



**ASC NOTICE**

**PROPOSED REPEAL AND REPLACEMENT OF  
ALBERTA SECURITIES COMMISSION RULE 71-801  
IMPLEMENTING THE MULTIJURISDICTIONAL  
DISCLOSURE SYSTEM**

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**September 28, 2017**

The Alberta Securities Commission (ASC) is publishing for a 30 day comment period the proposed repeal and replacement of ASC Rule 71-801 *Implementing the Multijurisdictional Disclosure System* (the **Proposed Rule**). The text of the Proposed Rule is attached to this notice.

**Substance and Purpose**

The ASC proposes to repeal the current version of ASC Rule 71-801 *Implementing the Multijurisdictional Disclosure System under National Instrument 71-101* (the **Existing Rule**) and replace it with the Proposed Rule. No changes to the substance of the northbound multijurisdictional disclosure system (**MJDS**) are proposed. The Proposed Rule would merely update outdated references within the Existing Rule.

The Proposed Rule would also introduce certain additional accommodations to better align the requirements of Alberta securities laws with the southbound MJDS.

**Background**

National Instrument 71-101 *The Multijurisdictional Disclosure System* (**NI 71-101**) creates the northbound MJDS. The Existing Rule provides exemptions from the requirements of Alberta securities laws designed to work with NI 71-101 to facilitate northbound MJDS. However, the Existing Rule has not been updated since its implementation and consequently contains a number of outdated references.

**Summary of Changes**

Other than the accommodations, discussed below, the substance of the Proposed Rule is intended to be the same as that of the Existing Rule. Rather than referring to outdated statutory provisions, the Proposed Rule would refer to the existing requirements set out in National Instrument 41-101 *General Prospectus Requirements* and National Instrument 62-104 *Take-Over Bids and Issuer Bids*. The exemptions continue to be conditional on compliance with NI 71-101 and U.S. securities laws. No changes are proposed to NI 71-101.

In the interests of harmonization, the drafting of the Proposed Rule is substantially similar to existing British Columbia Rule 71-801 *Implementing the Multijurisdictional Disclosure System under National Instrument 71-101*.

While the Existing Rule is principally designed to facilitate northbound MJDS, it also contains one exemption that applies in respect of prospectus offerings relying on the southbound MJDS. The Proposed Rule proposes to expand upon that exemption and to also provide two additional accommodations to better align the requirements of Alberta securities laws with those of the SEC in respect of southbound offerings under MJDS.

First, the Proposed Rule would slightly expand on the underwriter certificate exemption in section 3 of the Existing Rule. The exemption in section 3 is currently limited to situations where securities are offered and sold *only* in the United States. However, it is not uncommon for some portion of a northbound MJDS offering to also be made to investors in other foreign jurisdictions. The ASC has routinely provided discretionary exemptive relief to accommodate this situation where the offering is not made to any Canadians. We propose that the Proposed Rule codify this relief.

Second, the Proposed Rule would provide an exemption from the prospectus delivery requirement where there are no Canadian investors and the requirements of U.S. federal securities law in respect of delivering or providing access to a prospectus are complied with. We understand that Rule 172 of the *Securities Act of 1933* (United States) (**1933 Act**) permits the prospectus delivery requirement under U.S. federal securities law to be satisfied on the basis of “access equals delivery” principles together with a notice obligation under Rule 173 of the 1933 Act. We do not propose that the exemption be available for equity lines of credit and at-the-market (ATM) distributions as additional conditions are typically imposed in connection with discretionary relief relating to those distributions. We propose to continue to deal with those types of offerings through discretionary exemptive relief.

Third, the Proposed Rule would provide that statements that would otherwise be required under Alberta securities law that are permitted to be excluded by SEC Form F-10 as not material to offerees or purchasers in the United State are also permitted to be excluded.

### **Request for Comments**

We request your feedback on the Proposed Rule. In addition to any general comments you may have or specific issues we have not considered, we also invite feedback on the following.

The SEC has provided that a U.S. registration statement filed under the MJDS may omit disclosure that is applicable only to Canadian investors and that is not be material to U.S. investors. Specifically, Item 1 of Form F-10 *Registration Statement Under the Securities Act of 1933* states:

Notwithstanding the foregoing, such prospectus used in the United States need not contain any disclosure applicable solely to Canadian offerees or purchasers that would not be material to offerees or purchasers in the United States, including, without limitation, (i) any Canadian “red herring” legend; (ii) any discussion of Canadian tax considerations other than those material to U.S. offerees or purchasers; (iii) the names of any Canadian underwriters not acting as underwriters in the United States or a description of the Canadian plan of distribution (except to the extent necessary to describe the material facts of the

U.S. plan of distribution); (iv) any description of offerees' or purchasers' statutory rights under applicable Canadian, provincial or territorial securities legislation (except to the extent such rights are available to U.S. offerees or purchasers); or (v) certificates of the issuer or any underwriter.

1. Alberta securities laws require that the cover of a printed preliminary prospectus contain a 'red herring' legend, i.e., be printed in red ink and include a statement that the prospectus is not yet final and that the content may be subject to completion or amendment. We understand that a similar U.S. red herring would be provided to non-Canadian investors. Are there any circumstances where the Canadian red herring would be material to a U.S. investor?
2. Alberta securities laws require a discussion of statutory rights of action available under Part 17 of the *Securities Act* (Alberta). As above, Form F-10 provides that, Canadian rights of action are not required to be stated "except to the extent such rights are available to U.S. investors". In your view, are there circumstances in which these rights would not be available to U.S. investors?
3. In the context of an MJDS offering where some of the investors are neither Canadian nor American, would the disclosure of the Canadian red herring or statutory rights of action be material to those foreign investors?

Please send comments, questions or requests for additional information to:

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All comments received will be posted on the ASC website at [www.albertasecurities.com](http://www.albertasecurities.com). Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

## Annex A

**ALBERTA SECURITIES COMMISSION RULE 71-801  
IMPLEMENTING THE MULTIJURISDICTIONAL DISCLOSURE SYSTEM****Definitions****1.** In this Instrument

“Act” means the *Securities Act* (Alberta);

“bid” has the meaning ascribed to it in National Instrument 71-101 *The Multijurisdictional Disclosure System*;

“bid circular” has the meaning ascribed to it in National Instrument 62-104 *Take-Over Bids and Issuer Bids*;

“directors’ circular” means the circular required by section 2.17 of National Instrument 62-104 *Take-Over Bids and Issuer Bids*;

“individual director’s or officer’s circular” means the circular contemplated by section 2.20 of National Instrument 62-104 *Take-Over Bids and Issuer Bids*;

“MJDS” has the meaning ascribed to it in National Instrument 71-101 *The Multijurisdictional Disclosure System*;

“MJDS prospectus” has the meaning ascribed to it in National Instrument 71-101 *The Multijurisdictional Disclosure System*;

“notice of change” means the notice contemplated in Form 62-104F5 *Notice of Change or Notice of Variation*;

“notice of variation” means the notice contemplated in Form 62-104F5 *Notice of Change or Notice of Variation*;

“prospectus delivery requirement” means the requirement under section 129 of the Act for a dealer, not acting as an agent of the purchaser to send to a purchaser a prospectus within prescribed time limits and the requirement of section 6.7 of National Instrument 44-102 *Shelf Distributions*;

“right of action disclosure requirement” means the requirement under each of the following, as applicable:

- (a) item 30.1 of Form 41-101F1 *Information Required in a Prospectus*,

- (b) item 20 of Form 44-101F1 *Short Form Prospectus*,
- (c) paragraphs 5.5.2 and 5.5.3 of National Instrument 44-102 *Shelf Distributions*;

“take-over bid” has the meaning ascribed to it in National Instrument 62-104 *Take-Over Bids*;

“underwriter certificate requirement” means the requirement to include a certificate of an underwriter in a prospectus, as set out in each of the following, as applicable:

- (a) subsection 5.9(1) of National Instrument 41-101 *General Prospectus Requirements*;
- (b) National Instrument 44-101 *Short Form Prospectus Distributions*;
- (c) National Instrument 44-102 *Shelf Distributions*;
- (d) National Instrument 44-103 *Post Receipt Pricing*.

### **MJDS prospectus**

2. A distribution of securities made by an MJDS prospectus that complies with National Instrument 71-101 *The Multijurisdictional Disclosure System* is exempt from National Instrument 41-101 *General Prospectus Requirements* other than
  - (a) paragraph 16.1(a), and
  - (b) in respect of a rule 415 offering, section 17.2

### **Exemption from certain requirements for southbound offerings**

3. (1) If the conditions in subsection (2) are met, an issuer that files a prospectus in respect of a distribution of securities to be made pursuant to an applicable registration statement under the multijurisdictional disclosure system adopted by the SEC, as amended from time to time, is exempt from each of the following:
  - (a) the underwriter certificate requirement;
  - (b) the prospectus delivery requirement;
  - (c) the right of action disclosure requirement.

- (2) The exemptions referred to in subsection (1) are available to an issuer if each of the following conditions are met:
- (a) the prospectus is used only to qualify the distribution of securities to purchasers resident outside of Canada;
  - (b) either
    - (i) each purchaser represents in writing to the issuer or underwriter that the purchaser is not resident in Canada, or
    - (ii) each underwriter, dealer or agent engaged by the issuer in respect of the distribution has agreed with the issuer in writing that it will not, to the best of the underwriter's, dealer's or agent's, as applicable, knowledge, after reasonable inquiry, distribute securities under such prospectus to a purchaser resident in Canada;
  - (c) no advertisement or solicitation in furtherance of the distribution is undertaken in Canada by either the issuer or any underwriter, dealer or agent engaged by the issuer in respect of the distribution;
  - (d) the securities are distributed in compliance with U.S. federal securities law, including those requirements relating to an underwriter's certificate, the delivery of a prospectus to a purchaser, and disclosure to investors of their rights of action;
  - (e) the securities distributed under such prospectus are lawfully distributed in the jurisdiction of residence of the purchaser.

#### **Bids for securities of U.S. issuers**

4. (1) Subject to subsection (2), the following provisions of National Instrument 62-104 *Take-Over Bids and Issuer Bids* do not apply to a bid that complies with Part 12 of National Instrument 71-101 *The Multijurisdictional Disclosure System*:
- (a) sections 2.2, 2.3, 2.7, 2.9, 2.13, 2.23, 2.24, 2.25, 2.27 to 2.32, 2.34 and 3.2;
  - (b) subsections 2.10(3), 2.10(4), 2.11(4), 2.12(2), 2.12(3), 2.12(4), 2.12(5), 2.26(1), 2.26(2), 2.26(3) and 3.3(1);
  - (c) section 2.4, 2.5 and subsection 2.26(4), unless 20 percent or more of each class of securities that is subject to the bid is held by persons whose last address as shown on the books of the issuer is in Canada, as determined in accordance with subsections 12.1(2), (3) and (4) of National Instrument 71-101 *The Multijurisdictional Disclosure System*;

- (d) section 2.8, in respect only of the requirement to deliver the bid to holders of securities that, before the expiry of the bid, are convertible into securities of the class that is subject to the bid and whose last address as shown on the books of the offeree issuer is in Alberta;
  - (e) the requirement in subsection 2.10(1) that a bid circular be in the required form.
- (2) Despite subsection (1), an offeror under a bid must file a copy of any bid circular, notice of change, and notice of variation on the day the bid circular, notice of change or notice of variation, as applicable, is sent, or as soon as practicable after that.

**Application of the Act and Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* in respect of MJDS directors' circulars and MJDS individual director's or officer's circulars**

5. (1) The following provisions of the Act and National Instrument 62-104 *Take-Over Bids and Issuer Bids* do not apply to a director or an individual director or officer that elects to comply with U.S. federal securities law under Part 12 of National Instrument 71-101 *The Multijurisdictional Disclosure System* in preparing a directors' circular or individual director's or officer's circular in relation to a take-over bid made for securities of the offeree issuer under Part 12 of National Instrument 71-101 *The Multijurisdictional Disclosure System*:
- (a) section 160 of the Act;
  - (b) section 2.19 and subsections 2.17(2), 2.17(3), 2.17(4), 2.18(2), 2.20(2), 2.20(3), 2.20(4), 2.20(5), 2.20(6) and 2.20(7) of National Instrument 62-104 *Take-Over Bids and Issuer Bids*.
- (2) Despite subsection (1), the person or company that sends a directors' circular, individual director's or officer's circular, notice of change or notice of variation must file the circular, notice of change or notice of variation, as applicable, on the day it is sent, or as soon as practicable after that.

**Effective date and repeal**

6. (1) This Instrument comes into force on •, 2017.
- (2) Alberta Securities Commission Rule 71-801 *Implementing The Multijurisdictional Disclosure System Under National Instrument 71-101*, which came into force on November 1, 1998, is repealed.



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October 30, 2017

**VIA EMAIL**

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RE: **Alberta Securities Commission – ASC Notice – Proposed Release and Replacement of Alberta Securities Commission Rule 71-801 – *Implementing the Multijurisdictional Disclosure System***

Ladies and Gentlemen,

We appreciate the opportunity to submit the below comments regarding the notice published by the Alberta Securities Commission (the "**ASC**") in respect of the proposed repeal of ASC Rule 71-801 – *Implementing the Multijurisdictional Disclosure System* (the "**Existing Rule**") and the replacement thereof with the new rule set forth in the notice (the "**Proposed ASC Rule**").

While we are supportive of the ASC's initiative to update references within the Existing Rule, particularly with respect to the underwriter certificate exemption in section 3, we suggest that the ASC also consider taking this opportunity to pursue a more fundamental overhaul of the ASC's policies with respect to outbound distributions as evidenced by ASC Policy 45-601 – *Distributions Outside Alberta* ("**Policy 45-601**"), which we believe are connected to the underwriter certificate page issue (as well as the similar issues addressed in Section 3 of the Proposed ASC Rule). In the alternate, we have also included in this letter some minor suggested changes to the Proposed ASC Rule.

**Outbound Distributions Generally**

In our view, absent the position taken by the ASC in Policy 45-601, there would be no need for the Proposed ASC Rule to include the exemptions set forth in Section 3 thereof. The multijurisdictional disclosure system adopted by the SEC is designed such that a qualifying Canadian issuer can register securities for sale in the United States (the "**U.S.**") by essentially wrapping a Canadian prospectus with Form F-10, and the wrapped prospectus need only be compliant with the applicable Canadian province's prospectus form requirements, as modified by Form F-10 (which modifications eliminate the need for an underwriter certificate, among other things). As such, if there are no sales in Canada under the prospectus contained in the F-10, absent Policy 45-601, an Alberta Issuer would not be required to comply with the

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prospectus distribution related requirements in Alberta or any other Canadian province (just the prospectus form requirements, as modified).

Section 2.2 of Policy 45-601, however, indicates that the ASC considers a distribution by an issuer with a fundamental connection to Alberta (an "**Alberta Issuer**") to be a distribution in Alberta regardless of where the purchasers are located and, in applying Policy 45-601, ASC staff have indicated that they would generally expect that a prospectus or prospectus exemption will be required for every such sale of securities by an Alberta Issuer.

In the case of a southbound MJDS prospectus offering, the result of Policy 45-601 is therefore that the prospectus contained in the Form F-10 must be both a U.S. registration statement (to comply with U.S. requirements related to the actual sales to investors in the U.S.) and an Alberta prospectus in order to qualify the outbound distribution from Alberta, even if there are no sales under the prospectus in Canada (and if there are sales in both Canada and abroad, the ASC applies the prospectus requirements that would otherwise be applicable only to the Canadian sales, to both the Canadian and foreign sales – for example by requiring the foreign dealers selling the securities outside of Canada to sign the certificate page as if they were Canadian underwriters or to obtain exemptive relief).

In our view, there is no public policy reason for Alberta's prospectus related requirements to be applied to non-Canadian sales. We also do not believe that requiring the use of one of the existing prospectus exemptions is a good solution, as such imposes additional compliance requirements on the issuer and the underwriters. We do not believe that the current approach is necessary for the purposes of investor protection, given that the foreign jurisdictions in which these sales are made already have their own laws in place to protect the investors involved. As such, we believe that an unfortunate result of Policy 45-601 has been the imposition of unnecessary burdens on Alberta Issuers, which could limit access to foreign capital markets.

Policy 45-601 has also generated practical challenges for Alberta Issuers accessing foreign capital markets in other ways. For example, Alberta Issuers offering securities abroad pursuant to a private placement have been required to either receive representations from foreign purchasers regarding their status as accredited investors under *National Instrument 45-106 – Prospectus Exemptions* ("**NI 45-106**") or rely on the exemption in section 3.1 of ASC Rule 72-501 (the "**72-501 Exemption**"). We believe that requiring foreign investors to comply with the additional requirements of NI 45-106 or the 72-501 Exemption is unnecessary, given that the foreign jurisdictions involved generally have their own rules that must be complied with in conducting such private placements (particularly in the case of the U.S., where the classes of investors who can participate in such private placement are often even more limited than the framework available under NI 45-106).

The reporting requirements under Form 45-106F1 – Report of Exempt Distribution ("**45-106F1**"), which is currently required when using the accredited investor exemption or the 72-501 Exemption for foreign sales, also pose special challenges in the case of foreign purchasers. Such reporting requirements are often difficult for foreign dealers to comply with, such that it can become a contentious issue in preparing for a U.S. private placement by an Alberta Issuer, to the point where the 45-106F1 requirement could in itself have the effect of limiting access to foreign capital markets for Alberta Issuers.

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### Suggested Solutions

We would suggest that the ASC take this opportunity to re-examine its policies with respect to the extraterritorial application of Alberta prospectus rules to distributions of securities outside of Canada and, in the interest of the harmonization of securities laws across Canadian jurisdictions, that the ASC consider adopting a regime that parallels that currently being proposed by the Ontario Securities Commission (the "**OSC**") through a combination of existing "Interpretation Note 1 Distributions of Securities Outside Ontario" and proposed OSC Rule 72-503 – *Distributions Outside Canada and Proposed Companion Policy 72-503 Distributions Outside Canada* (collectively, the "**Proposed OSC Rule**").

Adopting a rule in Alberta that is a substantively similar to the Proposed OSC Rule would address the underwriter certificate page requirement and alleviate the practice of requiring issuers to apply for exemptive relief therefrom, and would have the added benefit of providing useful exemptions from the prospectus requirement for distributions of securities outside of Canada made concurrently with a prospectus offering in Canada and in accordance with foreign securities laws. The Proposed OSC Rule also contains a number of other exemptions that, if adopted in Alberta, would greatly facilitate private placements and public offerings by Alberta Issuers outside of Canada, and provides for a limited reporting requirement on a new form that requires relatively limited disclosures and, importantly, does not require disclosure of the identity of purchasers outside Canada.

We believe that the Proposed OSC Rule, if adopted in Alberta in a similar form, would address some of the challenges that Alberta Issuers currently face in accessing foreign capital markets. While the Proposed ASC Rule alone would address some minor technical issues that cause unnecessary expense and concern for Alberta Issuers, we suggest that the ASC consider a more broad examination of the ASC's policies regarding outbound distributions, and that the ASC consider harmonizing those with the regime in Ontario. Alberta is home to the head offices of many world leading capital-intensive businesses, but Alberta itself has a relatively small investor base. As such, we believe that it is particularly important that the ASC be focused on enhancing access to foreign capital markets for Alberta Issuers.

### Comments on the Proposed ASC Rule

In the meantime, the following are some other minor amendments that could be made to the Proposed Rule that we think would be helpful in addressing some of the problems that currently arise in respect of outbound distributions in Alberta:

- Part 3 of the Proposed ASC Rule is applicable only in the circumstance where an issuer is selling or distributing securities outside of Canada, and not concurrently within Canada. The Proposed ASC Rule does not address the circumstances in which the ASC has recently required Alberta Issuers to make an application for exemptive relief from the underwriter certificate requirement for any dealers that are engaged only in the placement of securities to purchasers resident outside of Canada in the context of a prospectus offering under which securities are distributed both to purchasers both in and outside of Canada. This issue arises where an Alberta Issuer that is qualified to issue securities under Form F-10 conducts an offering in both Canada and the U.S. and wishes to have both the U.S. sales and the Canadian sales governed by one underwriting agreement and sold under one harmonized prospectus

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(wrapped into a Form F-10 for U.S. purposes) but the U.S.-only underwriters are not able to sign the certificate page. This could be rectified by making the following changes to subsection 3(2) of the Proposed Rule:

(2) The exemptions referred to in subsection (1) only apply to that portion of the securities distributed by the issuer that meet ~~are available to an issuer if each of~~ the following conditions ~~are met~~:

(a) the ~~prospectus is used only to qualify the distribution of~~ securities are distributed to purchasers resident outside of Canada;

(b) either

(i) each purchaser of the securities represents in writing to the issuer or underwriter that the purchaser is not resident in Canada, or

(ii) each underwriter, dealer or agent engaged by the issuer in respect of the distribution of the securities has agreed with the issuer in writing that it will not, to the best of the underwriter's, dealer's or agent's, as applicable, knowledge, after reasonable inquiry, distribute securities under such prospectus to a purchaser resident in Canada;

(c) either

(i) if there is no concurrent offering of the securities pursuant to a prospectus in Canada, no advertisement or solicitation in furtherance of the distribution is undertaken in Canada by either the issuer or any underwriter, dealer or agent engaged by the issuer in respect of the distribution; or

(ii) if there is a concurrent offering of the securities pursuant to a prospectus in Canada, no advertisement or solicitation in furtherance of the distribution is undertaken in Canada by any underwriter, dealer or agent specified in subsection (b)(ii);

(d) the securities are distributed in compliance with U.S. federal securities law, including those requirements, if any, relating to: (i) an underwriter's certificate, (ii) the delivery of a prospectus to a purchaser, and (iii) disclosure to investors of their rights of action;

(e) the securities distributed under such prospectus are lawfully distributed in the jurisdiction of residence of the purchaser.

- The Proposed Rule does not address at-the-market distributions. We believe that it would be appropriate to extend the proposed exemptions to at-the-market distributions, and may be desirable to do so if the Canadian Securities Administrators (the "CSA") are considering amending rules related to the regulatory regime for at-the-market distributions (as was advocated for in our firm's comment letter to the CSA dated July 28, 2017, in response to *CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*).

We also suggest that the ASC consider concurrently amending Part 3 of ASC Policy 72-501 in order to facilitate the use of the prospectus exemption contemplated therein in the context of cross-border private

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placements and in the context of foreign private placements that are conducted concurrently with Canadian prospectus offerings by Alberta Issuers, including by eliminating or reducing the related reporting requirements in respect of foreign investors. In the event that the ASC wishes to consider amending ASC Policy 72-501, we would be happy to make additional submissions.

If you have any questions regarding this submission please contact Nicole L. Cargill at [nicole.cargill@blakes.com](mailto:nicole.cargill@blakes.com) or 403-260-9653 or Trevor Rowles at [trevor.rowles@blakes.com](mailto:trevor.rowles@blakes.com) or 403-260-9750.

Yours truly,

*(signed)* Nicole L. Cargill

*(signed)* Trevor Rowles

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