

Autorité des marchés financiers Notice relating to *Regulation 45-102 respecting Resale of Securities*

1. Introduction

On June 21, 2016, the Autorité des marchés financiers (the “AMF” or “we”) issued two blanket orders granting exemptive relief to certain Canadian institutional investors for the resale of securities outside of Canada if certain conditions are met. The effective date is June 30, 2016.

A number of Canadian institutional investors raised concerns about the uncertainty that exists with respect to the resale of securities of foreign issuers outside of Canada. They indicated that the resale provisions in *Regulation 45-102 respecting the Resale of Securities* (“Regulation 45-102”) may be a serious impediment to participating in offerings of securities in a foreign jurisdiction. They refer to the tradability of a security as an important and, in many circumstances, a decisive factor in their investment decision.

The resale provisions in Regulation 45-102 are a concern for certain Canadian institutional investors because resale provisions applicable to foreign issuers may vary depending on particular circumstances. Most foreign issuers are not reporting issuers in Canada.

In this notice, we set out the concerns raised by Canadian institutional investors and our policy rationale in addressing these concerns. In addition, we set out our approach for resale provisions applicable to Canadian institutional investors that we believe would provide needed certainty to market participants in their investment decisions.

Our goal is to provide transparency to the market with respect to our views on this matter, and in certain circumstances, to promote a level playing field for certain Canadian institutional investors with foreign investors.

1.1 Background

Several Canadian institutional investors have submitted to us their concerns as to the appropriateness of the resale provisions in Regulation 45-102 in the following two circumstances.

1.1.1 Prospectus offerings in a foreign jurisdiction by a Canadian issuer

Canadian issuers raise capital in foreign markets for many reasons including greater capital raising opportunities, increased liquidity for their securities, greater market coverage by analysts, and market exposure for their products and services.

Some Canadian issuers conduct public offerings in foreign markets and choose not to contemporaneously offer their securities to the public in Canada. Concurrently with a foreign public offering, an issuer may offer securities to Canadian institutional investors generally on a prospectus exempt basis at the same financial consideration as the public offering.

1.1.2 Public or exempt offerings in a foreign jurisdiction by a foreign issuer

In addition to participating in foreign public offerings, it appears that Canadian institutional investors are increasingly involved in exempt offerings by foreign issuers. Our understanding is that institutional investors generally acquire foreign securities to improve potential returns for their stakeholders, reduce risk exposure, diversify their portfolios and generally benefit from global market growth.

2. Resale provisions in Regulation 45-102

2.1 Policy rationale

The securities regulatory approach to distributions of securities operates on the basis of a “closed system” which ensures that all distributions of securities must be made with a prospectus or an exemption from the prospectus requirement. Securities that are distributed using prospectus exemptions are generally subject to resale restrictions.

The objective of the “closed system” is to prevent the free trading of securities for which there is no disclosure record. Publicly available information on the issuer and its securities is essential to enable an investor to make an informed investment decision.

A security holder may continue to trade a security within the exempt market by relying on a further exemption from the prospectus requirement.

The resale provisions in Regulation 45-102 require that an issuer be a reporting issuer for 4 months before securities can be freely traded. Without this requirement, securities issued under a prospectus exemption would be resold in the public market with little or no disclosure to the public about the issuer.

The resale provisions also include a requirement to hold securities for a specified period of time (the “restricted period”). The restricted period is meant to allow sufficient time for the thorough dissemination and absorption in the marketplace of information about the issuer and the securities distributed under a prospectus exemption, and assist those purchasing in the secondary market.

With a restricted period, securities cannot be sold other than pursuant to a further prospectus exemption until 4 months have elapsed since the distribution date. The restricted period may be indefinite if the issuer is not a reporting issuer.

Where it is determined that information in Canada about an issuer and its securities is not a concern, the resale provisions in section 2.14 of Regulation 45-102 allow the

resale of the issuer's securities without the reporting issuer and restricted period requirements.

Section 2.14 provides a prospectus exemption for the resale of securities on an exchange, or a market, outside of Canada or to a person outside of Canada where the issuer is not a reporting issuer in any jurisdiction of Canada, and residents of Canada own less than 10% of the outstanding securities of the issuer and represent less than 10% of the total number of security holders (the "maximum ownership conditions").

The section 2.14 exemption is premised on the assumption that there is little or no likelihood of a market for the securities to develop in Canada given that the issuer does not have a significant connection to Canada. This is supported by the maximum ownership conditions to the exemption.

2.2 Concerns and analysis

Certain Canadian institutional investors raised concerns as to the appropriateness of resale provisions in circumstances where the securities are distributed primarily in a foreign jurisdiction and they are solicited by an issuer (or its underwriters) to participate in the offering generally pursuant to a prospectus exemption in Canada.

They submitted that section 2.14 of Regulation 45-102 is often not available to them because the maximum ownership conditions are not met.

They also submitted that, in the circumstance where an issuer is conducting a contemporaneous public offering in a foreign jurisdiction, the resale provisions in section 2.5 of Regulation 45-102 should not apply as the provisions create for them an unfair disadvantage when compared to foreign investors who can freely trade their securities.

We considered whether the policy rationale for imposing the restricted period and reporting issuer requirements in Regulation 45-102 should apply in the following two circumstances put forward by these Canadian institutional investors:

- (1) a Canadian institutional investor purchases securities of a Canadian issuer under a prospectus exemption in Canada and the securities are issued under a prospectus in a foreign jurisdiction;
- (2) a Canadian institutional investor acquires securities of a foreign issuer under a prospectus exemption in Canada.

2.2.1 Prospectus offerings in a foreign jurisdiction by a Canadian issuer

A Canadian issuer's decision not to offer securities in Canada by way of a prospectus but to issue them on an exempt private placement basis to Canadian institutional investors is a business decision for the issuer.

If a Canadian institutional investor acquires securities of a Canadian issuer pursuant to a prospectus exemption at the same financial consideration as investors who purchase the same securities under a prospectus in a jurisdiction outside of Canada, it is questionable whether the Canadian institutional investor's resale conditions should be different from those of prospectus investors.

Restricted period requirement

The securities acquired by foreign investors are freely tradable in a foreign jurisdiction because they were acquired under a prospectus. If section 2.14 applies, Canadian institutional investors could resell their securities in the foreign jurisdiction.

However, as mentioned above, there may be circumstances where a restricted period (4 months or indefinite) would apply.

As a result, certain Canadian institutional investors would be at a disadvantage compared to foreign investors in a foreign public offering of a Canadian issuer. Although the securities were acquired at the same financial consideration as the prospectus offering in a foreign jurisdiction and not at a discount, these Canadian institutional investors, unlike the foreign investors, may not be able to immediately resell the securities on a foreign market.

We are concerned with the resulting unfair treatment for certain Canadian institutional investors.

Reporting issuer requirement

The other prong of the resale provisions in Regulation 45-102 is the reporting issuer requirement. Securities acquired under a prospectus exemption in Canada trade within the exempt market in Canada, and can only trade outside the exempt market if a prospectus is filed in Canada for the resale of securities or if the issuer is a reporting issuer in Canada.

The reporting issuer status in Canada ensures that there is sufficient publicly available information about an issuer and its securities for an investor in the Canadian market to make an informed investment decision. The reporting issuer requirement is based on the premise that there is a likelihood that a market for the securities of the issuer may develop in Canada.

As criteria for determining whether there may be a likelihood for a market in Canada, we consider factors relating to whether the issuer has a presence in Canada. In our view, an issuer incorporated or organized under the laws of Canada, or a jurisdiction of Canada, has a presence in Canada and this suggests that a market may likely develop in Canada.

An issuer can file a non-offering prospectus to become a reporting issuer.

2.2.2 Public or exempt offerings by a foreign issuer

Canadian institutional investors acquire securities of foreign issuers distributed under prospectus exemptions in Canada. In these circumstances, an analysis of whether the foreign issuer has a presence in Canada is key.

If there is no presence in Canada, there is little or no likelihood that a market may develop in Canada and, in line with the exemption in section 2.14 of Regulation 45-102, the reporting issuer and restricted period requirements may not be warranted.

As criteria for determining whether the issuer has a presence in Canada, we would consider as relevant factors, the location of its head office, mind and management, assets and operations, and the location of its security holders.

3. Current exemptions Available

3.1 Section 12 of the *Securities Act (Québec)*

We received applications from certain Canadian institutional investors in Québec for an exemption from the prospectus requirement for the resale of securities outside of Canada. Section 12 of the *Securities Act* requires a person intending to make a distribution of securities from Québec to persons established outside of Québec to prepare a prospectus and obtain a receipt from the AMF. An issuer does not have to prepare a prospectus and obtain a receipt if the AMF agrees or does not object after review of the information required to be filed with the AMF.

If an institutional investor wishes to resell the securities of a foreign issuer, or of a Canadian issuer conducting a concurrent public offering of securities in a foreign jurisdiction on conditions other than provided in Regulation 45-102, an application for an exemption must be filed with the AMF. The approach discussed below is intended to reflect as much as possible exemptive relief granted to these Canadian institutional investors in these circumstances.

We recognize that the application process does not provide the timing and deal certainty sought by market participants. For that reason, we are granting exemptive relief by issuing two blanket orders.

3.2 Section 2.14 of Regulation 45-102

Over the years, the Canadian Securities Administrators (the “CSA”) received several applications for a prospectus exemption for the resale of securities of a foreign non-reporting issuer where the maximum ownership conditions set out in section 2.14 of Regulation 45-102 were not met.

Although these exemptions were initially granted where the thresholds were barely exceeded, the CSA have granted relief in situations where the maximum ownership conditions were largely exceeded.

4. CSA initiative

The CSA have decided to study the current resale regime for prospectus-exempt securities under Regulation 45-102 to determine the extent to which the resale provisions continue to be relevant in today's markets and to assess the market impact of alternative regulatory approaches.

5. Exemptive relief granted

To immediately respond to the concerns raised by certain market participants and having concluded that it is not prejudicial to the public interest to do so, we are granting exemptive relief to certain Canadian institutional investors for the resale of securities outside of Canada if certain conditions are met.

The two blanket orders are available to those Canadian institutional investors that generally filed applications for exemptive relief for these types of distributions.

The relief applies to certain Canadian institutional investors only and not to all accredited investors. Our analysis of the issues was based on the concerns raised and the experiences of these Canadian institutional investors.

These Canadian institutional investors have the experience, resources and incentive to gather and analyze the information about an issuer available in the foreign jurisdiction in deciding whether to acquire or sell its securities.

We will consider extending the relief to other groups of investors as more analysis of the issues is conducted.

The exemption from the prospectus requirement would allow a Canadian institutional investor to resell securities acquired pursuant to a prospectus exemption, in the following circumstances:

- (1) The securities of a Canadian issuer were distributed under a prospectus in a foreign jurisdiction and the Canadian institutional investor acquired the securities at the same financial consideration as investors under the prospectus offering.

The following conditions apply:

- (a) the issuer is a reporting issuer in a jurisdiction of Canada at the time of resale;
- (b) the securities can only be sold through an exchange, or a market, outside of Canada, or to a person outside of Canada;
- (c) if the Canadian institutional investor is an insider of the issuer, the Canadian institutional investor has no reasonable grounds to believe that the issuer is in default of securities legislation.

- (2) The securities of a foreign issuer were distributed to a Canadian institutional investor.

The following conditions apply:

- (a) the issuer is not a reporting issuer in any jurisdiction of Canada at the time of resale;
- (b) the securities can only be sold through an exchange, or a market, outside of Canada, or to a person outside of Canada.

For the purposes of the exemptions, a Canadian institutional investor is defined as any of the following:

- (a) a Canadian financial institution or a Schedule III bank;
- (b) the Business Development Bank of Canada incorporated under the Business Development Bank of Canada Act (S.C., 1995, chapter 28);
- (c) a subsidiary of any person referred to in paragraph (a) or (b), if the person owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of the subsidiary;
- (d) a pension fund that is regulated by either the federal Office of the Superintendent of Financial Institutions or a pension commission or similar regulatory authority of a jurisdiction of Canada or a wholly-owned subsidiary of such a pension fund;
- (e) the Government of Canada or a jurisdiction of Canada, or any Crown corporation, agency or wholly-owned entity of the Government of Canada or a jurisdiction of Canada;
- (f) a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'île de Montréal or an intermunicipal management board in Québec;
- (g) an investment fund if one or both of the following apply:
 - (i) the fund is managed by a person registered as an investment fund manager under the securities legislation of a jurisdiction of Canada;
 - (ii) the fund is advised by a person authorized to act as an adviser under the securities legislation of a jurisdiction of Canada.

A foreign issuer is an issuer that is not incorporated or organized under the laws of Canada or a jurisdiction of Canada, unless (a) voting securities carrying more than 50% of the votes for the election of directors are held by persons whose last address as shown on the books of the issuer is in Canada, and (b) any one or more of the following (i) the majority of senior officers or directors are citizens or residents of Canada, (ii) more than 50% of assets are located in Canada or (iii) the business is administered principally in Canada.

A Canadian issuer is an issuer incorporated or organized under the laws of Canada, or a jurisdiction of Canada, or is not a foreign issuer.

Questions

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June 30, 2016

DECISION NO. 2016-PDG-0093

**Blanket decision on exemption from requirement to prepare prospectus for resale
in foreign jurisdictions of securities of Canadian issuers**

Whereas under section 12 of the *Securities Act*, CQLR, c. V-1.1 (the “Act”), every person intending to make a distribution of securities from Québec to persons established outside Québec is required to prepare a prospectus and obtain a receipt from the AMF (the “prospectus requirement”);

Whereas section 2.14 of Regulation 45-102 respecting Resale of Securities, CQLR, c. V-1.1, r. 20 (“Regulation 45-102”), concerns the resale of securities outside Canada;

Whereas representations have been made by certain large Canadian institutional investors that in certain circumstances the requirements under section 2.14 of Regulation 45-102 are detrimental to certain investment strategies;

Whereas the *Autorité des marchés financiers* (the “Authority”) intends to facilitate and permit the resale in foreign jurisdictions by certain large Canadian institutional investors included in any of the categories referred to in paragraphs (a), (b), (c), (e), (g), (i) or (l) of the definition of “permitted client” in section 1.1 of Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations, CQLR, c. V-1.1, r. 10 (individually, a “permitted client” and, collectively, the “permitted clients”), of securities of Canadian issuers offered by way of prospectus in foreign jurisdictions and acquired in Québec by the permitted client under a prospectus exemption;

Whereas a Canadian issuer is an issuer incorporated or organized under the laws of Canada or a jurisdiction of Canada, or is not a “foreign issuer” within the meaning of the definition in National Instrument 71-101, The Multijurisdictional Disclosure System, CQLR, c. V-1.1, r. 36;

Whereas the Canadian issuer has decided to offer securities by way of prospectus solely in a market outside Canada;

Whereas the securities of the Canadian issuer are traded only outside Canada;

Whereas the Authority therefore intends to permit the resale of such securities, subject to certain conditions, in order to promote a level playing field between permitted clients and foreign investors who resell the same issuers’ securities through their own markets;

Whereas permitted clients have made representations that the trades they intend to make from Canada will be carried out exclusively through an exchange, or a market, outside Canada, or with a person outside Canada;

Whereas the permitted clients referred to in this decision are sophisticated entities that do not require the same level of protection under the Act as the investing public;

Whereas it is necessary to grant certain issuers an exemption from the prospectus requirement, subject to certain conditions;

Whereas the Authority may, pursuant to section 263 of the Act, on such conditions as it may determine, exempt a person or a group of persons from any or all of the requirements under Titles II to VI of the Act or the regulations where it considers the exemption not to be detrimental to the protection of investors;

Whereas the *Direction du financement des sociétés* has conducted an analysis and the Superintendent, Securities Markets recommends that the exemption referred to in this decision be granted on the grounds that it is not detrimental to the protection of investors;

Accordingly:

The Authority exempts permitted clients from the requirement to prepare a prospectus for the resale in foreign jurisdictions of securities of Canadian issuers offered under a prospectus in a foreign jurisdiction and acquired in Québec under a statutory, regulatory or discretionary exemption, subject to the following conditions:

1. The Canadian issuer of the securities is a reporting issuer in a jurisdiction of Canada on the date the securities are resold;
2. The permitted client has acquired the securities at the same financial consideration as the foreign investors under the prospectus;
3. Where the permitted client is an insider of the Canadian issuer, the permitted client has no reasonable grounds to believe that the issuer is in default of securities legislation;
4. The securities are resold through an exchange, or a market, outside Canada, or to a person outside Canada.

This decision will come into effect on June 30, 2016.

Signed on June 21, 2016.

Louis Morisset
President and Chief Executive Officer

DECISION NO. 2016-PDG-0094

**Blanket decision on exemption from requirement to prepare prospectus for resale
in foreign jurisdictions of securities of foreign issuers**

Whereas under section 12 of the *Securities Act*, CQLR, c. V-1.1 (the “Act”) every person intending to make a distribution of securities from Québec to persons established outside Québec is required to prepare a prospectus and obtain a receipt from the AMF (the “prospectus requirement”);

Whereas section 2.14 of Regulation 45-102 respecting Resale of Securities, CQLR, c. V-1.1, r. 20 (“Regulation 45-102”), concerns the resale of securities outside Canada;

Whereas representations have been made by certain large Canadian institutional investors that in certain circumstances the requirements under section 2.14 of Regulation 45-102 are detrimental to certain investment strategies;

Whereas the *Autorité des marchés financiers* (the “Authority”) intends to facilitate and permit the resale in foreign jurisdictions by certain large Canadian institutional investors included in any of the categories referred to in paragraphs (a), (b), (c), (e), (g), (i) or (l) of the definition of “permitted client” in section 1.1 of Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations, CQLR, c. V-1.1, r. 10 (individually, a “permitted client” and, collectively, the “permitted clients”), of securities of foreign issuers acquired in Québec under a prospectus exemption;

Whereas permitted clients have made representations that the trades they intend to make from Canada will be carried out exclusively through an exchange, or a market, outside Canada, or with a person outside Canada;

Whereas the foreign issuer is a “foreign issuer” within the meaning of National Instrument 71-101, The Multijurisdictional Disclosure System, CQLR, c. V-1.1, r. 36 (“NI 71-101”), and such foreign issuer is not a reporting issuer in a Canadian jurisdiction;

Whereas the permitted clients referred to in this decision are sophisticated entities that do not require the same level of protection under the Act as the investing public;

Whereas it is necessary to grant an exemption from the prospectus requirement, subject to certain conditions;

Whereas the Authority may, pursuant to section 263 of the Act, on such conditions as it may determine, exempt a person or a group of persons from any or all of the requirements under Titles II to VI of the Act or the regulations where it considers the exemption not to be detrimental to the protection of investors;

Whereas the *Direction du financement des sociétés* has conducted an analysis and the Superintendent, Securities Markets recommends that the exemption referred to in this decision be granted on the grounds that it is not detrimental to the protection of investors;

Accordingly:

The Authority exempts permitted clients from the requirement to prepare a prospectus for the resale of securities of a “foreign issuer” within the meaning of the definition under NI 71-101, distributed from a foreign jurisdiction and acquired in Québec under a statutory, regulatory or discretionary exemption, subject to the following conditions:

1. The issuer of the securities is not a reporting issuer in a jurisdiction of Canada on the date the securities are resold;
2. The securities are resold through an exchange, or a market, outside Canada, or to a person outside Canada;

This decision will come into effect on June 30, 2016.

Signed on June 21, 2016.

Louis Morisset
President and Chief Executive Officer