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COMPANION POLICY 71-102CP TO NATIONAL INSTRUMENT 71-102 CONTINUOUS DISCLOSURE AND OTHER EXEMPTIONS RELATING TO FOREIGN ISSUERS

PART 1 GENERAL

1.1 Introduction and Purpose

- (1) National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* (the "Instrument") provides broad relief from most of the requirements of National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102") for two sub-categories of foreign reporting issuers – SEC foreign issuers and designated foreign issuers – on the condition that they comply with the continuous disclosure ("CD") requirements of the SEC or a designated foreign jurisdiction. SEC foreign issuers and designated foreign issuers are also exempted from certain other requirements of provincial and territorial securities legislation, including insider reporting and early warning, that are not contained in NI 51-102.
- (2) This Companion Policy provides information about how the provincial and territorial securities regulatory authorities interpret the Instrument, and should be read in conjunction with it.

1.2 Other Relevant Legislation

In addition to the Instrument, foreign issuers should consult the following non-exhaustive list of legislation to see how it may apply to them:

- (1) implementing legislation (the regulation, rule, ruling, order or other instrument that implements the Instrument in each applicable jurisdiction);
- (2) NI 51-102;
- (3) National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards* ("NI 52-107"); and
- (4) National Instrument 71-101 *The Multijurisdictional Disclosure System* ("NI 71-101").

1.3 Multijurisdictional Disclosure System

- (1) NI 71-101 permits certain U. S. incorporated issuers to satisfy specified Canadian CD requirements by using disclosure prepared in accordance with U. S. requirements. The Instrument does not replace or alter NI 71-101. There are instances in which NI 71-101 and the Instrument offer similar relief to a reporting issuer, but other instances in which the relief available to a reporting issuer in one instrument differs from the relief available to the reporting issuer under the other instrument. Many issuers that are eligible for an exemption under the Instrument will be ineligible to rely on NI 71-101 and vice versa. For example, the Instrument defines a class of "SEC foreign issuers". Not all U.S. issuers referred to in NI 71-101 are SEC foreign issuers and not all SEC foreign issuers are U.S. issuers.
- (2) [Repealed.]

1.4 Exemptions May Not Require Disclosure

Most of the exemptions in the Instrument are only available to a person or company that complies with a particular aspect of either U.S. federal securities laws or the laws of a designated foreign jurisdiction. If those laws do not require the issuer to disclose, file or send any information, for example, because the issuer may rely on an exemption under those laws, then the issuer is not required to disclose, file or send any information to rely on the exemption contained in the Instrument.

PART 2 DEFINITIONS

2.1 Foreign Reporting Issuers

To qualify for any of the exemptions contained in the Instrument the issuer in question must be a "foreign reporting issuer". The definition of foreign reporting issuer is based upon the definition of foreign private issuer in Rule 405 of the 1933 Act and Rule 3b-4 of the 1934 Act. For the purposes of the definition of "foreign reporting issuer", it is the CSA's view that

- (a) in calculating the percentage of assets located in Canada, the issuer should use the book value of the assets recorded in its most recent consolidated financial statements, either annual or interim; and
- (b) in determining the outstanding voting securities that are owned, directly or indirectly, by residents of Canada, an issuer should
 - (i) use reasonable efforts to identify securities held by a broker, dealer, bank, trust company or nominee or any of them for the accounts of customers resident in Canada;
 - (ii) count securities beneficially owned by residents of Canada as reported on reports of beneficial ownership, including insider reports and early warning reports; and

- (iii) 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.

The determination of the percentage of securities of the foreign issuer owned by residents of Canada should be made in the same manner for the purposes of paragraph (c) of the definition of “designated foreign issuer”. This method of calculation differs from that of NI 71-101, which only requires a calculation based on the address of record. Accordingly, some SEC foreign issuers may qualify for exemptive relief under NI 71-101 but not under the Instrument.

2.2 Investment Funds

Generally, the definition of “investment fund” would not include a trust or other entity that issues securities which entitle the holder to substantially all of the net cash flows generated by: (i) an underlying business owned by the trust or other entity, or (ii) the income-producing properties owned by the trust or other entity. Examples of trusts or other entities that are not included in the definition are business income trusts, real estate investment trusts and royalty trusts.

PART 3 INSIDER REPORTS

3.1 (Repealed)

PART 4 FILING OF DISCLOSURE DOCUMENTS

4.1 Filing of Disclosure Documents on SEDAR

A foreign issuer does not have to file multiple copies of a foreign disclosure document that it is filing to satisfy the conditions of more than one exemption under the Instrument. The issuer need only file the document in one SEDAR category, and under any other applicable SEDAR category may provide an appropriate reference to the location of the filed document. For example, a foreign issuer may wish to file its U. S. Form 20F to satisfy the conditions relating to both the AIF exemption and the MD&A exemption. The foreign issuer could file the Form 20F on SEDAR under either of the AIF category or the MD&A category, and under the other category would file a letter giving the SEDAR project number that the Form 20F is filed under.

PART 5 ELECTRONIC DELIVERY OF DOCUMENTS

5.1 Electronic Delivery of Documents

Any documents required to be sent under the Instrument may be sent by electronic delivery, as long as such delivery is made in compliance with Québec Staff Notice 11-201 relating to the *Delivery of Documents by Electronic Means*, in Québec, and National Policy 11-201 *Delivery of Documents by Electronic Means*, in the rest of Canada.

PART 6 EXEMPTIONS NOT INCLUDED

6.1 Resource Issuers - Standards of Disclosure for Mineral Projects and Oil and Gas Activities

The Instrument does not provide an exemption from National Instrument 43-101 *Standards of Disclosure for Mineral Projects* or National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities*. Issuers are reminded that those National Instruments apply to SEC foreign issuers and designated foreign issuers.

6.2 SEC Foreign Issuers

NI 51-102 contains exemptions for SEC issuers from the change in year-end requirements in NI 51-102. SEC foreign issuers under the Instrument will also meet the definition of SEC issuers under NI 51-102, and so will be able to rely on the change in year-end exemption in NI 51-102.

6.3 Foreign Reporting Issuers

The Instrument does not provide an exemption for any foreign reporting issuers from the requirement in section 4.9 of NI 51-102. A foreign reporting issuer must deliver a notice if it has been a party to an amalgamation, arrangement, merger, winding-up, reverse takeover, reorganization or other transaction that will have the effect of changing its continuous disclosure obligations under NI 51-102. The Instrument also does not provide an exemption for any foreign reporting issuers from the requirement to file disclosure materials under section 11.1 of NI 51-102 or to file a notice of change of status under section 11.2 of NI 51-102.

6.4 Auditor Oversight - Canadian Public Accountability Board - Certification and Audit Committees

Section 4.3 of the Instrument provides relief for an SEC foreign issuer relating to annual financial statements and auditors' reports on annual financial statements. Section 5.4 provides similar relief for a designated foreign issuer. Reporting issuers are subject to section 2.2 of National Instrument 52-108 *Auditor Oversight* ("NI 52-108") but may rely on the exemptions in sections 4.3 and 5.4 of the Instrument for relief from these obligations.

Sections 4.3 and 5.4, however, do not provide relief from

- (a) the requirements in sections 2.1, and Part 3 of NI 52-108 imposed directly on a public accounting firm that issues an auditor's report with respect to the financial statements of a reporting issuer;
- (b) the certification requirements in National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*; or
- (c) the audit committee requirements in National Instrument 52-110 *Audit Committees*.

SEC foreign issuers and designated foreign issuers must look to those instruments for any exemptions that may be available to them.

PART 7 EXEMPTIONS

7.1 Exemptions

- (1) The exemptions contained in the Instrument are in addition to any exemptions that may be available to an issuer under any other applicable legislation.
- (2) Issuers that have been given an exemption, waiver or approval by a regulator or securities regulatory authority before the Instrument and NI 51-102 came into effect, may be entitled to continue to rely on that exemption, waiver or approval. Issuers should refer to section 13.2 of NI 51-102 to determine in what circumstances the prior exemption, waiver or approval is available and what the reporting issuer must do to continue to rely on it.
- (3) If an issuer wishes to seek exemptive relief from NI 51-102 or other requirements of provincial and territorial securities legislation on grounds similar but not identical to those permitted under the Instrument, the issuer should apply for this relief under the exemptive provisions of NI 51-102, or other provincial and territorial securities legislation, as the case may be.

PART 8 TRANSITION

8.1 Transition

The amendments to the Instrument and this Policy which came into effect on January 1, 2011 only apply to documents required to be prepared, filed, delivered or sent under the Instrument for periods relating to financial years beginning on or after January 1, 2011.