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## NEW BRUNSWICK SECURITIES COMMISSION LOCAL POLICY 72-601

### *DISTRIBUTIONS OF SECURITIES OUTSIDE NEW BRUNSWICK*

#### 1. **The Act**

The basic prospectus requirement is contained in subsection 71(1)(a) of the *Act*. It provides, in part, that no person shall trade in a security on the person's own account or on behalf of any other person where the trade would be a distribution of a security unless a preliminary prospectus and a prospectus have been filed with the Executive Director and the Executive Director has issued receipts for those prospectuses.

"trade" is defined in subsection 1(1) of the *Act* as follows:

"trade" includes

- (a) a sale or disposition of a security for valuable consideration or an attempt to sell or dispose of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include the purchase of a security or, except as provided in paragraph (d), a trade pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,  
...
- (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of the activities specified in paragraphs (a) to (d)."

“distribution” is defined in subsection 1(1) of the *Act* as follows

“distribution”, where used in relation to trading in securities, means

- (a) a trade in securities of an issuer that have not been previously issued,  
...
- (c) a trade in previously issued securities of an issuer from the holdings of a control person,” (*placement*)

A “distribution” therefore, includes a sale by an issuer of its previously unissued securities to a purchaser, whether or not such purchaser is an underwriter of the securities. While the sale by an issuer to an underwriter acting as a purchaser is exempt from the prospectus requirements of the *Act* by section 2.33 of National Instrument 45-106 *Prospectus and Registration Exemptions*, the sale by the underwriter of such securities is a distribution under section 2.13 of NI 45-102 *Resale of Securities*.

“underwriter” is defined in subsection 1(1) of the *Act* as follows

“underwriter”, except as otherwise prescribed by regulation, means a person who, as principal, agrees to purchase securities with a view to distribution or who, as agent, offers for sale or sells securities in connection with a distribution and includes a person who has a direct or indirect participation in any such distribution, but does not include...” (*preneur ferme*)

## **2. Statement of Principle**

A distribution of securities outside New Brunswick by New Brunswick or non-New Brunswick issuers might also be considered to be a distribution of securities in New Brunswick requiring compliance with the prospectus provisions of the *Act* or an exemption from the *Act*.

However, where reasonable steps are taken by the issuer, underwriters and other participants (the Participants) effecting the distribution to ensure that such securities come to rest outside New Brunswick, the Commission takes the view that a prospectus is not required under the *Act*, nor is an exemption from the prospectus requirements necessary. Reasonable precautions and restrictions should be implemented by the Participants to ensure that the securities are not distributed, or redistributed, into New Brunswick or to New Brunswick residents and those securities come to rest outside New Brunswick. Such precautions and restrictions should be designed to ensure that the entire distribution process results in the securities being held by or for the

benefit of non-residents, as opposed to intermediaries in the distribution chain holding securities for resale to New Brunswick residents.

### **3. Operation of the Principle**

The number and nature of the restrictions that should be implemented, and precautions taken, in connection with the distribution of securities outside New Brunswick to ensure that such securities come to rest outside New Brunswick, will vary with the circumstances surrounding each distribution.

In some financings, some of the following restrictions or precautions might be advisable:

1. A restriction in the underwriting agreement against the underwriters selling the securities being offered to any New Brunswick resident;
2. 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;
3. An "all-sold" certificate by the underwriters that they have not, to the best of their knowledge, sold any securities to New Brunswick residents;
4. A statement provided in the confirmation slip sent by underwriters to purchasers of offered securities that it is the underwriters understanding that the purchaser is not a resident of New Brunswick; or
5. 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 a period of time (eg 90 days) from the date of closing.

In Eurobond or Eurodollar financings sufficient precaution will generally have been taken where:

1. the offering circular contains a legend stating that the securities are not qualified for sale in New Brunswick or Canada and may not be offered or sold directly or indirectly in New Brunswick or Canada;
2. the underwriters contractually agree that they will observe this restriction regarding the prohibition of offering in New Brunswick or Canada; and
3. the securities to be distributed are initially issued in temporary form exchangeable for definitive securities 90 days after completion of the

distribution upon certification that the definitive securities are not beneficially owned by New Brunswick or Canadian residents.

In other cases other factors will be relevant, including

- the class and nature of the securities being distributed,
- the attractiveness to New Brunswick investors of such securities,
- the likelihood that, absent such restrictions or precautions, the securities would come to rest in New Brunswick,
- whether a market for the class of securities being distributed or any other securities of the issuer already exist in New Brunswick,
- the likelihood of the development in the future of a market in New Brunswick for the securities being distributed,
- the way in which the distribution is proposed to be effected,
- the relationship between the capital markets of New Brunswick and the jurisdictions in which the securities are being distributed and the ease of access of one to the other,
- whether or not the underwriters and other participants in the distribution are, or are affiliated with, investment dealers that conduct substantial activities in New Brunswick, and
- the presence of the issuer in New Brunswick (whether through the conduct of business in New Brunswick, a number of shareholders resident in New Brunswick, the issuer being closely followed by New Brunswick investors or otherwise).

In case of private placements outside New Brunswick, where hold periods would have been applicable if the placement had taken place in New Brunswick, the Commission takes the view that the restrictions made, or precautions taken to ensure that the securities come to rest outside New Brunswick need not be effective beyond the time for the hold period which would have been applied had the placement been made in New Brunswick.

The onus is on the issuer, underwriters and other participants in the distribution to determine the number and nature of the restrictions to be implemented and precautions to be taken.

#### **4. New Brunswick Registrants**

Each New Brunswick registrant has the duty to take reasonable steps to ensure that trades in securities effected by or through such registrant do not involve trades of securities into New Brunswick or to New Brunswick residents without compliance with the prospectus requirements of the *Act* or in reliance on an exemption from the *Act*. More particularly, a registrant who sells, on behalf of one of his clients, securities in New Brunswick or purchases securities outside New Brunswick must take reasonable steps to ensure that the transaction does not involve the distribution of securities not qualified in New Brunswick coming to rest in New Brunswick or with New Brunswick residents.

All New Brunswick registrants should establish standard procedures to prevent unlawful distributions of securities into New Brunswick and to ensure that the registrant meets its continuing responsibility to know both its clients and the securities being sold by or to its clients.

**5. The Integrity of the New Brunswick Capital Markets and the Jurisdiction of the Commission**

The Commission will not hesitate to intervene, to the extent of its powers, in distributions of securities outside New Brunswick which negatively impact on the integrity of the New Brunswick capital markets.

Where the Commission becomes aware of distributions abroad by New Brunswick issuers that bring the reputation of New Brunswick's capital markets into disrepute, the Commission is of the view that it has the jurisdiction, for the due administration of the *Act* and in order to preserve the integrity of the New Brunswick capital markets, to exercise its cease trade powers or to take other appropriate action against issuers, underwriters and other participants so distributing securities abroad.