

BCSC provides clarification on when a foreign exchange contract may be a “security”



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The British Columbia Securities Commission today published a Companion Policy to Blanket Order 91-502 *Short Term Foreign Exchange Transactions* to clarify when a foreign exchange contract may be considered a "security" for the purposes of the British Columbia *Securities Act*.

The Companion Policy states that under s. 1(1) of the *Securities Act*, the following three components of the definition of "security" could describe a forex contract:

- (a) a document, instrument or writing commonly known as a security;
- (l) investment contract;
- (n) an instrument that is a futures contract or an option but is not an exchange contract.

The Blanket Order states that a contract or other obligation to purchase or sell the currency of any jurisdiction, where the terms of the transaction require settlement not later than three business days after the entering into of the transaction, is not a *futures contract*, provided that the contract or obligation is not otherwise a security under the *Securities Act*. The purpose of the Companion Policy is to clarify that the Blanket Order is limited to determining when a foreign exchange contract is not a futures contract. A forex contract may still be a "security" if it falls under any of the other relevant branches of the definition.

In this respect, the Companion Policy cites three decisions of the B.C. Securities Commission where the Commission concluded that a forex contract was an "investment contract" and, therefore, a security. The Companion Policy thus clarifies that in determining whether a forex contract is a security, the Blanket Order cannot be relied upon in a vacuum. Whether another part of the definition of security applies to the relevant contract must also be considered, even when settlement is required within three business days by the terms of the transaction. The Companion Policy notes that the Blanket Order is also designed to provide relief from registration and prospectus requirements for those managing currency risk in their business operations and is not meant to provide registration relief for other investors.

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This newsletter was prepared by members of the Structured Finance and Financial Products Group at Stikeman Elliott.