

Offshore Distributions: New OSC Rule

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The Ontario Securities Commission's new rule governing offshore distributions will provide substantially greater certainty to offering participants in capital raising transactions outside of Canada. OSC Rule 72-503 Distributions Outside Canada will become effective on March 31.

The Four New Exemptions

OSC Rule 72-503 contains four new prospectus exemptions for offerings outside Canada, summarized below. Exemptions are also provided from the dealer and underwriter registration requirements for foreign dealers participating in these offshore offerings.

1. Foreign Qualified Offering

A prospectus exemption is available for offshore public offerings that are either

- registered with the SEC, or
- qualified by a prospectus or the equivalent in a specified foreign jurisdiction.¹

The securities are freely tradable (i.e., there are no resale restrictions controlling sales back into Canada).

2. Concurrent Ontario Prospectus Offering

This prospectus exemption is available for the foreign tranche of a cross-border offering, where the concurrent domestic tranche is qualified by a prospectus in Ontario. An example is a Canadian prospectus offering combined with a U.S. private placement under Rule 144A. When relying on this exemption, the prospectus should clearly state that it does not qualify sales to investors outside Canada. In respect of the foreign sales, the issuer (and any selling securityholders) must materially comply with applicable foreign disclosure requirements, unless exempt therefrom. The securities issued in the foreign tranche are freely tradable back into Canada.

3. Reporting Issuer Conducting a Foreign Offering

Reporting issuers may sell securities anywhere outside Canada without a prospectus, and the securities are freely tradable back into Canada. This exemption is not conditional on filing an SEC registration statement or other foreign prospectus-equivalent. The issuer must materially comply with any applicable foreign disclosure requirements, unless exempt therefrom.

4. Foreign Offering by Non-Reporting Issuer

This exemption permits private companies (i.e., issuers that are not reporting issuers in any Canadian jurisdiction) to sell securities anywhere outside Canada, and the exemption is not conditional on filing an SEC registration statement or other foreign prospectus-equivalent. The issuer must materially comply with any applicable foreign disclosure requirements, unless exempt therefrom. Securities sold under this exemption are not freely tradable back into Canada. A legend is required on the securities unless and until the issuer becomes a reporting issuer in Canada and four months have elapsed thereafter.

Reporting Requirements

A Report of Distributions Outside Canada will only be required for transactions done in reliance on the third or fourth prospectus exemptions described above. The report must be filed electronically on Form 72-503F and must be filed within 10 days of the distribution (by non-investment funds) or within 30 days of calendar year end (by investment funds). The report requires basic information about the type and terms of the securities distributed and the dealers, agents and/or underwriters. No information about the purchasers is required.

Status of Interpretation Note 1

The prospectus exemptions described above are safe harbors meant to provide certainty for offering participants when selling securities outside Canada. These transactions historically were governed by Interpretation Note 1—now being repealed—which set forth qualitative factors for determining whether an Ontario prospectus was required, such as the issuer's connection to Ontario and the likelihood of the securities coming to rest outside Canada. The Companion Policy of the new rule indicates that these factors are still relevant—but only for offshore transactions that fail to qualify under one of the exemptions above. In those cases, it is still open to the issuer and underwriters to assess from first principles whether the offshore offering is subject to Ontario securities laws.

Cross-Canada Disharmony

Rule 72-503 is an Ontario rule. Unfortunately, the regulation of offshore offerings is an area of disharmony across Canada so issuers and underwriters still have to consider, based on the facts and circumstances, whether an offshore offering is subject to, or exempt from, the prospectus requirements of other Canadian jurisdictions.

¹ The specified foreign jurisdictions are Australia, France, Germany, Hong Kong, Italy, Japan, Mexico, the Netherlands, New Zealand, Singapore, South Africa, Spain, Sweden, Switzerland, the U.K. and any other member state of the E.U. The OSC has stated that it will consider applications for exemptive relief in respect of distributions in other jurisdictions.

To discuss these issues, please contact the author(s).

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