

Note: [31 Jul 2010] – The following is a consolidation of ASC Policy 45-601. It incorporates the amendments to this document that came into effect on July 31, 2010. This consolidation is provided for your convenience and should not be relied on as authoritative.

ALBERTA SECURITIES COMMISSION POLICY 45 - 601

DISTRIBUTIONS OUTSIDE ALBERTA

PART 1 PURPOSE AND DEFINITIONS

1.1 Purpose - This policy statement is intended to provide guidance to issuers regarding:

- (i) the application of the Act where an issuer distributes securities to a purchaser outside the province;
- (ii) the application of the Act to indirect distributions into Alberta; and
- (iii) precautions that an issuer outside of Alberta, but with certain ties to Alberta, may take to reduce the likelihood that a securities transaction to which the issuer is a party would be considered by the Commission to constitute a distribution.

1.2 Definitions

Defined terms - In this policy

“investor relations activities” means activities or oral or written communications, by or on behalf of an issuer or securityholder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer but does not include:

- (a) the dissemination of information provided, or records prepared, in the ordinary course of the business of the issuer:
 - (i) to promote the sale of products or services of the issuer; or
 - (ii) to raise public awareness of the issuer;

that cannot reasonably be considered to promote the purchase or sale of securities of the issuer;
- (b) activities or communications necessary to comply with the requirements of:
 - (i) the Act or the rules; or
 - (ii) the by-laws, rules or other regulatory instruments of a self-regulatory body or exchange; or
- (c) communications by a publisher of, or writer for, a bona fide newspaper, news magazine or business or financial publication that is of general or regular paid circulation and that is distributed only to its purchasers or subscribers for value, where:
 - (i) the communication is only through the newspaper, magazine or publication; and
 - (ii) the publisher or writer receives no commission or other consideration other than for acting in the capacity of publisher or writer;

"hold period" means the applicable time period during which securities previously acquired by a purchaser under an exemption set out in the Act or the rules must be held before being resold; and

"Rule 72-501" means Alberta Securities Commission Rule 72-501 - Distributions to Purchasers Outside Alberta.

PART 2 Characterization as Distribution

2.1 General Principles - 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. There are two primary circumstances where an issuer must comply with the requirements of the Act in making a distribution to a purchaser outside the province. These are:

1. A Distribution from the Province - Where an issuer distributes securities from Alberta, it must comply with the registration and prospectus requirements of the Act or rely on exemptions from those requirements; and
2. An Indirect Distribution into the Province - Where an issuer located outside of Alberta distributes securities to a purchaser outside the province and the securities are resold in Alberta, or resold through a market in Alberta, in a manner that indicates the securities did not come to rest outside the province, the resale will be considered to be a continuation of the distribution by the issuer. In these circumstances, the issuer must comply with the registration and prospectus requirements of the Act or rely on exemptions from those requirements.

Where a distribution is made under a prospectus exemption, any subsequent trade of those securities in Alberta will be a distribution unless the resale requirements in sections 109 to 112 of the Act, including hold periods, are complied with.

A trade may occur in more than one jurisdiction. In that case, an issuer must satisfy itself that it is in compliance with the requirements of all jurisdictions in which it effects a trade.

2.2 Distribution From Alberta - The onus is on an issuer and its counsel to determine whether a distribution of securities to a purchaser outside of Alberta is made from the province, based on the facts and circumstances of each particular transaction.

The Commission is of the view that a trade in a security by an issuer with a fundamental connection to Alberta will constitute a distribution from the province. Factors evidencing such a connection are identified in the definition of Alberta issuer in Rule 72-501 as follows:

- (i) the issuer's mind and management is primarily located in Alberta, or
- (ii) the business of the issuer is primarily administered from, and the operations of the issuer is primarily conducted in, Alberta.

The Commission considers that the location of an issuer's "mind and management" will typically be indicated by the location of its head or executive office or the place of residence of its executive officers and its directors.

Acts, advertising, solicitations, conduct or negotiations, including underwriting or investor relations activities, that take place in Alberta in furtherance of a trade are strong indicators of a distribution occurring in Alberta.

The Commission does not, however, consider that every act that is related to or incidental to a distribution is in furtherance of the distribution. For example, the Commission would not consider that the presence of a single director in Alberta participating in a conference call about a distribution nor the presence of the issuer's counsel or transfer agent in Alberta to be sufficient in themselves to make the distribution a distribution from Alberta. However, active advertising or solicitations being conducted from Alberta would be sufficient for the Commission to consider that the distribution was occurring in Alberta.

The above examples are indicative of the types of factors that should be considered by an issuer in determining whether it is making a distribution from Alberta and should not be viewed as an exhaustive list.

If an issuer makes a distribution from the province, it may rely on the general registration and prospectus exemptions in the Act and rules, including, in appropriate circumstances, Rule 72-501.

Securities distributed from Alberta may be resold outside Alberta during the hold period. However, if a holder resells the securities to a purchaser in Alberta or through a market in Alberta before the expiry of the hold period, the sale would be a distribution and a prospectus would be required unless another exemption was available.

- 2.3 Indirect Distributions into Alberta** - The definition of "distribution" in the Act includes "a transaction or series of transactions involving a purchase and sale or a repurchase and resale in the course of or incidental to a distribution". The term "distribution" can include both a direct, single-step transaction and, depending on the circumstances, an indirect or multi-step transaction.

An indirect distribution in Alberta may occur, for example, where an issuer distributes securities from outside of Alberta to a purchaser outside Alberta and shortly thereafter that purchaser, directly or indirectly, resells the securities to a purchaser in Alberta or through a market in the province. In that case, the distribution would not be completed until the purchaser outside of Alberta resold the securities in Alberta. If the issuer knows or could reasonably foresee that the securities will be resold in or through a market in Alberta, the issuer likely will be considered to have made a distribution in Alberta, requiring compliance with the registration and prospectus requirements of the Act, unless an exemption was available.

- 2.4 Significant Connection to Alberta** - Where an issuer makes a distribution that would not be considered to be made from Alberta, but the issuer has a significant connection with the province or its capital markets, it may be prudent for the issuer to take precautions to ensure that any distribution it makes to a purchaser outside Alberta is not subsequently resold in or through a market in Alberta in a manner that the Commission would consider to be a distribution by the issuer.

There are a number of factors that should be considered in determining whether an issuer not located in Alberta has a significant connection with Alberta or its capital markets. These include:

- the majority of trading in the issuer's securities takes place on an exchange in Alberta
- a class of the issuer's securities is listed on an exchange in Alberta
- the issuer is a reporting issuer in Alberta

- a significant portion of the issuer's assets are located in Alberta
- a significant portion of the issuer's revenues are derived from operations in Alberta
- a significant proportion of the issuer's security holders are in Alberta and
- the issuer is incorporated or organized in Alberta

These factors are not all of equal weight. Certain of these factors alone (e.g. where the majority of the trading in the issuer's securities is in Alberta) may lead the Commission to take the position that a subsequent resale in or through a market in Alberta of securities initially distributed to a purchaser outside the province is part of the same transaction or series of transactions and, therefore, constitutes a distribution by the issuer in Alberta. For other factors, a similar determination would likely only be made if several factors were all present.

2.5

Steps and Precautions to be Taken - Depending on the factors that are present, the issuer, underwriter and other participants undertaking the distribution of securities to purchasers outside Alberta may be well advised to take steps to ensure that the securities remain outside of Alberta for period during which a purchaser resident in Alberta would be required to hold the securities. These steps will, in the absence of evidence to the contrary, protect the issuer from a subsequent determination by the Commission that it completed a distribution in Alberta.

The steps and precautions that should be taken in connection with the distribution of securities to purchasers outside of Alberta will vary with the circumstances surrounding each distribution.

Where the issuer's mind and management is located outside Alberta and the offering is being made solely in another jurisdiction such as another province or territory of Canada or the United States of America, that has comparable disclosure requirements for public offerings and equivalent or longer hold periods for private placements applicable to the offering, these additional steps need not be taken.

"Investment funds that are reporting issuers are reminded that section 27 of the rules requires that they file all information not already filed with the Executive Director whether in the same or a different form, that they file with a government of another jurisdiction, an agency of a government of another jurisdiction, or an exchange wherever situate, if it is material to purchasers and required to be filed by that other jurisdiction or exchange".

Where the purchaser is resident in a jurisdiction without comparable disclosure and comparable hold periods, some or all of the following steps or precautions might be advisable:

- (i) a restriction in the underwriting agreement prohibiting the underwriters from selling the securities being offered to any Alberta resident;
- (ii) a restriction in the banking group or selling group agreement prohibiting the members of the banking group or selling group from selling the securities being offered to any Alberta resident;
- (iii) a clear and prominent statement on the front page of any record concerning the distribution provided to the purchaser stating that the offered securities are not qualified for sale in Alberta and may not be offered and sold in Alberta, directly or indirectly, on behalf of the issuer;

- (iv) a restriction in the subscription agreement of a prohibition of any of the offered securities being acquired by an Alberta resident or by any purchaser for subsequent resale, during the resale time restriction period, to a Alberta resident;
- (v) an “all sold” certificate is provided to the issuer by the underwriters or members of the selling group or banking group, on completion of an offering, to the effect that they have not, to the best of their knowledge, sold any securities to an Alberta resident;
- (vi) a statement provided in the confirmation slip sent by the underwriters to purchasers of the offered securities that it is the underwriter’s understanding the purchaser is not an Alberta resident;
- (vii) a provision in the transfer agency agreement between the transfer agent and the issuer requiring the transfer agent not to register securities in the name of any security holder with an address in Alberta for the period during which an Alberta purchaser would be required to hold the securities; or
- (viii) a legend on the certificate representing the security stating that the security may not be traded in Alberta until the expiry of the period during which an Alberta purchaser would be required to hold the security, except as otherwise permitted by the Act and rules.