

**NATIONAL POLICY 46-201
ESCROW FOR INITIAL PUBLIC OFFERINGS**

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NATIONAL POLICY 46-201 ESCROW FOR INITIAL PUBLIC OFFERINGS

Securities regulators usually require an issuer making an initial public offering to enter into an escrow agreement with its principals and an escrow agent. We may also require an escrow agreement in connection with a prospectus when public investors are asked to finance a significant change of business and escrow has not been previously imposed on the issuer's principals in connection with that business.

Under an escrow agreement principals place their securities in escrow with an escrow agent. Principals are restricted from selling or dealing in other ways with the escrow securities until they are released from escrow according to the escrow agreement.

This Policy describes the circumstances where securities regulators consider an escrow agreement necessary or desirable and the terms of escrow we consider appropriate. Until recently, different provinces had different escrow policies. This Policy describes uniform terms for escrow agreements that will be used throughout Canada.

Part I – Purpose and Interpretation

1.1 What is the purpose of escrow?

(1) A public investor who buys securities in an initial public offering or an offering to fund a significant change of business relies on the issuer's management and principal securityholders to carry out the plans described in the issuer's prospectus. This is particularly true for issuers with a limited history of operations.

(2) An escrow agreement ties the issuer's management and its principal securityholders to the issuer by restricting their ability to sell their securities for a period of time following the issuer's offering. This gives them an incentive to devote their time and attention to the issuer's business while they are securityholders.

1.2 Interpretation

(1) When we refer to securities that a person or company "holds", we mean that the person or company has direct or indirect beneficial ownership of, or control or direction over, the securities.

(2) You should use common sense in applying this Policy to your own circumstances, as we will apply the Policy according to its purpose.

1.3 Will a Canadian exchange impose additional escrow terms?

A Canadian exchange may impose additional conditions or more stringent release terms.

Part II – Application of the Policy

2.1 When does this Policy apply?

This Policy applies when an issuer and/or one or more of its securityholders distributes shares or convertible securities (both defined in section 3.7) to the public by prospectus in one of the following ways (an **IPO**):

- (a) an initial distribution by the issuer
- (b) a distribution by one or more of the issuer's securityholders if it is the initial public distribution of the issuer's securities (e.g., a corporate spin-off)
- (c) a distribution, other than an initial distribution, by a reporting issuer and/or one or more of its securityholders, if no escrow has been previously imposed by a securities regulator or a Canadian exchange on the issuer's principals in connection with its current business.

2.2 What are the exceptions?

- (1) This Policy does not apply to a distribution by:
 - (a) an exempt issuer (defined in section 3.2);
 - (b) a capital pool company under Canadian Venture Exchange Inc. (**CDNX**) Policy 2.4;
 - (c) a Tier 3 issuer listed on CDNX; or
 - (d) an issuer that, following a business combination, is a successor to issuers whose principals have been subject to escrow requirements.
- (2) This Policy generally does not apply when there is only a prospectus that does not offer securities to the public, such as a prospectus that an issuer files with a securities regulator only to become a "reporting issuer".

2.3 How does this Policy apply to special warrant prospectuses?

- (1) Special warrants are convertible securities that a principal is required to place in escrow. The principal must also place the securities issued on conversion of the special warrants in escrow, even if the securities are qualified under the prospectus.
- (2) A prospectus that only qualifies the securities issued on conversion of special warrants is generally not an IPO prospectus because there are no additional proceeds raised. However, if there is a market for the securities, the prospectus may be considered an IPO prospectus for the purpose of this Policy. Otherwise, the IPO prospectus will be the next prospectus of the issuer that makes a public offering.

2.4 *Can securities regulators impose additional or different terms?*

A securities regulator may impose additional or different escrow terms if:

- (a) an underwriter has not signed the IPO prospectus;
- (b) the issuer has not applied to have its securities listed on a Canadian exchange, or a Canadian exchange has not agreed to list the securities distributed under the IPO prospectus; or
- (c) there are other exceptional circumstances.

Part III – Escrow Classifications

3.1 *Escrow classifications*

Issuers are classified as either exempt issuers, established issuers or emerging issuers. Whether or not an issuer's securities will be subject to escrow, and the schedule for release of escrow securities from escrow will depend on the classification of the issuer.

3.2 *Exempt issuers*

Securities regulators do not generally consider that escrow is necessary for an exempt issuer. An **exempt issuer** is an issuer that, after its IPO:

- (a) has securities listed on The Toronto Stock Exchange (**TSE**) and is classified by the TSE as an exempt issuer; or
- (b) has a market capitalization of at least \$100 million. (In calculating market capitalization, multiply the number of the outstanding securities of the class of securities offered on the IPO, on completion of the IPO, by the IPO price.)

3.3 *Established and emerging issuers*

- (1) Securities regulators generally consider that escrow is necessary for established and emerging issuers.
- (2) An **established issuer** is an issuer that, after its IPO:
 - (a) has securities listed on the TSE and is not classified by the TSE as an exempt issuer;
 - (b) has securities listed on the CDNX and is a CDNX Tier 1 issuer; or
 - (c) has securities listed on the Bourse de Montréal Inc. (**Bourse**) and is eligible to be classified as a CDNX Tier 1 issuer.

(3) An **emerging issuer** is an issuer that, after its IPO, is not an exempt issuer or an established issuer.

3.4 When is an issuer classified for escrow purposes?

An issuer is classified based on its circumstances immediately after completion of its IPO. If an emerging issuer becomes an established issuer at a later point, it may have the release schedule changed. See section 4.4.

3.5 Whose securities are subject to escrow?

(1) Securities regulators generally require principals of an emerging or established issuer to place their securities in escrow under an escrow agreement.

(2) A **principal** of an issuer is:

(a) a person or company who acted as a promoter of the issuer within two years before the IPO prospectus

(b) a director or senior officer of the issuer or any of its material operating subsidiaries at the time of the IPO prospectus

(c) a **20% holder** – a person or company that holds securities carrying more than 20% of the voting rights attached to the issuer’s outstanding securities immediately before and immediately after the issuer’s IPO

(d) a **10% holder** – a person or company that

(i) holds securities carrying more than 10% of the voting rights attached to the issuer’s outstanding securities immediately before and immediately after the issuer’s IPO and

(ii) has elected or appointed, or has the right to elect or appoint, one or more directors or senior officers of the issuer or any of its material operating subsidiaries.

(3) In calculating these percentages, include securities that may be issued to the holder under outstanding convertible securities in both the holder’s securities and the total securities outstanding.

(4) A company, trust, partnership or other entity more than 50% held by one or more principals will be treated as a principal. (In calculating this percentage, include securities of the entity that may be issued to the principals under outstanding convertible securities in both the principals’ securities of the entity and the total securities of the entity outstanding.) Any securities of the issuer that this entity holds will be subject to escrow requirements.

(5) A principal's spouse and their relatives that live at the same address as the principal will also be treated as principals and any securities of the issuer they hold will be subject to escrow requirements.

3.6 Are any principals exempt from escrow requirements?

A principal that holds securities carrying less than 1% of the voting rights attached to an issuer's outstanding securities immediately after its IPO is not subject to escrow requirements. (In calculating this percentage, include securities that may be issued to that principal under outstanding convertible securities in both the principal's securities and the total securities outstanding.)

3.7 What types of securities are subject to escrow?

3.7.1 Escrow securities

(1) The following securities are subject to escrow (**escrow securities**) if a principal holds them immediately before the issuer's IPO:

- (a) **shares** – equity securities that carry the right to participate in earnings and assets remaining on winding-up or liquidation, including common shares, restricted voting shares, subordinate voting shares, multiple voting shares and non-voting shares
- (b) **convertible securities** – securities that allow the holder to acquire shares or other convertible securities (such as warrants, special warrants qualified under the IPO prospectus, convertible shares, convertible debentures, rights and options), except for non-transferable incentive stock options issued to principals of the issuer to purchase securities solely for cash at a price equal to or greater than the IPO price

(2) Securities will be released from escrow if they are sold in a “permitted secondary offering” which is defined in section 3.8.

3.7.2 Additional escrow securities

Shares and convertible securities that a holder of escrow securities acquires in relation to securities that are in escrow at the time:

- (a) as a dividend or other distribution;
- (b) on the exercise of a right of purchase, conversion or exchange, including securities received on conversion of special warrants;
- (c) on a subdivision, or compulsory or automatic conversion or exchange; or

- (d) from a successor issuer in a business combination, if this is required under Part V
(additional escrow securities) must be placed in escrow by the holder.

3.8 *What is a permitted secondary offering?*

- (1) A principal may sell its securities in the issuer in the issuer's IPO free of escrow in the following circumstances **(a permitted secondary offering)**:
- (a) the sale is conducted on a firmly underwritten basis; or
- (b) the sale is conducted on a best efforts basis after completion of the sale by the issuer of all or the specified minimum number of its securities offered in the IPO (if any), if the principal is not a promoter, director or senior officer of the issuer or any of its material operating subsidiaries.
- (2) The permitted secondary offering must be disclosed in the IPO prospectus.

3.9 *Is there a standard form of escrow agreement?*

The terms of escrow are set out in a written escrow agreement among an emerging issuer or an established issuer, an escrow agent and the issuer's principals whose securities are subject to escrow. The standard form of escrow agreement is attached as an Appendix to this Policy. An issuer must file a copy of the signed escrow agreement with securities regulators in the jurisdictions where the issuer files its IPO prospectus.

3.10 *Who may be an escrow agent?*

A person or company approved by a Canadian exchange to act as a transfer agent may be an escrow agent.

Part IV – Release of Escrow Securities from Escrow

4.1 *When are escrow securities released from escrow?*

- (1) The release of escrow securities from escrow will vary depending on the escrow classification of the issuer that issued the securities. Principals of established issuers will have their escrow securities released from escrow over an 18-month period. Principals of emerging issuers will have their escrow securities released over a three-year period. The timing of escrow release will also be affected if a securityholder dies, if an emerging issuer becomes an established issuer, or if an issuer is party to a business combination.
- (2) The escrow agreement sets out release procedures for escrow securities.

4.2 Release schedule for established issuers

4.2.1 Usual case

A principal's escrow securities in an established issuer are released as follows:

On the date the issuer's securities are listed on a Canadian exchange (the listing date)	25% of the escrow securities
6 months after the listing date	25% of the escrow securities
12 months after the listing date	25% of the escrow securities
18 months after the listing date	25% of the escrow securities

4.2.2 If there is a permitted secondary offering

(1) If a principal has sold in a permitted secondary offering more than 25% of that principal's escrow securities, the principal's escrow securities are released as follows:

For delivery to complete the issuer's IPO	All escrow securities sold in the permitted secondary offering
6 months after the listing date	33 1/3% of the unsold escrow securities
12 months after the listing date	33 1/3% of the unsold escrow securities
18 months after the listing date	33 1/3% of the unsold escrow securities

(2) If a principal has sold in a permitted secondary offering 25% or less of that principal's escrow securities, the principal's escrow securities are released as follows:

For delivery to complete the issuer's IPO	All escrow securities sold in the permitted secondary offering
On the listing date	25% of the escrow securities less the escrow securities sold in the permitted secondary offering
6 months after the listing date	25% of the escrow securities
12 months after the listing date	25% of the escrow securities
18 months after the listing date	25% of the escrow securities

4.2.3 Additional escrow securities

If a holder of escrow securities acquires additional escrow securities, they are released in equal portions on the remaining release dates.

4.3 *Release schedule for emerging issuers*

4.3.1 *Usual case*

A principal's escrow securities in an emerging issuer are released as follows:

On the date the issuer's securities are listed on a Canadian exchange (the listing date)	10% of the escrow securities
6 months after the listing date	15% of the escrow securities
12 months after the listing date	15% of the escrow securities
18 months after the listing date	15% of the escrow securities
24 months after the listing date	15% of the escrow securities
30 months after the listing date	15% of the escrow securities
36 months after the listing date	15% of the escrow securities

4.3.2 *Alternate meaning of "listing date"*

The **listing date** is the date the issuer completes its IPO if:

- (a) the issuer's securities are not listed on a Canadian exchange immediately after its IPO; or
- (b) the issuer's securities are listed on a Canadian exchange immediately before its IPO.

4.3.3 *If there is a permitted secondary offering*

- (1) If a principal has sold in a permitted secondary offering more than 10% of that principal's escrow securities, the principal's escrow securities are released as follows:

For delivery to complete the issuer's IPO	All escrow securities sold in the permitted secondary offering
6 months after the listing date	16 2/3% of the unsold escrow securities
12 months after the listing date	16 2/3% of the unsold escrow securities
18 months after the listing date	16 2/3% of the unsold escrow securities
24 months after the listing date	16 2/3% of the unsold escrow securities
30 months after the listing date	16 2/3% of the unsold escrow securities
36 months after the listing date	16 2/3% of the unsold escrow securities

(2) If a principal has sold in a permitted secondary offering 10% or less of that principal's escrow securities, the principal's escrow securities are released as follows:

For delivery to complete the issuer's IPO	All escrow securities sold in the permitted secondary offering
On the listing date	10% of the escrow securities less the escrow securities sold in the permitted secondary offering
6 months after the listing date	15% of the escrow securities
12 months after the listing date	15% of the escrow securities
18 months after the listing date	15% of the escrow securities
24 months after the listing date	15% of the escrow securities
30 months after the listing date	15% of the escrow securities
36 months after the listing date	15% of the escrow securities

4.3.4 Additional escrow securities

If a holder of escrow securities acquires additional escrow securities, they are released in equal portions on the remaining release dates.

4.4 What happens if an emerging issuer becomes an established issuer after its IPO?

(1) An emerging issuer becomes an established issuer if it:

- (a) lists its securities on the TSE;
- (b) becomes a CDNX Tier 1 issuer;
- (c) has its securities listed on the Bourse and become eligible to be classified as a CDNX Tier 1 issuer; or
- (d) lists or quotes its securities on an exchange or market outside Canada that its "principal regulator" under National Policy 43-201 *Mutual Reliance Review System for Prospectuses and Annual Information Forms* or, if the issuer has only filed its IPO prospectus in one jurisdiction, the securities regulator in that jurisdiction, is satisfied has minimum listing requirements at least equal to those of CDNX Tier 1.

(2) If an emerging issuer becomes an established issuer 18 months or more after its listing date, all escrow securities will be released immediately.

(3) If an emerging issuer becomes an established issuer within 18 months after its listing date, all escrow securities that would have been released to that time, if the issuer was an established issuer on its listing date, will be released immediately. Remaining escrow securities will be released in equal instalments on the day that is 6 months, 12 months and 18 months after the listing date.

4.5 Release of escrow securities on death of holder

If a holder of escrow securities dies, the holder's escrow securities will be released from escrow.

4.6 Release of escrow securities

Once escrow securities are released from escrow, they are no longer escrow securities for the purpose of this Policy.

Part V – Business Combinations

5.1 When does this Part apply?

This Part applies to business combinations. A **business combination** is:

- (a) a formal take-over bid
- (b) a plan of arrangement
- (c) an amalgamation
- (d) a merger
- (e) any other similar transaction

5.2 Can a holder of escrow securities tender them in a business combination?

- (1) Yes, a holder of escrow securities can tender them in a business combination. The tendered escrow securities will be released from escrow and delivered under the business combination if the terms and conditions of the business combination have been satisfied or waived.
- (2) The escrow agreement contains special procedures for tendering escrow securities.

5.3 If the holder receives securities of another issuer in exchange for the holder's escrow securities, will the new securities be subject to escrow?

If the holder receives securities of another issuer (**successor issuer**) in exchange for the holder's escrow securities, the new securities will be subject to escrow, if immediately upon completion of the business combination:

- (a) the successor issuer is not an exempt issuer (defined in section 3.2);
- (b) the holder is a principal (defined in section 3.5) of the successor issuer; and
- (c) the holder holds more than 1% of the voting rights attached to the successor issuer's outstanding securities. (In calculating this percentage, include securities that may be issued to the principal under outstanding convertible securities to both the principal's securities and the total securities outstanding.)

5.4 *If the new securities are subject to escrow, when will they be released?*

- (1) If the new securities are subject to escrow, the escrow agent will hold the new securities in escrow on the same terms and conditions, including release dates, as applied to the escrow securities that were exchanged.
- (2) However, if the issuer is an emerging issuer, the successor issuer is an established issuer, and the business combination occurs 18 months or more after the issuer's listing date, all escrow securities will be released immediately.
- (3) If the issuer is an emerging issuer, the successor issuer is an established issuer and the business combination occurs within 18 months after the issuer's listing date, all escrow securities that would have been released to that time, if the issuer was an established issuer on its listing date, will be released immediately. Remaining escrow securities will be released in equal instalments on the day that is 6 months, 12 months and 18 months after the issuer's listing date.

Part VI – Dealing with Escrow Securities

6.1 *Can a holder of escrow securities vote and receive distributions on the escrow securities?*

A holder of escrow securities may vote and receive distributions on the holder's escrow securities.

6.2 *Restrictions on dealing with escrow securities*

Escrow restricts the ability of holders to deal with their escrow securities while they are in escrow. The standard form of escrow agreement sets out these restrictions. Except to the extent that the escrow agreement expressly permits, a principal cannot sell, transfer, mortgage, enter into a derivative transaction concerning, or otherwise deal in any way with the holder's escrow securities or the related share certificates or other evidence of the escrow securities. A private company, controlled by one or more principals of the issuer, that holds escrow securities of the issuer, may not participate in a transaction that results in a change of its control or a change in the economic exposure of the principals to the risks of holding escrow securities.

6.3 *When can a holder of escrow securities transfer them within escrow?*

- (1) A holder may transfer escrow securities within escrow:
 - (a) to existing or, upon their appointment, incoming directors or senior officers of the issuer or any of its material operating subsidiaries, if the issuer's board of directors has approved the transfer;
 - (b) to a person or company that before the proposed transfer holds more than 20% of the voting rights attached to the issuer's outstanding securities;

- (c) to a person or company that after the proposed transfer
 - (i) will hold more than 10% of the voting rights attached to the issuer's outstanding securities, and
 - (ii) has the right to elect or appoint one or more directors or senior officers of the issuer or any of its material operating subsidiaries;
 - (d) to a trustee in bankruptcy or another person or company entitled to escrow securities on the bankruptcy of the holder;
 - (e) to a financial institution on the realization of escrow securities pledged, mortgaged or charged by the holder to the financial institution as collateral for a loan; or
 - (f) to or between a registered retirement savings plan (RRSP), registered retirement income fund (RRIF) or other similar registered plan or fund with a trustee, where the beneficiaries of the plan or fund are limited to the holder and his or her spouse, children and parents.
- (2) The escrow agreement sets out transfer procedures for escrow securities.
- (3) Securities laws and other legislation may impose additional restrictions on transfer. (See section 7.4.)

6.4 *Can a holder pledge, mortgage or charge escrow securities as collateral for a loan?*

A holder can pledge, mortgage or charge escrow securities to a financial institution as collateral for a loan. The loan agreement must provide that the escrow securities will remain in escrow if the lender realizes on the escrow securities to satisfy the loan.

6.5 *Can a holder exchange or convert convertible escrow securities?*

A holder of a convertible security that is in escrow may exchange or convert the security within escrow. Securities acquired on conversion or exchange of convertible escrow securities are additional escrow securities and remain in escrow.

Part VII – General Provisions

7.1 *Amendments to escrow agreement require regulatory approval*

The securities regulator in each jurisdiction where the issuer files its IPO prospectus has jurisdiction over the escrow agreement and escrow securities of the issuer. No amendment to an escrow agreement is valid unless the securities regulators that have jurisdiction have approved it.

7.2. Will mutual reliance principles apply to escrow filings?

Yes, the securities regulators will apply mutual reliance principles in administering this Policy.

7.3 What happens if an issuer does not complete its IPO?

If an issuer does not complete its IPO and becomes a reporting issuer in one or more jurisdictions because it has obtained a receipt for its IPO prospectus, its escrow agreement will remain in effect until the securities regulators in those jurisdictions order that the issuer has ceased to be a reporting issuer.

7.4 Do local resale restrictions still apply to escrow securities after they are released from escrow?

Although this Policy may permit the release of escrow securities from escrow or permit a holder to transfer or deal in other ways with escrow securities, other restrictions imposed by securities legislation, securities regulators and Canadian exchanges will still apply.

Part VIII – Amendment of Release Terms in Escrow Agreements Made Prior to this Policy

8.1 Can the release terms of escrow agreements made prior to this Policy be amended?

(1) The securities regulators consent to amendments to escrow agreements made prior to the date of this Policy (**existing escrow agreements**) to reflect the release terms of this Policy on the following conditions:

- (a) The issuer's board of directors must have approved the amendment.
- (b) All parties to the existing escrow agreement, except parties whose securities are no longer in escrow, must have agreed to the amendment.
- (c) The issuer must have obtained any approval by a Canadian exchange required by the existing escrow agreement.
- (d) The amendment must have been approved by a majority vote of the securityholders of the issuer, or consented to by securityholders holding a majority of the securities of the issuer, excluding in each case escrow securityholders and their affiliates and associates.
- (e) The amendment to the release terms must apply to all escrow securities.
- (f) Once the escrow agreement has been amended and these conditions have been met, the issuer must issue a news release at least 60 days before the first release of escrow securities under the amended escrow agreement notifying the market of the amendment and the new release terms.

- (g) The issuer's classification as an exempt, established or emerging issuer must be determined at the date of the news release.
- (h) The news release must set out the date of the first release of escrow securities under the amended escrow agreement. The first release date must be at least 60 days after the news release and that date will take the place of the listing date for purposes of the appropriate release schedule under this Policy.
- (i) If the issuer is an exempt issuer, all escrow securities may be released no earlier than 60 days after the news release, subject to the 10% limit in (k) below.
- (j) If the issuer is an emerging or an established issuer, the new release schedule must be the schedule included in this Policy for that class of issuer, subject to the 10% limit in (k) below.
- (k) The number of escrow securities to be released at any one time may not exceed 10% of the issuer's outstanding securities at the time of release. Securities remaining in escrow after the last scheduled release will continue to be released from escrow at 6-month intervals until all escrow securities have been released.
- (l) Escrow securities must be released on a pro rata basis, with each holder of escrow securities receiving the same percentage of the escrow securities that are released as the percentage of total escrow securities held by the holder.
- (m) The issuer must file with the securities regulators in the jurisdictions where it filed its IPO prospectus:
- (i) a copy of the amended escrow agreement, and
 - (ii) a certificate of a director or senior officer of the issuer confirming that the escrow agreement has been amended in accordance with this Part.
- (2) The parties to an existing escrow agreement may amend the agreement by entering into an agreement in the form of Form 46-201F *Escrow Agreement*.
- (3) Our consent does not limit the right of a Canadian exchange to impose additional conditions or more stringent release terms.

Part IX – Effective Date

This Policy takes effect on September 21, 2001.