Annex B

Summary of Comments and CSA Responses

The following is a summary of comments and CSA responses in respect of the proposed amendments to section 2.14 of National Instrument 45-102 *Resale of Securities* (NI 45-102) and proposed changes to Companion Policy 45-102 to National Instrument 45-102 *Resale of Securities* (45-102CP) (the "proposed amendments") and proposed consequential amendments published on June 29, 2017.

PART I. GENERAL COMMENTS

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1.	**General support for the proposed amendments**	We received eight comment letters. Five commenters generally support the proposed amendments. Six commenters support the CSA proposal to remove the ownership conditions and the effort to simplify the criteria and process relating to financings undertaken by foreign issuers. The following are examples of the comments received: • Ownership conditions are no longer appropriate and are not the best indicators of whether there is minimal connection to Canada. The ownership conditions create uncertainty, complexity and cost for Canadian investors in determining whether the conditions are met. • The current exemption is impractical because not all foreign issuers are willing to provide assurances with respect of the ownership conditions, leading to a loss of investment opportunities. • The proposed amendments add predictability to the process and much-needed certainty to Canadian investors and reduce	We acknowledge the comments of support and thank commenters.

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		impediments to participating in foreign offerings. • The proposed amendments will assist Canadian pension fund managers to achieve diversification through investments in foreign securities. The proposed amendments will also help them become increasingly competitive in foreign markets, allow them to better fulfill their mandates and in turn contribute to the wellbeing of Canadian pensioners. • The proposed amendments strike the correct balance between protecting Canadian investors and facilitating fair and efficient capital markets. One commenter only commented on specific aspects of the proposed amendments.	
2.	**General support for initiative to reform the existing exemption but not for the proposed approach** *Suggested alternatives*	Two commenters are supportive of the initiative to reform the existing resale exemption, but generally oppose the proposed amendments and suggest alternative approaches. One of these commenters submits that while it appreciates the objective the CSA is trying to achieve, current section 2.14 and proposed section 2.14.1 establish arbitrary thresholds that fail to identify circumstances where the prospectus requirement should not be applied to an offshore resale of securities. For example, the commenter suggests instead that we consider circumstances where the risk is low that the trade is an indirect distribution into Canada because there is not a meaningful Canadian market into which the traded securities are likely to flow back without first coming to rest outside of Canada. That commenter suggests that listing (in the case of an initial public offering) and/or published trading volume is a much better proxy for flow back risk than the Canadian ownership thresholds or the proposed "foreign issuer" concept and is accessible	We thank commenters for their support. We considered the suggestions made by the commenters; however, we are of the view that our approach is more consistent with the policy rationale for the exemption and provides an appropriate proxy for determining whether an issuer has a minimal connection to Canada. We renumbered proposed section 2.14.1 to section 2.15.

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		to all investors. The other of these commenters notes that the proposed amendment applies the "distribution from the jurisdiction is a distribution in the jurisdiction" regulatory framework to resales. The commenter does not agree with the approach. Instead the commenter suggests that if the securities of the issuer are listed in Canada, then the trading volume in Canada and the risk of flow back should be considered to justify Canadian regulation of foreign transactions. If the issuer is not listed in Canada then the proposed definition of “foreign issuer” would only apply if the issuer of the securities is not filing continuous disclosure documents in a "good" disclosure jurisdiction.	

PART II. COMMENTS ON SPECIFIC QUESTIONS

ITEM	TOPIC AND SUBTOPIC	SUMMARIZED COMMENT	CSA RESPONSE
1.	**Definition of “foreign issuer”** *Support for the definition as proposed*	Three commenters generally agree with the definition as proposed. One commenter submits that the proposed definition provides simplicity and predictability, which in turn makes the process more efficient, and does not discourage issuers from conducting these transactions. There may be circumstances where the definition may capture issuers without a significant connection to Canada, but these situations would not occur frequently, and would be better managed through the issuer obtaining an exemption order rather than by attempting to accommodate such situations in the regulation. One commenter agrees that the proposed elements of the definition	We acknowledge the comments of support and thank commenters.

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		of "foreign issuer" are appropriate for purposes of establishing that an issuer has a minimal connection to Canada. Another is of the view that the proposed definition of foreign issuer adequately promotes the policy rationale of section 2.14 and if the elements are satisfied, correctly makes the philosophical presumption that an issuer will not develop anything but a minimal connection to Canada.	
2.	**Definition of "foreign issuer"** *Suggested alternative:* *Current definitions of foreign issuer in Canadian securities laws*	One commenter suggests that for the purpose of consistency of interpretation the CSA consider revising the definition of "foreign issuer" to mirror the language used elsewhere in Canadian securities laws, for example in National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* (NI 71-102) or National Instrument 71-101 *The Multijurisdictional Disclosure System* (NI 71-101), unless there is intended to be a substantive difference between such definitions. Another commenter suggests that consistent with the approach taken in NI 71-102, NI 71-101 and the "foreign private issuer" test under the U.S. Securities Act, the definition of foreign issuer should be based on much more significant connections to Canada, such as having a majority of the issuer's voting securities held in Canada in addition to one of the factors in the proposed definition of foreign issuer.	We considered the current definitions in Canadian securities rules suggested by the commenters but concluded that these were not appropriate for the new exemption. We are of the view that in the context of the foreign issuer definition, which serves as an alternative to the ownership conditions for assessing an issuer's connection to Canada, the inclusion of an ownership condition is unnecessarily burdensome.

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3.	**Definition of "foreign issuer"** *Suggested alternative:* *Incorporation outside of Canada only*	One commenter suggests that the CSA consider revising the definition of "foreign issuer" so that any issuer incorporated or organized outside Canada will qualify, and continue to qualify, without regard to any of the elements currently listed in the proposed definition. The commenter recognizes that head office, residence of directors and executive officers and location of assets tests for establishing connections to Canada are used in NI 71-102, NI 71-101 and the test of "foreign private issuer" status used in U.S. Securities and Exchange Commission (SEC) rules. However, the assessment of whether an issuer meets the tests is a matter that is determined by the issuer, in order to assess whether or not some benefit is available to it.	We are of the view that additional factors are necessary to establish whether an issuer has a minimal connection to Canada.
4.	**Definition of "foreign issuer"** *Suggested changes to the proposed definition*	Several commenters suggest that we make changes to the elements of the definition of foreign issuer particularly because of the difficulties in determining whether each can be met. 1. Asset based test Two commenters express concerns that it may not be feasible to determine compliance or convenient to ask the issuer to make representations as to its compliance with the asset-based test. A multinational issuer is not normally required to provide in its disclosure a geographic breakdown of where its assets are located. Identifying the location of the assets held by an issuer's subsidiaries for the purposes of this test may be difficult. One of the commenters suggests that an asset-based test may not be an appropriate proxy to determine whether there is a risk that a market will develop in Canada. The commenter is of the view that the asset-based test can be removed from the definition of foreign	We considered the comments and agree that certain changes to the definition are appropriate. We revised the definition of foreign issuer to remove the asset-based component. In our view, the revised definition appropriately reflects whether an issuer has a minimal connection to Canada. We do not agree with the suggestion that all elements of the definition be satisfied before an issuer is disqualified as a foreign issuer. We are of the view that the revised definition strikes the appropriate balance between determining whether the issuer has a

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		issuer, and the remaining elements are sufficient to ensure that a market for the securities does not develop in Canada. Alternatively, the commenter suggests that we consider adopting the definition of "eligible foreign security" in National Instrument 45-107 *Listing Representation And Statutory Rights Of Action Disclosure Exemptions*. The other commenter is of the view that an issuer having a majority of its assets located in Canada may establish that there is a Canadian market for its products; however, it is not a meaningful indicator of a market for its securities. 2. Disqualification One commenter suggests that failure to satisfy only one of the proposed elements of the definition of "foreign issuer" is not sufficient to establish a connection with Canada. All of the proposed elements of the definition of foreign issuer should have to be established in order for an issuer to lose the benefit of the exemption.	minimal connection to Canada and not being unduly burdensome. If we require that all elements be satisfied, it could allow an issuer considered to have a significant connection to Canada to use the exemption.
5.	**Definition of foreign issuer** *Interpretive guidance*	One commenter suggests that we provide guidance on how to satisfy the majority of directors component of the definition in the context of a limited partnership. Two commenters suggest that we clarify the term "ordinarily reside" as it applies to the executive officers and directors of an issuer.	We added guidance in 45-102CP to assist investors in their determination of whether paragraph (b) of the definition of foreign issuer applies to an issuer. In particular, guidance is added to explain the meaning of director and executive officer in the context of non-corporate issuers including limited partnerships and to clarify what is meant by "ordinarily reside".

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6.	**Definition of executive officer**	Two commenters propose a much narrower definition of the term "executive officer" restricted to those individuals that are named in public disclosure documents and deleting the reference to individuals with a "policy-making function" since an investor may not be able to determine who these individuals are if they are not specifically named in the issuer's disclosure.	We considered the comments received and agree that certain changes are appropriate. We revised the definition of executive officer to remove the reference to individuals who have "a policy-making function". In line with our objective to simplify an investor's obligation to determine who the executive officers are, we have limited the definition to those individuals in charge of a principal business unit, division or function including sales, finance or production as disclosed in the issuer's offering document or most recent public disclosure document containing that information.
7.	**Availability of information to determine foreign issuer status**	Four commenters provide views on whether information is readily available to investors. One commenter is of the view that other than the offering document and the public disclosure documents, Canadian investors will not have access to information to apply the proposed test. This commenter believes that a request for information from the issuer may result in no securities being sold to Canadian investors (as happened in some cases when Canadian investors requested certification that ownership conditions were met) and suggests that the information should be based on readily available public information that is likely to be required in the foreign issuer's home country disclosure requirements. Another commenter is of the view that information about the	We considered the comments received and added guidance in 45-102CP to assist investors in their determination of whether an issuer is a foreign issuer on the distribution date. An investor can use the information disclosed in the foreign issuer's offering document or most recent public disclosure document containing that information unless the investor has reason to believe that the information in the document is not accurate.

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		residency of executive officers and directors and location of assets may need representation from the issuer on the distribution date. One commenter is of the view that, except for the geographical distribution of assets, it should be relatively easy for investors to determine whether the issuer meets the definition of foreign issuer. One commenter submits that the jurisdiction of the issuer's incorporation can be easily determined by reference to disclosure documents prepared or filed by the issuer but information regarding the location of the head office may be less easy to obtain. The commenter suggests that the disqualification with respect to head office in Canada could be tied to stating a Canadian head office address in the issuer's disclosure documents.	
8.	**Date of determination of whether an issuer is a foreign issuer**	Four commenters agree that the distribution date should be when the determination is made. One of the commenters suggests the date of the last applicable public disclosure document. Two of these commenters as an alternative would support the choice between the distribution date and the date of trade. Another commenter suggests that issuers should be permitted to determine whether they are "foreign issuers" on a yearly basis, either as of year-end or the end of the second fiscal quarter, the latter being when foreign companies are required to make annual determinations regarding "foreign private issuer" status under the SEC rules. This may aid investors (and issuers) in being able to make a more certain determination by providing a specific reference point for which current financial statements and other information will be available.	We continue to believe that the distribution date is the appropriate date because it is at that date that an investor makes an investment decision and having the foreign issuer status change over time would create uncertainty. To respond to comments received, we provided guidance in 45-102CP that investors can use information in the offering document or the most recent public disclosure document containing that information to determine foreign issuer status unless the investor has reason to believe that the information in the document is not accurate.

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9.	**Date of determination of non-reporting issuer status**	Two commenters support either the distribution date or the date of trade. Two commenters support the distribution date. The commenters are of the view that investors should be provided with certainty at the time of their investment decision as to whether the proposed exemption will be available for the subsequent resale of the securities.	We retained the determination of non-reporting issuer status at either the distribution date or the date of trade because it provides flexibility for investors. For example, the option of using the date of trade accommodates security holders of a foreign issuer that was a reporting issuer on the distribution date but is a no longer a reporting issuer on the date of trade. In that situation, the securities would be subject to an indefinite hold period. With this flexibility, security holders of a foreign issuer would be able to avail themselves of the resale provisions in section 2.15, provided that the other conditions of the exemption are met.
10.	**No unusual efforts condition**	Of the four commenters who commented on this condition, two commenters are of the view that this condition creates practical difficulties as the definition of insider varies in different jurisdictions. One of these commenters suggests that we remove the condition because it is not necessary. It is unlikely that a selling security holder will take steps to prepare the market in Canada for a distribution of securities through an offshore market. The inclusion of anti-avoidance language (similar to what has been proposed in Proposed Ontario Securities Commission Rule 72-503 *Distributions Outside of Canada*) would achieve the same objective. Another commenter asks that, if we keep the condition, the CSA	We removed the "no unusual efforts" condition. We are of the view that selling security holders who wish to rely on the exemption cannot take active steps to sell or create demand for the security in Canada. Any activity undertaken by a selling security holder to sell or create a demand for the security in Canada would be an act in furtherance of a trade and would therefore be considered a "distribution" occurring in Canada. As a result, even without the condition, any

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		provide further explanation as to the policy rationale for this condition. The proposed exemption does not permit a trade to be made through an exchange or market in Canada or to a person or company in Canada, the commenter does not see how preparing the market or creating a demand in Canada raises a potential policy concern. If we keep the condition, two commenters suggest that we provide guidance as to what is meant by "preparing the market" and "no unusual effort". One commenter believes that condition is appropriate and consistent with the policy objectives. First, it protects Canadian investors by ensuring that investors in Canada are not acquiring securities on a foreign market that they would not have been able to acquire directly from existing Canadian shareholders. It also preserves the integrity of the Canadian and global capital markets by discouraging market participants from exploiting gaps in investor protection mechanisms that may exist between different legal regimes. The commenter believes that unusual efforts to prepare the market in Canada, or to create demand in Canada, would effectively defeat (i) the first objective to the extent that, as a result, Canadian investors are successfully enticed to purchase securities on an exchange or market outside Canada that they could not lawfully purchase directly from the seller within Canada, and (ii) the second objective to the extent that they undermine the integrity of the capital markets by allowing Canadian resale restrictions to be circumvented through cross-border transactions. The commenter believes that in practice the number of situations in which an insider in Canada could successfully prepare the market in Canada, or create demand in Canada, for a foreign issuer's	selling security holder engaged in these activities in Canada would not be able to rely on the exemptions in sections 2.14 and 2.15. We added further guidance in 45-102CP to clarify that in the context of a trade to a person outside of Canada, a selling security holder cannot sell securities to a person or company outside of Canada if the selling security holder has reason to believe it is acquiring the securities on behalf of a Canadian investor. While all jurisdictions consider avoidance structures to be contrary to the exemptions in sections 2.14 and 2.15, the Alberta Securities Commission and Ontario Securities Commission have included an anti-avoidance provision in their local rules. Please refer to the local annexes of those jurisdictions for further information.

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		securities may well be quite limited. Nevertheless, even if a remote concern, the commenter agrees that the restriction is appropriate and notes that it is consistent with the restrictions on directed selling efforts in the United States under the SEC regime regulating offshore resales.	
11.	**Repeal of existing 2.14 exemption**	One commenter suggests that we repeal the exemption. The commenter submits that circumstances may exist but they would be extremely rare and could be dealt with by using a specific exemption order. Two commenters suggest that we keep existing section 2.14. One of these commenters suggests modifying the exemption. If we repeal section 2.14, three commenters suggest that we include provisions to grandfather previous transactions that benefitted from the exemption.	We considered the comments received and decided to retain section 2.14. To avoid confusion, we renumbered proposed section 2.14.1 to section 2.15. The policy rationale for section 2.14 is consistent with the policy rationale for section 2.15 – to provide an exemption for resale outside of Canada for the securities of an issuer with a minimal connection to Canada. The definition of "foreign issuer" under section 2.15 serves as an alternative to the ownership conditions under section 2.14 for assessing an issuer's connection to Canada. By retaining section 2.14, it would provide a transition for previous exempt distributions to continue to benefit from the exemption and provide a limited exemption for securities of non-reporting Canadian issuers that have a minimal connection to Canada.

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12.	**Exemption for Canadian issuers** *Should we consider a similar exemption*	Four commenters encourage the CSA to provide an exemption for the resale of securities of a Canadian issuer outside of Canada. One of these commenters suggests that the exemption would be helpful to issuers whose only connection to Canada is its organization or formation with no other material connection to Canada. Another of these commenters refers to the circumstance where concurrently with foreign public offering by a Canadian issuer, the issuer will offer securities in Canada under a prospectus exemption. Canadian investors would be at a disadvantage compared with foreign investors who participated in the same distribution, as they would be subject to resale restrictions to which the foreign investors would not be subject. One commenter is not supportive because such an exemption may encourage issuers to list outside of Canada and offer securities to Canadian investors without a hold period. This could be an incentive to circumvent Canadian securities law and sell securities to Canadians outside of the Canadian regulatory system by avoiding the prospectus process and resale provisions.	We thank commenters for their feedback. We will consider the comments and suggestions in our broader review of the resale regime in NI 45-102. In the meantime, we will continue to deal with these circumstances through exemptive relief applications.
13.	**Exemption for Canadian issuers** *Suggested conditions to the exemption*	One commenter suggests that we consider a similar exemption for the resale outside of Canada for a Canadian issuer that distributes securities primarily in a foreign jurisdiction without requiring that the issuer become a reporting issuer in Canada. A condition that there be no unusual effort to prepare the market or to create a demand should be included. One commenter submits that an exemption for the resale of securities of a Canadian issuer outside of Canada should be subject to additional conditions or limitations considered necessary for the	We thank commenters for their feedback. We will consider the comments and suggestions in our broader review of the resale regime in NI 45-102. In the meantime, we will continue to deal with these circumstances through exemptive relief applications.

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		protection of Canadian investors, and to avoid potential abuses that could bring the capital markets into disrepute. The commenter suggests that we look at the U.S. model for direction on what conditions we could consider for the exemption. Another commenter suggests that, in the case of a listed security, we apply a trading volume test as trading volume is a better proxy for the existence of a significant Canadian market for the securities. Specifically, the exemption would provide that the first trade of securities of a non-reporting issuer is not a distribution if the trade is to a person outside of Canada or through an exchange, or market, outside of Canada.	