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**REQUEST FOR COMMENTS**

**Notice and Request for Comment** – Publication of proposed Financial and Consumer Services Commission Local Rule 72-501 *Distribution of Securities to Persons Outside New Brunswick* (Local Rule 72-501), Companion Policy 72-501CP, and the proposed repeal of Local Policy 72-601 *Distribution of Securities Outside New Brunswick* (Local Policy 72-601).

**Introduction**

On 17 June 2013, the Financial and Consumer Services Commission (Commission) approved publication in order to obtain comments on Proposed Local Rule 72-501, Companion Policy 72-501CP, and the proposed repeal of Local Policy 72-601.

**Substance and Purpose of Proposed Instrument**

Currently, under Local Policy 72-601, where reasonable steps are taken by the issuer, underwriters and other participants effecting the distribution to ensure that the securities come to rest outside New Brunswick, the Commission takes the view that a prospectus is not required nor is an exemption from the prospectus requirement necessary.

Proposed Local Rule 72-501 represents a new approach in that it provides registration and prospectus exemptions for distributions outside of New Brunswick. It sets out the circumstances in which a distribution of securities to purchasers outside of New Brunswick is exempt from the registration and prospectus requirement of securities legislation in New Brunswick. However, it does not establish bright line tests for determining when a distribution outside New Brunswick also constitutes a distribution in New Brunswick, to which a prospectus requirement applies. Consequently, this requirement will depend upon the facts and circumstances of the distribution.

**Request for Comment**

The Commission seeks comments on the Proposed Local Rule 72-501, Companion Policy 72-501CP, and the proposed repeal of Local Policy 72-601.

**How to Provide your Comments**

Comments are to be provided, in writing, by no later than 23 September 2013 to:

Secretary  
Financial and Consumer Services Commission  
85 Charlotte Street, Suite 300

Saint John, N.B. E2L 2J2  
Telephone: 506-658-3060  
Toll Free: 866-933-2222 (within NB only)  
Fax: 506-658-3059  
E-mail: [info@fcnb.ca](mailto:info@fcnb.ca)

We cannot keep submissions confidential. A summary of the written comments received during the comment period may be published.

### **Questions**

If you have any questions, please refer them to:

Kevin Hoyt  
Director of Securities  
Financial and Consumer Services Commission  
Tel: 506-643-7691  
Email: [kevin.hoyt@fcnb.ca](mailto:kevin.hoyt@fcnb.ca)

**FINANCIAL AND CONSUMER SERVICES COMMISSION**

**LOCAL RULE 72-501**

***DISTRIBUTION OF SECURITIES TO PERSONS OUTSIDE NEW BRUNSWICK***

**PART 1  
DEFINITIONS AND INTERPRETATION**

**Definitions**

**1. In this Instrument**

“genuine market” includes:

- (a) the Eurobond market, as regulated by the International Capital Market Association, and
- (b) any foreign securities exchange or non-exchange market that the Executive Director of the Financial and Consumer Services Commission has designated.

“qualified market” includes

- (a) The Toronto Stock Exchange Inc.,
- (b) Tier 1 or Tier 2 of the TSX Venture Exchange Inc.,
- (c) Bourse de Montréal Inc.,
- (d) NYSE MKT LLC,
- (e) Nasdaq Global Market,
- (f) Nasdaq Global Select Market,
- (g) Nasdaq Capital Market,
- (h) the New York Stock Exchange,
- (i) the London Stock Exchange Limited, and
- (j) any predecessor or successor to any of the entities referred to in paragraphs (a) through (i).

## PART 2 EXEMPTIONS

### Division 1 – Distributions to Purchasers outside New Brunswick

- 2.1 This Instrument provides relief for an issuer that has equity securities listed on a qualified market and that sells securities to purchasers outside New Brunswick, subject to certain conditions.
- 2.2 Section 45 and section 71 of the *Securities Act*, S.N.B. 2004, c. S-5.5 do not apply to a distribution of securities by an issuer provided that:
- (a) the distribution is not made to a purchaser resident in New Brunswick,
  - (b) the purchaser certifies in the subscription agreement that the purchaser is not resident in New Brunswick and the issuer does not believe, and has no reasonable grounds to believe, that the certification is false,
  - (c) the purchaser acknowledges in the subscription agreement that,
    - (i) no Canadian securities regulatory authority has reviewed or passed on the merits of the securities,
    - (ii) there is no government or other insurance covering the securities,
    - (iii) there are risks associated with the purchase of the securities,
    - (iv) there are restrictions on the purchaser's ability to resell the securities and it is the responsibility of the purchaser to find out what those restrictions are and to comply with them before selling the securities, and
    - (v) the issuer has advised the purchaser that the issuer is relying on an exemption from the requirements to provide the purchaser with a prospectus and to sell securities through a person registered to sell securities under the *Securities Act* (New Brunswick) and, as a consequence of acquiring securities pursuant to this exemption, certain protections, rights and remedies provided by the *Securities Act* (New Brunswick) including statutory rights of rescission or damages, will not be available to the purchaser,
  - (d) the issuer has equity securities listed or quoted on a qualified market, and
  - (e) the issuer files a Form 45-106F1 *Report of Exempt Distribution* within 10 days from the date of the distribution.

- 2.3 A trade in a security acquired by the seller under section 2.2 of the Instrument or under any predecessor Instrument is subject to section 2.5 of National Instrument 45-102 *Resale of Securities*.

### Division 2 – Eurobond Offerings

- 2.4 This Instrument provides relief for Eurobond offerings.
- 2.5 Section 45 and section 71 of the *Securities Act* (New Brunswick) do not apply to the distribution of a non-convertible debt security provided that:
- (a) the distribution is not made to a person in Canada,
  - (b) the debt has been accepted for listing on a genuine market outside Canada,
  - (c) the issuer files a Form 45-106F1 *Report of Exempt Distribution* within 10 days from the date of the distribution,
  - (d) the offering circular contains a legend stating that the securities are not qualified for sale in New Brunswick and may not be offered or sold directly or indirectly in New Brunswick,
  - (e) the underwriters contractually agree that they will observe this restriction regarding the prohibition of offering in New Brunswick,
  - (f) the securities to be distributed are initially issued in temporary form exchangeable for definitive securities 40 days after completion of the distribution on certification by the holder that the definitive securities are not beneficially owned by New Brunswick residents, and
  - (g) the Executive Director of the Financial and Consumer Services Commission has not advised the issuer in writing that its securities are not eligible to use the exemption set out in this Instrument.
- 2.6 A trade in a non-convertible debt security issued under section 2.5 of this Instrument is a distribution unless:
- (a) the issuer is a reporting issuer in a jurisdiction listed in Appendix B to National Instrument 45-102 *Resale of Securities* and is an electronic filer under National Instrument 13-101 *System for Electronic Document Analysis and Retrieval*,
  - (b) a 40 day period has elapsed from the date of issue of the non-convertible debt security,

- (c) the trade is not a control distribution,
- (d) no unusual effort is made to prepare the market or to create a demand for the securities that are the subject of the trade,
- (e) no extraordinary commission or consideration is paid to a person or company in respect of the trade, and
- (f) if the selling securityholder is an insider or officer of the issuer, the selling securityholder has no reasonable grounds to believe that the issuer is in default of the *Securities Act* (New Brunswick).

**PART 3  
COMING INTO FORCE**

3. This Instrument comes into force on ●.

**COMPANION POLICY TO  
FINANCIAL AND CONSUMER SERVICES COMMISSION  
LOCAL RULE 72-501  
*DISTRIBUTION OF SECURITIES TO PERSONS OUTSIDE NEW BRUNSWICK*  
PART 1  
GENERAL COMMENTS**

This Companion Policy provides guidance regarding the application of the *Securities Act*, S.N.B. 2004, c. S-5.5 where an issuer distributes securities to a person outside the province.

A distribution of securities by an issuer with connections to New Brunswick may, depending on the facts and circumstances surrounding the transaction, be subject to the *Securities Act* (New Brunswick) even if the initial purchaser is not located in New Brunswick.

There are two primary circumstances where an issuer must comply with the requirements of the *Securities Act* (New Brunswick) in making a distribution to a person outside the province. These are:

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

Where a distribution is made under a prospectus exemption, any subsequent trade of those securities in New Brunswick will be deemed a distribution unless the resale requirements in National Instrument 45-102 *Resale of Securities*, including hold periods, are complied with.

As noted in section 1.3 of the Companion Policy to National Instrument 45-106 *Prospectus and Registration Exemptions*, a distribution may occur in more than one jurisdiction. In that case, the issuer must satisfy itself that it complies with the applicable laws of each relevant jurisdiction.

## PART 2: EXEMPTIONS

### (1) DISTRIBUTION FROM NEW BRUNSWICK

The onus is on an issuer and its counsel to determine whether a distribution of securities to a person outside New Brunswick is made from the province, based on the facts and circumstances of each particular transaction. The existence of any of the following factors would generally indicate that the distribution is made from New Brunswick:

- (i) the issuer's mind and management is primarily located within New Brunswick. This may be indicated if, for example, the issuer's head office or the residences of the issuer's key officers and directors are located in the province;
- (ii) the business of the issuer is administered from, and the operations of the issuer are conducted in, New Brunswick; or
- (iii) acts, advertisements, solicitations, conduct or negotiations in furtherance of the distribution take place in New Brunswick (including any underwriting or investor relations activities).

With respect to the third factor above, the Financial and Consumer Services Commission does not consider that every act that is related to or incidental to a distribution is in furtherance of the distribution. For example, the Financial and Consumer Services Commission would not consider that the presence of a single director in New Brunswick participating in a conference call about a distribution nor the presence of the issuer's counsel or transfer agent in New Brunswick to be sufficient in themselves to make the distribution a distribution from New Brunswick. However, active advertising or solicitations being conducted from New Brunswick would be sufficient for the Financial and Consumer Services Commission to consider that the distribution was occurring in New Brunswick.

The above examples are indicative of the types of factors that an issuer should consider in determining whether it is making a distribution from New Brunswick. However, they should not be viewed as an exhaustive list.

Where an issuer makes a distribution from the province, it may rely on the general registration and prospectus exemptions in the *Securities Act* (New Brunswick). In certain

circumstances, an issuer may also rely on special exemptions provided under section 2.4, section 2.5 and section 2.6 of the Instrument.

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

## **(2) INDIRECT DISTRIBUTION INTO NEW BRUNSWICK**

The definition of "distribution" in the *Securities Act* (New Brunswick) includes "a transaction or series of transactions involving further purchases and sales 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 into New Brunswick may occur, for example, where an issuer distributes securities from outside of the province to a person outside the province and shortly thereafter that person, directly or indirectly, resells the securities into the province or through a market in the province. In that case, the distribution would not be completed when the person acquired the securities but would continue until the purchaser resold the securities into New Brunswick. If the issuer knows or could reasonably foresee that the securities will be resold in New Brunswick, the issuer would likely be considered to have made a distribution in the province, requiring compliance with the registration and prospectus requirements of the *Securities Act* (New Brunswick).

Where an issuer makes a distribution that would not be considered to be made from New Brunswick, 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 person outside the province is not subsequently resold into or through a market in the province in a manner that would be considered a distribution by the issuer.

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

- the majority of trading in the issuer's securities is in New Brunswick;
- the issuer is a reporting issuer in New Brunswick;
- a significant portion of the issuer's assets are located in New Brunswick;
- a significant portion of the issuer's revenues are derived from operations in New Brunswick;
- a significant portion of the issuer's security holders are in New Brunswick; and
- the issuer is incorporated or organized in New Brunswick.

Depending on the factors that are present, the issuer, underwriter and other

participants undertaking the distribution may be well advised to take steps to ensure that the securities remain outside New Brunswick for the period during which a domestic purchaser would be required to hold the security. These steps will, in the absence of evidence to the contrary, protect the issuer from a subsequent determination that it distributed in New Brunswick.

The steps and precautions that should be taken in connection with the distribution of securities to purchasers outside New Brunswick to ensure that the securities remain outside of New Brunswick will vary with the circumstances surrounding each distribution. Where the issuer's mind and management is located outside New Brunswick and the offering is being made solely in another jurisdiction, such as another province of Canada or the United States, that has comparable disclosure requirements for public offerings and equivalent or longer hold periods for private placements applicable to the offering, these additional steps may not need to be taken.

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

- (i) a restriction in the underwriting agreement against the underwriters selling the securities being offered to any New Brunswick resident;
- (ii) a similar restriction in the banking group or selling group agreements requiring banking group members or selling group members not to offer securities to New Brunswick residents;
- (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 New Brunswick and may not be offered and sold in New Brunswick, directly or indirectly, on behalf of the issuer;
- (iv) a restriction in the subscription agreement against any of the offered securities being acquired by a New Brunswick resident or by any person for subsequent resale, during the applicable hold period, to a New Brunswick resident;
- (v) an "all sold" certificate by the underwriters that they have not, to the best of their knowledge, sold any securities to New Brunswick residents;
- (vi) a statement provided in the confirmation slip sent by the underwriters to purchasers of the offered securities that it is the underwriters' understanding that the purchaser is not a resident of New Brunswick;
- (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 New Brunswick resident for the period during which a domestic purchaser would be required to hold the security; or

- (viii) a legend on the certificate representing the security stating that the security may not be traded in New Brunswick until the expiry of the period during which a domestic purchaser would be required to hold the security, except as permitted by the *Securities Act* (New Brunswick).