# CMRA Policy 71-601 Distribution of Securities to Persons Outside CMR Jurisdictions

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### PART 1 INTRODUCTION AND DEFINITIONS

### 1. Introduction

### **Purpose of this Policy**

This Policy provides guidance regarding the application of the prospectus requirement where an issuer distributes securities to a person outside of the CMR Jurisdictions.

#### 2. Definitions

Terms used in this Policy have the meaning given to them in the Act, CMRA Regulation 11-501 *Definitions, Procedure, Civil Liability and Related Matters,* or National Instrument 14-101 *Definitions.* 

### PART 2 DISTRIBUTIONS OF SECURITIES TO PERSONS OUTSIDE CMR JURISDICTIONS

A distribution of securities by an issuer with connections to a CMR Jurisdiction may, depending on the facts and circumstances surrounding the transaction, be subject to the prospectus requirement even if the initial investor is not located in a CMR Jurisdiction.

There are two primary circumstances where an issuer must comply with the prospectus requirement in making a distribution to a person outside of the CMR Jurisdictions. These are:

- 1. A Distribution from a CMR Jurisdiction Where an issuer distributes securities from a CMR Jurisdiction, it must comply with the prospectus requirement or rely on an exemption from that requirement; and
- 2. An Indirect Distribution into a CMR Jurisdiction Where an issuer located outside of the CMR Jurisdictions distributes securities to a person outside those jurisdictions and the securities are resold into a CMR Jurisdiction, or through a market in a CMR Jurisdiction, in a manner that indicates the securities did not come to rest outside the CMR Jurisdictions, the resale will be considered a continuation of the distribution by the issuer. In these circumstances, the issuer must comply with the prospectus requirement or rely on an exemption from that requirement.

Where a distribution is made under a prospectus exemption to an initial investor, either within or outside of a CMR Jurisdiction, any subsequent trade of those securities in a CMR Jurisdiction will be deemed a distribution subject to the prospectus requirement. In these circumstances, the resale requirements in National Instrument 45-102 *Resale of Securities*, including hold periods, must be complied with, unless a prospectus exemption is available.

As noted in section 1.3 of the Companion Policy to National Instrument 45-106 *Prospectus 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.

### 1. Distribution from a CMR Jurisdiction

The onus is on an issuer and its counsel to determine whether a distribution of securities to a person outside of the CMR Jurisdictions is made from a CMR Jurisdiction, 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 a CMR Jurisdiction:

- (a) the issuer's mind and management is primarily located within a CMR Jurisdiction. 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 a CMR Jurisdiction;
- (b) the business of the issuer is administered from, and the operations of the issuer are conducted in, a CMR Jurisdiction;
- (c) acts, advertisements, solicitations, conduct or negotiations in furtherance of the distribution take place in a CMR Jurisdiction (including any underwriting or investor relations activities).

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

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

Where an issuer makes a distribution from a CMR Jurisdiction, it may rely on the general prospectus exemptions under the Act. In certain circumstances, an issuer may rely on exemptions provided under CMRA Regulation 71-501 *International Issuers and Securities Transactions with Persons Outside the CMR Jurisdictions*.

Securities distributed from a CMR Jurisdiction under a prospectus exemption may be resold outside of the CMR Jurisdictions during the hold period. However, if a holder resells the securities to a person in a CMR Jurisdiction or through a market in a CMR Jurisdiction 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 a CMR Jurisdiction

The definition of "distribution" in the Act includes "a transaction or series of transactions involving a purchase and sale or a repurchase and resale 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 a CMR Jurisdiction may occur, for example, where an issuer distributes securities from outside of the CMR Jurisdictions to a person outside of those jurisdictions and shortly thereafter that person, directly or indirectly, resells the securities into a CMR Jurisdiction or through a market in a CMR Jurisdiction. 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 the CMR Jurisdiction. If the issuer knows or could reasonably foresee that the securities will be resold in a CMR Jurisdiction, the issuer would likely be considered to have made a distribution in that CMR Jurisdiction, requiring compliance with the prospectus requirement.

Where an issuer makes a distribution that would not be considered to be made from a CMR Jurisdiction, but the issuer has a significant connection with a CMR Jurisdiction 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 CMR Jurisdictions is not subsequently resold into or through a market in a CMR Jurisdiction 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 a CMR Jurisdiction has a significant connection with the CMR Jurisdiction or its capital markets. These include

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

Depending on the factors that are present, the issuer, underwriter and other participants undertaking a distribution that would not be considered to be made from a CMR Jurisdiction may be well advised to take steps to ensure that the securities remain outside of CMR Jurisdictions for the period during which a domestic purchaser of securities of a reporting issuer would be required to hold the security (i.e., 4 months).

These steps will, in the absence of evidence to the contrary, help protect the issuer from a subsequent determination that it distributed securities in a CMR Jurisdiction.

The steps and precautions that should be taken in connection with the distribution of securities to purchasers outside of CMR Jurisdictions to ensure that the securities remain outside of CMR Jurisdictions will vary with the circumstances surrounding each distribution. Where the issuer's

mind and management is located outside CMR Jurisdictions 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. Section 10 [Filing of material filed in other jurisdictions] of CMRA Regulation 81-501 Investment Funds requires that an investment fund that is a reporting issuer file with the Chief Regulator any documents filed with a securities regulator outside of a CMR Jurisdiction or with an exchange wherever situate where it contains information that is not already filed with the Chief Regulator and is material to investors. Section 11.1 of National Instrument 51-102 Continuous Disclosure Obligations requires a reporting issuer to file a copy of any disclosure material that it sends to its securityholders; in the case of an SEC issuer, any information filed with the Securities and Exchange Commission under the 1934 Act that is not already filed in a jurisdiction; and any disclosure material that it files with another provincial or territorial securities regulatory authority or regulator other than in connection with a distribution. This would not include an offering document filed with another securities regulatory authority in Canada or with the Securities and Exchange Commission or state regulators in the United States.

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:

- (a) a restriction in the underwriting agreement against the underwriters selling the securities being offered to any resident of a CMR Jurisdiction;
- a similar restriction in the banking group or selling group agreements requiring banking group members or selling group members not to offer securities to residents of any CMR Jurisdictions;
- (c) 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 CMR Jurisdictions and may not be offered and sold in CMR Jurisdictions, directly or indirectly, on behalf of the issuer;
- a restriction in the subscription agreement against any of the offered securities being acquired by a resident of a CMR Jurisdiction or by any person for subsequent resale, during the applicable hold period, to a resident of a CMR Jurisdiction;
- (e) an "all sold" certificate by the underwriters that they have not, to the best of their knowledge, sold any securities to residents of any CMR Jurisdiction;
- (f) 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 a CMR Jurisdiction;
- (g) 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 resident of a CMR Jurisdiction for the period during which a domestic purchaser would be required to hold the security;
- (h) a legend on the certificate representing the security stating that the security may not be traded in a CMR Jurisdiction until the expiry of the period during which a

domestic purchaser of securities of a reporting issuer would be required to hold the security (i.e., 4 months), except as permitted by the Act and Regulations made under the Act.

### 3. Distribution by person other than issuer

Although this Policy refers throughout to a distribution of securities by an "issuer", the principles expressed in this Policy apply to any other distribution such as when the securityholder is a control person of the issuer or the first trade by the securityholder is deemed to be a distribution of securities by National Instrument 45-102 *Resale of Securities* or other applicable securities laws.

### 4. Registration requirement

If there is a distribution by an issuer from a CMR Jurisdiction to a purchaser outside of the CMR Jurisdiction, the issuer or its selling agents may be subject to the registration requirement in the CMR Jurisdiction. Refer to section 1.3 of the Companion Policy to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations for the factors used to determine whether trading or advising activity triggers the registration requirement.