

Ontario Securities Commission

Companion Policy 45-102CP

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**COMPANION POLICY 45-102CP
RESALE OF SECURITIES**

Application

1.1 (1) National Instrument 45-102 (NI 45-102) has been implemented in all jurisdictions.

(2) Except for sections 2.1, 2.8, 2.9 and 2.15, Part 2 of NI 45-102 does not apply in Manitoba; and

(3) Sections 2.14 and 2.15 do not apply in Alberta and Ontario. In Alberta and Ontario, local measures similar to sections 2.14 and 2.15 apply and are found in sections 10 and 11 of Alberta Securities Commission Rule 72-501 *Distributions to Purchasers Outside Alberta* and in sections 2.7 and 2.8 of Ontario Securities Commission Rule 72-503 *Distributions Outside Canada*.

Purpose

1.2 (1) NI 45-102 provides that first trades of securities distributed under certain exemptions from the prospectus requirement are distributions unless certain conditions are met. The conditions impose restrictions on the resale of the securities. If the securities were distributed under any of the provisions listed in Appendix D to NI 45-102 or under other securities legislation which specifies that the first trade is subject to section 2.5 of NI 45-102, the conditions include that the issuer is and has been a reporting issuer for a four month seasoning period and that a four month restricted period has elapsed from the date of the initial distribution. If the securities were distributed under any of the provisions listed in Appendix E to NI 45-102 or under other securities legislation which specifies that the first trade is subject to section 2.6 of NI 45-102, the conditions include that the issuer is and has been a reporting issuer for a four month seasoning period. NI 45-102 also provides an exemption for a control distribution and a sale by a pledgee of pledged securities if the sale would be a distribution for the purposes of securities legislation.

(2) Appendices D and E to NI 45-102 list the harmonized exemptions in National Instrument 45-106 *Prospectus Exemptions* (NI 45-106) and local exemptions that are subject to the resale restrictions under section 2.5 or 2.6 of NI 45-102, while Appendix F lists the harmonized exemptions in NI 45-106 applicable to underwriters. Each of these appendices also contains transitional provisions applicable to securities acquired under exemptions listed in the Appendices to NI 45-102 as Appendices D, E and F read on March 30, 2004. For all local exemptions that remain in force, you should look to the local instrument itself to see if it specifies that the securities acquired are subject to section 2.5 or 2.6 of NI 45-102 as well as to Appendix D and E to NI 45-102. You may also wish to consult the CSA Staff Notice 45-304 listing local registration and prospectus exemptions in place in each jurisdiction of Canada, which the CSA will update periodically.

(3) Nothing in NI 45-102 is intended to restrict the ability of a purchaser to resell securities during the restricted period or seasoning period under a prospectus or an exemption from the prospectus requirement. This includes the further exemptions found in sections 2.14 and 2.15, and the similar exemptions in Alberta and Ontario. For example, if a person or company obtains a discretionary exemption order or ruling that imposes any of the resale restrictions contained in section 2.5, 2.6 or 2.8 on a security that is the subject of the order or ruling, the person or company may rely on section 2.14 or 2.15, or the similar exemptions in Alberta and Ontario, to resell the security.

Open System Jurisdiction

1.3 Sections 2.5 and 2.6 of NI 45-102 do not apply in Manitoba because Manitoba does not impose restrictions on first trades in securities distributed under an exemption from the prospectus requirement in those jurisdictions unless the trade is a control distribution.

Example of Application of Section 2.5

1.4 If an issuer distributes securities to a purchaser in British Columbia, the issuer must file a prospectus or rely upon a prospectus exemption under the securities legislation of British Columbia. If the issuer relies upon a British Columbia prospectus exemption listed in Appendix D to NI 45-102, section 2.3 of NI 45-102 applies and the first trade of the securities is subject to section 2.5 of NI 45-102. Section 2.5 provides that the first trade is a distribution unless, among other conditions, a four month restricted period has elapsed. If the British Columbia purchaser seeks to resell the securities into Ontario, a prospectus must be filed in Ontario or a prospectus exemption relied upon unless the conditions in subsection 2.5(2) of NI 45-102 are satisfied.

Reporting Issuer Status

1.5 Reporting issuer status in any jurisdiction will satisfy the reporting issuer requirements in subsections 2.5(2), 2.6(3) and 2.8(2) of NI 45-102. See section 1.11 for guidance if an issuer becomes a reporting issuer by filing a prospectus after the distribution date.

Legending of Securities

1.6 (1) Items 3 and 3.1 of subsection 2.5(2) of NI 45-102 impose legend or legend notation requirements for securities distributed under any of the provisions listed in Appendix D to NI 45-102 or another prospectus exemption of any jurisdiction subject to the resale restrictions in subsection 2.5(2) of NI 45-102. This requirement applies to securities transferred during the restricted period, whether to initial or subsequent transferees. However, because of the definition of "distribution date", in the case of most resales, the subsequent purchaser's restricted period will expire four months and a day after the original distribution date.

(2) If the security is entered into a direct registration or other electronic book-entry system, or where a certificate representing the security is not issued directly to a purchaser, the issuer must provide written notice of the legend restriction notation to the purchaser. We would consider providing written notice of the legend restriction notation to the purchaser in a subscription agreement or including the legend restriction notation in an ownership statement issued under a direct registration system or other electronic book-entry system delivered directly to the purchaser to be ways of meeting the written notice requirement.

(3) In addition to the written notice condition contemplated in item 3.1 of subsection 2.5(2), issuers may want to assist purchasers of restricted securities with compliance with the resale restrictions in item 2 of subsection 2.5(2) through other means. For example, issuers can request that the direct registration or electronic book-entry system in which the security is entered apply any available procedures to identify the restricted nature of the security, such as the assignment of a separate CUSIP or ISIN number to the security for the duration of the restricted period. There may be alternative procedures available depending on the capabilities of the particular direct registration system or other electronic book-entry system.

(4) Issuers may add additional wording to that found in item 3 of subsection 2.5(2) of NI 45-102. If you supplement the specified text of the legend on the certificate or the legend notation on the written notice, that additional wording cannot alter the meaning of the specified wording. You should also look to section 1.10 for further guidance on the legending of convertible and underlying securities.

(5) A reference to a purchaser of a security in items 3 and 3.1 of subsection 2.5(2) of NI 45-102 means a person who makes the investment decision about the acquisition of a security. In most cases, the person making the investment decision will be the beneficial owner of the security. In some cases, however, the person making the investment decision will not be the beneficial owner. In the case of a fully managed account, the manager may be making the investment decision. In the case of a trust, the trustee may be making the investment decision.

There may be other examples where the person making the investment decision is not the beneficial owner of the security.

Removal of Legend

1.7 NI 45-102 does not preclude an issuer or its transfer agent from removing a legend once the requirements in subsection 2.5(2)3 have been satisfied. The parties involved in a transfer of securities would not be prevented from transferring those securities even if the legend on the certificate was stale-dated. The transferor should, however, verify exchange rules to determine if removal of the legend is necessary to effect "good delivery".

Calculation of Restricted and Seasoning Periods

1.8 The restricted period in item 2 of subsection 2.5(2) of NI 45-102 is calculated from the distribution date, that is, the date the securities were distributed in reliance on an exemption from the prospectus requirement by the issuer or a control person. For example, if an issuer or control person distributes securities under a private placement exemption to a purchaser in Saskatchewan and the private placee resells the securities during the restricted period to a purchaser in Alberta under a further private placement exemption, upon resale by the Alberta purchaser, that purchaser will determine whether the restricted period has expired by calculating the time period from the date the issuer or control person distributed the securities to the Saskatchewan purchaser.

No Unusual Effort

1.9 Persons interested in the meaning of the concept of "no unusual effort is made to prepare the market or to create a demand for the security that is the subject of the trade" found in subsections 2.5(2), 2.6(3) and 2.8(2) of NI 45-102 should look to the case law, in particular the order of the Ontario Securities Commission dated April 24, 1985 in the matter of Daon Development Corporation and Daon Corporation as well as to the definition of unusual effort in section 3.1 of the Alberta Securities Commission Rule 45-511 *Local Prospectus Exemptions and Related Requirements*.

Underlying Securities

1.10 The restricted period or seasoning period applicable to trades in underlying securities is calculated from the distribution date of the convertible security, exchangeable security or multiple convertible security. If the applicable restricted period or seasoning period expired prior to the conversion or exchange, subsection 2.5(3) provides that an issuer is not required to place a legend on the certificate representing the underlying securities or a legend restriction notation in the written notice.

Becoming a Reporting Issuer By Filing a Prospectus After the Distribution Date

1.11 If an issuer is not a reporting issuer at the distribution date but subsequently becomes a reporting issuer after the distribution date by filing and obtaining a receipt for a prospectus in one of the jurisdictions listed in Appendix B, section 2.7 of NI 45-102 provides that the four month seasoning requirement in sections 2.5, 2.6 and 2.8 of NI 45-102 does not apply. This means that the securities issued prior to the prospectus being filed may then be resold, provided however that the restricted period under section 2.5 or 2.8 of NI 45-102 has expired.

For example, if, on September 28, 2009, an issuer that is not a reporting issuer in any jurisdiction issues securities which are subject to section 2.5 to purchasers under a private placement and the issuer subsequently receives a receipt for its initial public offering prospectus

on October 28, 2009, then those purchasers can resell the securities acquired under the private placement on January 29, 2010, being the date that is four months and a day from the original distribution date, provided that the conditions in subsection 2.5(2) are satisfied.

Realization of Pledged Securities

1.12 The prospectus exemption in section 2.8 of NI 45-102 is available for realizations of pledged securities under either a power of sale or by way of foreclosure. This means that a pledgee, mortgagee or other encumbrancer can rely on the exemption in section 2.8 of NI 45-102 to immediately effect a resale of pledged securities under a power of sale or to foreclose and take the securities on its own books for subsequent resale.

Securities Exchange Take-over Bid or Issuer Bid

1.13 Section 2.11 of NI 45-102 provides relief from the seasoning requirement for a trade of securities issued in connection with a securities exchange take-over bid or securities exchange issuer bid if a securities exchange take-over bid circular or securities exchange issuer bid circular is filed by the offeror under securities legislation of the local jurisdiction. A bid circular may be filed for either a formal bid or an exempt bid. The basis for this exemption is that a securities exchange take-over bid circular or securities exchange issuer bid circular for a formal bid is required to contain prospectus-level disclosure for the offeror or other issuer whose securities are being offered in exchange for the securities of the offeree issuer. If a take-over bid circular or issuer bid circular is prepared in connection with an exempt bid, the circular must meet the disclosure standards in securities legislation relating to the form and content of a take-over bid circular or issuer bid circular, as the case may be, for a formal bid for the exemption in section 2.11 to be available.

Exemptions for Certain Trades in the Local Jurisdiction

1.14 The exemption in section 2.10 of NI 45-102 is subject to a condition that the issuer of the underlying security was a reporting issuer in the local jurisdiction at the time of the trade. The exemptions in sections 2.11 and 2.12 of NI 45-102 are subject to a condition that the offeror was a reporting issuer in the local jurisdiction on the date securities of the offeree issuer are first taken up under the take-over bid or issuer bid and, in the case of the exemption in section 2.12, an additional condition that issuer of the underlying security was a reporting issuer in the local jurisdiction at the time of the trade. Issuers cannot rely on a prospectus filed in another jurisdiction nor can an offeror rely on a take-over bid circular or issuer bid circular filed in another jurisdiction to satisfy these conditions.

Resales of Securities under Section 2.14

1.15 (1) For the purposes of section 2.14 of NI 45-102, in determining the percentage of the outstanding securities of the class or series that are directly or indirectly owned by residents of Canada and the number of owners directly or indirectly that are residents of Canada, an issuer should use reasonable efforts to

- (a) determine securities held of record by a broker, dealer, bank, trust company or nominee for any of them for the accounts of customers resident in Canada;
- (b) count securities beneficially owned by residents of Canada as reported on reports of beneficial ownership; and
- (c) assume that a customer is a resident of the jurisdiction or foreign jurisdiction in which the nominee has its principal place of business if, after reasonable inquiry, information regarding the jurisdiction or foreign jurisdiction of residence of the customer is unavailable.

(2) Lists of beneficial owners of securities maintained by intermediaries under SEC Rule 14a-13 under the *1934 Act* or other securities law analogous to National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* may be useful in determining the percentages referred to in subsection (1).

(3) There is no requirement to place a legend on the securities in order to rely on the exemption in section 2.14 of NI 45-102.

(4) *Bona fide trades outside of Canada* – The exemptions in subsections 2.14(1) and 2.14(2) permit the resale of securities of an issuer in a bona fide trade outside of Canada. The exemptions are each subject to a condition that the trade is made through an exchange or a market outside of Canada, or to a person or company outside of Canada.

In our view, selling security holders who wish to rely on the exemptions may not take steps to sell in Canada by either (1) pre-arranging with a buyer that is a resident of Canada and settling on an exchange or a market outside of Canada or (2) selling securities to a person or company outside of Canada who the selling security holder has reason to believe is acquiring the securities on behalf of a Canadian investor. A selling security holder engaged in activities to sell or create a demand for the security in Canada would not be able to rely on the exemptions in section 2.14.

As with all prospectus exemptions, a person relying on an exemption has to satisfy itself that the conditions to the exemption are met.

Resale of Securities under Section 2.15

1.15.1 (1) *Directors and Executive Officers* – The definition of "foreign issuer" in section 2.15 of NI 45-102 uses the terms "directors" and "executive officers". The term "director" is defined in provincial and territorial securities legislation in Canada and generally means a director of a company or an individual performing a similar function or acting in a similar capacity for any non-corporate issuer.

For a non-corporate issuer, an executive officer is a person who is acting in a capacity with the non-corporate issuer that is similar to that of an executive officer of a company.

(2) *Definition of foreign issuer* – In order to rely on section 2.15, a selling security holder will have to determine if the issuer is a foreign issuer on the distribution date. In some cases, the issuer will provide that information to investors at the time of the offering, perhaps in representations in subscription agreements or in offering materials. If the issuer doesn't provide that information, we defined "foreign issuer" such that a security holder can determine whether an issuer is a foreign issuer by using the information disclosed in the issuer's most recent disclosure document containing that information that is publicly available in a foreign jurisdiction or the offering document provided by the issuer in connection with the distribution of the security that is the subject of the resale. A security holder may rely on this information unless the security holder has reason to believe that it is not accurate.

The term "ordinarily reside" is used to clarify that when an executive officer or director has a temporary residence outside of Canada, such as a vacation home, the executive officer or director would not generally be considered to reside outside of Canada for the purposes of the definition of foreign issuer

(3) There is no requirement to place a legend on the securities in order to rely on the exemption in section 2.15 of NI 45-102.

(4) *Bona fide trades outside of Canada* – The exemptions in subsections 2.15(2) and 2.15(3) permit the resale of securities of an issuer in a bona fide trade outside of Canada. The exemptions are each subject to a condition that the trade is made through an exchange or a market outside of Canada, or to a person or company outside of Canada.

In our view, selling security holders who wish to rely on the exemptions may not take steps to sell in Canada by either (1) pre-arranging with a buyer that is a resident of Canada and settling

on an exchange or a market outside of Canada or (2) selling securities to a person or company outside of Canada who the selling security holder has reason to believe is acquiring the securities on behalf of a Canadian investor. A selling security holder engaged in activities to sell or create a demand for the security in Canada would not be able to rely on the exemptions in section 2.15.

As with all prospectus exemptions, a person relying on an exemption has to satisfy itself that the conditions to the exemption are met.

Filing of Form 45-102F1

1.16 Section 2.8 of NI 45-102 provides that the prospectus requirement does not apply to a control distribution if the conditions in section 2.8 are met. Selling security holders are required to give advance notice of intention to resell their securities under subsection 2.8(3) of NI 45-102 by filing a completed and signed Form 45-102F1. Under subsection 2.8(4), the advance notice expires on the earlier of the date the selling security holder files the last of the insider reports reflecting the sale of all securities referred to in the Form and 30 days after the Form 45-102F1 is filed. A new Form 45-102F1 must be filed in accordance with subsection 2.8(3) if the selling security holder wishes to continue to resell securities from a control block. Form 45-102F1 should be filed through SEDAR under the issuer's profile under "*Continuous Disclosure – Resale of Securities (NI 45-102) - Form 45-102F1*". Consult National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)* and the current CSA SEDAR Filer Manual (including code updates) for further information about filing documents electronically.

Application of section 2.10

1.17 Section 2.10 of NI 45-102 applies when securities qualified by a prospectus are convertible into or exchangeable for securities of a reporting issuer other than the issuer of the convertible or exchangeable securities. Those securities would be converted or exchanged in reliance on the prospectus exemption in paragraph 2.42(1)(b) of NI 45-106. As a result, those securities would be subject to a seasoning period requirement because distributions under subsection 2.42(1) of NI 45-106 for a security being distributed in the circumstances referred to in clause (b) of subsection 2.42(1) are listed in Appendix E of NI 45-102. Section 2.10 removes the seasoning period requirement for the underlying securities provided the requirements of that section are met.