

## **NOTICE OF PROPOSED MULTILATERAL INSTRUMENT 72-101, COMPANION POLICY 72-101CP AND FORM 72-101F1**

### **Substance and Purpose of Proposed Multilateral Instrument, Form and Companion Policy**

#### ***General***

The substance and purpose of proposed Multilateral Instrument 72-101 Distributions Outside of the Local Jurisdiction (the "Multilateral Instrument") is to harmonize the exemptions from the prospectus requirement and the registration requirement under securities legislation in Canada for a distribution of securities to purchasers not in the local jurisdiction. The substance and purpose of proposed Companion Policy 72-101CP (the "Companion Policy") is to provide guidance to issuers and selling securityholders regarding the application of securities legislation to a distribution of securities to purchasers not in the local jurisdiction. Form 72-101F1 (the "Form") is a report of a distribution of securities to purchasers outside of the local jurisdiction.

The Multilateral Instrument, Form and Companion Policy are proposed to be implemented in all jurisdictions except Quebec. The proposed Multilateral 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 Companion 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 "implementing jurisdictions").

#### ***Achieving Harmonization and Clarity***

The Multilateral Instrument harmonizes the approach of Canadian securities regulatory authorities to distributions outside of the local jurisdiction. The Multilateral Instrument has been structured as a grant of exemptions rather than a safe harbour in order to provide greater certainty to issuers and selling securityholders in structuring transactions. It sets out the circumstances in which a distribution of securities to purchasers outside of the local jurisdiction is exempt from the prospectus requirement of securities legislation in the local jurisdiction. However, it does not establish bright line tests for determining when a distribution outside of the local jurisdiction also constitutes a distribution in the local jurisdiction to which a prospectus requirement applies. Rather, the Companion Policy states that the Canadian securities regulatory authorities are of the view that the issue, or a sale that is a control distribution, of securities may be subject to the securities legislation of the local jurisdiction if one or more connecting factors to the local jurisdiction exist. Consequently, whether or not a distribution to purchasers outside of the local jurisdiction also constitutes a distribution in the local jurisdiction depends upon the facts and circumstances of the distribution.

Once an issuer or selling securityholder has determined that a trade outside of the jurisdiction constitutes a distribution under the securities legislation of one or more jurisdictions, the issuer or

securityholder would evaluate whether the transaction can be structured in accordance with the registration and prospectus exemptions provided by the Multilateral Instrument.

The Multilateral Instrument sets out the terms of the exemptions from the registration requirement and the prospectus requirement, whether a restricted period applies, and the length of the restricted period (40 days, four months or 12 months). The four and 12 month restricted periods are harmonized with the hold periods applicable to privately placed securities under proposed Multilateral Instrument 45-102 Resale of Securities ("MI 45-102"). The Multilateral Instrument provides that restricted periods do not apply in the open system jurisdictions, including Manitoba.

## **Summary of the Proposed Multilateral Instrument, Form and Companion Policy**

### ***Characterization as Distribution***

Part 2 of the Companion 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. Subsection 2.1(3) states that 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.

Section 2.2 of the Companion 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: (i) where the mind and management of the issuer are primarily located; (ii) 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; (iii) the location of the principal register of the equity securities of the issuer; and (iv) 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 item (ii) whether a significant percentage of the outstanding securities of the class being distributed that are directly or indirectly held of record by residents of the local jurisdiction is a relevant connecting factor.

The Manitoba Securities Commission is concerned generally that the views expressed about when jurisdiction might be taken by a Canadian securities regulator is overly expansive and *ultra vires*. The consideration of this factor could be interpreted as an extra-territorial application of securities legislation which would be unconstitutional. There is also a concern that no real guidance is offered in determining the local jurisdiction and that in many cases an issuer may believe it has 2 or more local jurisdictions. This would lead to confusion among the issuers as to whom they are ultimately answerable to in making their distribution.

Specific comment is being sought on the potential inclusion of another connecting factor being "a substantial market for the securities being distributed exists in the local jurisdiction". The Manitoba Securities Commission is of the view that this proposed factor is, for the reasons noted above, inappropriate.

The views of certain Canadian securities regulators as to the scope of their jurisdiction can be found in Appendix 1.

### ***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 securityholder would then evaluate whether the exemptions provided by the Multilateral Instrument would be available. The Multilateral Instrument provides an exemption from the registration requirement and prospectus requirement for a distribution outside of the local jurisdiction in two situations: (i) a distribution made under a public offering document; and (ii) a distribution made other than under a public offering document. The restrictions that must be taken to ensure the securities to 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 jurisdictions but has been structured to avoid the requirements of the local jurisdiction). If the offering is made under a public offering document and subject to substantive requirements in another jurisdiction then a backdoor underwriting is less likely. For this reason there are fewer restrictions and no restricted period applicable to a public offering. Further, secondary market purchasers in the local jurisdiction will have access to the public offering document.

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.

Part 1 contains the definitions of other terms and phrases used in the Multilateral Instrument that are not defined in or interpreted under a national definition instrument in force in an adopting jurisdiction. National Instrument 14-101 Definitions sets out definitions for commonly used terms and should be read together with the Multilateral Instrument.

The prospectus exemption in section 2.1 of the Multilateral Instrument is subject to the following conditions: (i) the distribution is made under a public offering document; (ii) all purchasers of the securities are outside of the local jurisdiction; (iii) any underwriting agreement prohibits the distributors from distributing the securities to any person or company in the local jurisdiction; and (iv) neither the issuer, the selling securityholder nor a distributor takes any actions to prepare the market or create a demand in the local jurisdiction for the securities being distributed. Part 4 of the Companion Policy provides guidance as to which activities would be considered preparing the market.

The prospectus exemption for distributions made under a public offering document is not available if another securities regulator is relying upon the prospectus review conducted by the securities regulator in the local jurisdiction. Section 2.2 of the Multilateral Instrument states that the exemption from the prospectus requirement provided by section 2.1 is unavailable if the issuer of the securities uses the mutual reliance review system implemented by National Policy 43-201 Mutual Reliance Review System for Prospectuses and AIFs ("NP 43-201") and the principal regulator of the issuer under NP 43-201 is in the local jurisdiction. Section 2.3 states that the exemption from the prospectus requirement provided by section 2.1 is unavailable for a U.S. only distribution under the multijurisdictional disclosure system implemented by the SEC if the review jurisdiction of the issuer under section 4.2 of Companion Policy 72-101CP The Multijurisdictional Disclosure System is in the local jurisdiction.

Section 2.4 of the Multilateral Instrument provides a prospectus exemption for distributions outside of the local jurisdiction made other than under a public offering document if the following conditions are met: (i) all purchasers are outside of the local jurisdiction; (ii) any underwriting agreement prohibits the distributors from the distributing the securities to any person or company in the local jurisdiction; (iii) the underwriting agreement prohibits hedging transactions if equity securities are being distributed; (iv) neither the issuer, the selling securityholder nor a distributor takes any actions to prepare the market or create a demand in the local jurisdiction for the securities being distributed; (v) the securities are legended; and (vi) any offering document contains a statement describing the resale restrictions to which the securities are subject.

Paragraph 2.4(e) of the Multilateral Instrument imposes a condition that the certificate representing the securities carry a legend stating that, subject to securities legislation, the holder shall not trade the securities before the expiry of the restricted period.

Section 2.7 provides that an issuer, or the seller in the case of a control distribution, that relies on the exemption in Section 2.4 must file a report of a trade in Form 72-101F1 which is analogous to a Form 45-501F1.

### ***Resale of Securities Distributed Other than Under a Public Offering Document***

Section 2.6 of the Multilateral Instrument provides that any trade of securities distributed under section 2.4 is a distribution unless: (i) the issuer of the securities is a reporting issuer or a reporting issuer equivalent; (ii) the restricted period has expired; (iii) the trade is not a control distribution; (iv) no unusual effort is made to prepare the market or create a demand for the securities that are the subject of the trade; and (v) if the seller of the securities is an insider or officer of the issuer, the seller has reasonable grounds to believe that the issuer is not in default of any requirement of securities legislation.

Section 2.7 provides that section 2.6 does 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.

### ***Restricted Period***

No restrictions are imposed on resale of securities distributed under section 2.1 of the Multilateral Instrument. 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. Further, resale restrictions would not be workable as securities distributed under a public offering document are sold on the basis that resale is not restricted.

Resale of securities distributed under section 2.4 of the Multilateral Instrument would be restricted for: (i) 40 days if the securities are sold in the Eurobond Market; (ii) four months if the issuer is a qualifying issuer; and (iii) 12 months if the issuer is not a qualifying issuer. A qualifying issuer is any issuer that is a reporting issuer (or equivalent) in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec or Nova Scotia, is an electronic filer under SEDAR, has filed a current AIF, and 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.

### ***Exemption from the Registration Requirement***

Section 3.1 of the Multilateral Instrument provides that the registration requirement does not apply to a distribution that is exempt from the prospectus requirement under section 2.1 or 2.4 of the Multilateral Instrument.

### ***Interplay of Prospectus Exemptions***

Subsection 3.1(2) of the Companion Policy outlines that an issuer or a selling securityholder may concurrently rely in the local jurisdiction on section 2.4 of the Multilateral Instrument and in the jurisdiction or foreign jurisdiction in which there are purchasers of the securities being distributed, on a prospectus or registration exemption under securities legislation of that jurisdiction or foreign jurisdiction.

Subsection 3.1(3) of the Companion Policy clarifies that an issuer or selling securityholder may make a concurrent private placement in the local jurisdiction and a distribution outside of the local jurisdiction under section 2.4 of the Multilateral Instrument.

Subsection 3.1(7) clarifies that nothing in the Multilateral Instrument is 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.

Subsection 3.1(8) cites an example of the application of resale restrictions and clarifies that the Multilateral Instrument does not impose any restrictions on resales in the United States or to another foreign jurisdiction.

Subsection 3.1(10) explains that "tacking" of a hold period under MI 45-102 and a restricted period under MI 72-101 is permitted.

### ***Discretionary Authority***

Part 5 of the Companion Policy states that the Multilateral Instrument does not alter the discretionary authority of a security regulatory authority to halt a distribution, remove an exemption or cease trade securities if it determines that it is necessary to do so to preserve the integrity of the capital market of the local jurisdiction.

### ***Summary of Form 72-101F1***

Form 72-101F1 Report of a trade under section 2.4 of Multilateral Instrument 72-101 Distributions Outside of the Local Jurisdiction provides notice to the market of a distribution outside of the local jurisdiction under section 2.4 of the Multilateral Instrument.

### **Alternatives Considered**

The implementing jurisdictions considered maintaining the current system regulating distributions outside of the local jurisdiction. However, in light of the problems encountered by stakeholders in dealing with uncertainty as to the application of securities legislation and with the differing requirements across Canada, they have determined it was advisable to develop a more certain and harmonized approach to distributions outside of the local jurisdiction.

### **Related Instruments**

The Multilateral Instrument, Form, and Companion Policy are related to each other.

The Canadian Securities Administrators (the "CSA"), other than the Commission des valeurs mobilières du Québec, will be publishing MI 45-102 at the same time as the Multilateral Instrument, Form and Companion Policy. MI 45-102 imposes resale restrictions on securities initially distributed under an exemption from the prospectus requirement. In addition, the CSA intends to publish shortly 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 Companion Policy.

### **Unpublished Materials**

In proposing the Multilateral Instrument, Form and Companion Policy, the implementing jurisdictions have not relied on any significant unpublished study, report, decision or other written materials.

## **Anticipated Costs and Benefits**

The principal benefit of the Multilateral Instrument and Form will be to more effectively harmonize the approach of securities regulatory authorities in the implementing jurisdictions and provide for more regulatory certainty. In addition, because the restricted period commences once an issuer becomes a reporting issuer in one of the specified jurisdictions, most security holders will be subject to the same restrictions on resale, regardless of the reporting issuer status in the local jurisdiction.

The costs associated with the Multilateral Instrument and Form are the costs associated with filing AIFs and continuous disclosure materials in a jurisdiction. Issuers may also incur greater costs in the preparation of current AIFs.

In the view of the implementing jurisdictions, the benefits outweigh the costs.

## **Specific Requests for Comment**

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

### 1. Connecting Factors

Subsection 2.2(1) of the Companion Policy provides that a distribution of securities to purchasers outside of the local jurisdiction may constitute a distribution in the local jurisdiction if one or more connecting factors to the local jurisdiction exist. Comment is sought as to whether the connecting factors enumerated in subsection 2.2(1) are the most relevant factors for determining whether a distribution in the local jurisdiction exists. Should "a substantial market for the securities being distributed exists in the local jurisdiction" be added as a connecting factor?

### 2. Public Offering Document

The CSA requests comments on the definition of public offering document in the Multilateral Instrument including whether prospectuses filed in any other foreign jurisdictions should be included in the definition.

### 3. Requirement that the Certificate Representing the Securities Distributed Under Section 2.4 be Legended

Part 2 of the Multilateral 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 many jurisdictions, there is currently no requirement to legend certificates for private placements either in or outside the jurisdiction. Under the System for Shorter Hold Periods for Issuers Filing an AIF (the "SHAIF System") implemented in British Columbia and Alberta in 1998, certificates must bear a legend stating that the securities may not be traded during the hold period and legended certificates are proposed to be required under MI 45-102.

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 Multilateral Instrument specify that issuers of securities in uncertificated form could satisfy the legending requirements by any means reasonably designed to notify holders and subsequent purchasers of the applicable resale restrictions, such as notices of the restriction to investors on confirmations, use of global securities held in a depository and restrictions on trading through the use of restricted CUSIP numbers?

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

The Multilateral 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. The Multilateral Instrument also provides a four-month restricted period for investment grade securities (i.e., debt, asset-backed securities, preferred shares) distributed under an exemption from the prospectus requirement. This is broader than the application of the four month hold period under the SHAIF System and moves away from the "legal for life" criteria for private placement hold periods in some jurisdictions.

**Comments**

Interested parties are invited to make written submissions with respect to the Multilateral Instrument, Form and Companion 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 in the public file in certain jurisdictions and form part of the public record, unless confidentiality is requested. Comment letters will be circulated among 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.)  
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Chris Besko  
The Manitoba Securities Commission  
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Randee Pavalow, Iva Vranic or Jean-Paul Bureaud  
Ontario Securities Commission  
Suite 800, Box 55  
20 Queen Street West  
Toronto, Ontario M5H 3S8  
Telephone: (416) 593-8257/(416) 593-8115/(416) 593-8131  
E-mail: rpavalow@osc.gov.on.ca or ivranic@osc.gov.on.ca or bureaud@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  
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### **Multilateral Instrument, Form and Companion Policy**

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

Dated: September 8, 2000

## **Appendix 1 Views on Jurisdiction**

Certain of the Implementing Jurisdictions, with the exception of Manitoba, are including in the form of notice being published with the Multilateral Instrument their views concerning when they, as a Canadian security regulator would exercise jurisdiction. What follows is a brief outline of these views.

### **Ontario**

The jurisdictional scope of securities legislation in respect of a distribution of securities is not expressly addressed in the *Securities Act* (Ontario) or the regulations. The limited jurisprudence in Canada on the issue of the jurisdiction of securities legislation does make clear that it extends to activities outside Ontario on the basis of their effects within Ontario. Justice LaForest stated as follows in *Libman v the Queen*, [1985] 2 S.C.R. 178, 207, a securities fraud action brought under the Criminal Code (Canada)

The jurisdictional scope of the Act, having as its principal purpose the protection of the public interest, similarly should be viewed as covering activities taking place outside Ontario on the basis of their consequence within Ontario.

In *Quebec (Sa Majesté du Chef) v Ontario Securities Commission*, [1992] 10 O.R. (3d) 577 (C.A.) McKinlay J.A. wrote at p. 595

...I am of the view that territorial jurisdiction of the OSC under s.124 does not depend solely upon the province or country in which relevant transactions may have taken place, but rather upon whether or not persons availing themselves of the benefits of trading in the Ontario capital markets act in a manner consistent with the provisions of the Act.

Consequently, whether or not a distribution of securities outside of Ontario also constitutes a distribution in Ontario depends on the effects or consequence in Ontario of the distribution.

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. It 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 requiring a prospectus to be filed or an exemption to be relied upon. 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 Commission takes the view that a prospectus is not required under the Act, nor is an exemption from the prospectus requirement necessary.

The Interpretation Note stated the principle that, in determining whether a distribution outside of Ontario also constitutes a distribution in Ontario, an issuer or selling shareholder must consider the factors that connect the distribution with Ontario. The Interpretation Note listed factors such as class and nature of the

securities being distributed, the attractiveness to Ontario investors of such securities, the likelihood that, absent restrictions, the securities would come to rest in Ontario, whether a market for the class of securities being distributed or any other securities of the issuer already exists in Ontario, the likelihood of the development in the future of a market in Ontario for the securities being distributed, the way in which the distribution is proposed to be effected, the relationship between the capital markets of Ontario and the jurisdiction in which the securities are being distributed and the ease of access of one to the other, whether or not the underwriters and other participants in the distribution are, or are affiliated with, investment dealers that conduct substantial activities in Ontario, and the presence of the issuer in Ontario (whether through the conduct of business in Ontario, a number of shareholders resident in Ontario, the issuer being closed followed by Ontario investors or otherwise).

Even if the connecting factors are sufficient such that the distribution might constitute a distribution in Ontario, a prospectus would not be required nor would an exemption from the prospectus requirement be necessary if reasonable steps are taken to ensure that the securities come to rest outside of Ontario. The restrictions or precautions varied with the connecting factors with Ontario and the nature of the distribution and included restrictions in documents governing the distribution against market participants distributing the securities to Ontario residents and a covenant by the transfer agent not to register securities in the name of any Ontario resident for a period of time (e.g. ninety days) from the date of closing.

The Interpretation Note did not seek to establish bright line tests to determine when a distribution outside of Ontario also constitutes a distribution in Ontario but rather sought to provide guidance to assist issuers and selling securityholders in structuring transactions. The Interpretation Note is not securities legislation, 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. The principal drawback of the Interpretation Note is that both market participants and Commission staff have found it difficult to administer because of its uncertainty.

### **British Columbia and Alberta**

British Columbia Securities Commission NIN 97/48 provides guidance regarding the application of local securities legislation 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 British Columbia may, depending on the facts and circumstances surrounding the transaction, be subject to the *Securities Act* even if the initial purchaser is not located in British Columbia". In essence 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 NIN identifies three factors which would generally indicate that the distribution is made from British Columbia. Issuers are cautioned that these factors are merely indicative of the factors that should be considered by an issuer when determining whether it is making a distribution from British Columbia. The NIN also outlines precautions to be taken by issuers "not located in British Columbia" but having a significant connection to the province or its capital markets to address flow-back concerns arising from indirect distributions back into the province. The Alberta Securities Commission has also issued similar interpretation guidelines in ASC Policy 45-601.

## United States - SEC Regulation S

The U.S. Securities and Exchange Commission ("SEC") adopted Regulation S in 1990 to clarify the extraterritorial application of the registration requirements of the *Securities Act of 1933*. The regulation contains a general statement providing that the registration requirement does not apply to offers or sales of securities that occur outside the U.S. as well as two non-exclusive safe harbours. One safe harbour applies to offers and sales by issuers, distribution participants and affiliates and the other applies to resales by persons other than issuers, distribution participants and affiliates.

An offer or sale of securities that satisfies all the conditions of the applicable safe harbour is deemed outside the U.S. and is therefore not subject to the registration requirement. However, neither the safe harbour nor the general statement is available for a transaction that, although in technical compliance with the regulation, is part of a plan or scheme to evade the registration requirements of the *Securities Act of 1933*.

The safe harbours provide specific guidance to issuers and other market participants regarding the circumstances under which securities may be sold offshore without registration. The issuer safe harbour distinguishes between three categories of securities offerings on the basis of factors such as nationality and whether the issuer files periodic reports with the SEC under the *Securities Exchange Act of 1934*.

Generally, the restrictiveness of the conditions imposed on an issuer in each category depends on (i) the degree to which the U.S. markets are the issuer's primary trading market; (ii) the amount of information available in the U.S. regarding the issuer; and (iii) the likelihood that securities sold offshore by an issuer will flow back into the U.S.

Securities of an issuer with little or no connection to the U.S. markets are clearly less likely to flow back into the U.S. following an offshore offering and are therefore subject to the least restrictive requirements.

In 1998, the SEC adopted amendments to Regulation S designed to stop abusive practices relating to sales of equity securities by U.S. issuers that file periodic reports with the SEC under the *Securities Exchange Act of 1934*. The amendments classified the equity securities of U.S. issuers as restricted securities within the meaning of SEC Rule 144 and lengthened the applicable restricted period or distribution compliance period from 40 days to one year.

The purpose of the distribution compliance period is to ensure that the persons relying on the safe harbour are not engaged in an unregistered, non-exempt distribution into the U.S. capital markets and that the securities will come to rest offshore. All equity securities sold by U.S. issuers under Regulation S must carry a legend stating that the transfer of securities is prohibited other than in accordance with the *Securities Act* and that hedging transactions involving the securities may not be conducted except in compliance with the *Securities Act of 1933*.<sup>1</sup>

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<sup>1</sup> See Muglia, R. and Tierney, A. SEC tightens Regulation S rules for U.S. issuers May 1998 International Financial Law Review 27