant factors for determining jurisdiction. Should a “substantial market for the securities being distributed exists in the local jurisdiction” be added as a connecting factor?

2. *Public Offering Documents*

Comment is sought on the definition of public offering document in the Instrument, including whether prospectuses filed in any other foreign jurisdiction should be included in the definition.

3. *Requirement That a Legended Certificate Representing the Securities Distributed Under Section 2.4 Be Provided to Investors*

Part 2 of the Instrument provides that if the securities are distributed in reliance on the exemption for distributions other than under a public offering document, the certificate representing the securities must carry a legend stating that, subject to securities legislation, the holder of the securities shall not trade the securities before the expiry of the appropriate restricted period.

In other jurisdictions there is currently no requirement to legend certificates for private placements either in or outside of the local jurisdiction. Under the System for Shorter Hold Periods for Issuers Filing an AIF (the “SHAIF System”) implemented in Alberta and British Columbia in 1998, certificates must bear a legend stating that the securities may not be traded during the hold period. Legended certificates are also proposed under MI 45-501.

The implementing jurisdictions believe that, while the legending requirement may represent a change in current commercial practice in some jurisdictions, it will ensure better regulation of the exempt market.

Comment is sought as to whether the legending requirement is workable. Should the Instrument specify that issuers of securities in uncertificated form could satisfy the legending requirements in any means reasonably designed to notify holders and subsequent purchasers of the applicable resale restrictions, such as notices of the restriction to investors on confirmation certificates, use of global securities held in a depositary and restrictions on trading through the use of restricted CUSIP numbers?

4. *Provision for 40 Day and Four-Month Restricted Periods*

The Instrument provides for a 40 day restricted period for securities distributed in the Eurobond Market. The 40 day period has been structured to correspond to the 40 day distribution compliance period for Category 2 issuers under Regulation S in the US. The Instrument also provides for a four-month restricted period for investment grade securities (i.e., debt, asset backed securities, preferred shares) distributed under exemptions from the prospectus requirement. This goes beyond the SHAIF System and moves away from the “legal for life” criteria of some jurisdictions.

Comments

Interested parties are invited to make written submissions with respect to the Instrument, Form and Policy. Submissions received by **December 8, 2000** will be considered.

Submissions should be sent to the securities regulatory authorities listed below in care of the Saskatchewan Securities Commission, in duplicate, as indicated below:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
The Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

c/o Dean Murrison, Committee Chair
Saskatchewan Securities Commission
800, 1920 Broad Street
Regina, Saskatchewan S4P 3V7
Telephone: 306-787-5879
E-mail: dmurrison@ssc.gov.sk.ca

A diskette containing the submission (in DOS or Windows format, preferably WordPerfect) should also be submitted to the Chair of the Committee.

Comment letters submitted in response to requests for comments are placed on the public file in certain jurisdictions and form part of the public record, unless confidentiality is requested. Comment letters will be circulated amongst the securities regulatory authorities, whether or not confidentiality is requested. Although comment letters requesting confidentiality will not be placed on the public file, freedom of information legislation in certain jurisdictions may require the securities regulatory authorities in those jurisdictions to make comment letters available. Persons submitting comment letters should therefore be aware that the press and members of the public may be able to obtain access to any comment letters.

Questions may be referred to the Chair and/or any of the following members of the Committee:

Margaret Sheehy or Brenda Leong
British Columbia Securities Commission
865 Hornby Street, 2nd Floor
Vancouver, British Columbia V6Z 2H4
Telephone: (604) 899-6650 / (604) 899-6642 or (800)373-6393 (in B.C.)
E-mail: msheehy@bcsc.bc.ca
bleong@bcsc.bc.ca

Marsha Manolescu
Alberta Securities Commission
20th Floor, 10025 Jasper Avenue
Edmonton Alberta T5J 3Z5
Telephone: (780) 422-1914
E-mail: Marsha.Manolescu@seccom.ab.ca

Chris Besko
The Manitoba Securities Commission
1130 - 405 Broadway
Winnipeg, Manitoba R3C 3L6
Telephone: (204) 945-2561
E-mail: cbesko@cca.gov.mb.ca

Margo Paul or Jean-Paul Bureaud
Ontario Securities Commission
20 Queen Street West, Suite 1900, Box 55
Toronto, Ontario M5H 3S8
Telephone: (416) 593-8136/ (416)593-8131
E-mail: mpaul@osc.gov.on.ca
jbureaud@osc.gov.on.ca

Shirley Lee
Nova Scotia Securities Commission
1690 Hollis Street
P.O. Box 458
Halifax, Nova Scotia B3J 3J9
Telephone: (902) 424-5441
E-mail: lees@gov.ns.ca

Instrument and Policy

The text of the Instrument and Policy follow, together with footnotes that are not part of the Instrument or Policy, but have been included to provide background and explanation.

Dated: September 8, 2000