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## Forooghian+Co

November 5, 2021

### BY EMAIL

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Alberta Securities Commission  
Financial and Consumer Affairs Authority of Saskatchewan  
Manitoba Securities Commission  
Ontario Securities Commission  
Autorité des marchés financiers  
Financial and Consumer Services Commission (New Brunswick)  
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island  
Nova Scotia Securities Commission  
Office of the Superintendent of Securities, Service NL  
Northwest Territories Office of the Superintendent of Securities  
Office of the Yukon Superintendent of Securities  
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Dear Mesdames/Sirs:

### **CSA Notice and Request for Comment - Proposed Amendments to National Instrument 45-106 Prospectus Exemptions to introduce the Listed Issuer Financing Exemption**

We are writing in response to *CSA Notice and Request for Comment – Proposed Amendments to National Instrument 45-106 Prospectus Exemptions* (the “**Proposed Amendments**”) to introduce a new prospectus exemption available to reporting issuers that are listed on a Canadian stock exchange (the “**Listed Issuer Financing Exemption**”). Capitalized terms used and not otherwise defined herein have the meaning ascribed thereto in the Proposed Amendments.

We applaud the CSA for proposing to implement a new prospectus exemption which will provide listed issuers with a more efficient capital raising method. We recognize that in preparing the Proposed Amendments, the CSA must balance the competing priorities of investor protection against the significant cost and burden of raising capital for listed issuers.



## RESPONSES TO QUESTIONS INCLUDED IN THE PROPOSED AMENDMENTS

1. Under the Proposed Amendments, the total dollar amount that an issuer can raise using the Listed Issuer Financing Exemption would be subject to the following thresholds:
  - a. the greater of 10% of an issuer's market capitalization and \$5,000,000
  - b. the maximum total dollar limit of \$10,000,000
  - c. a 100% dilution limit.

**Are all of these thresholds appropriate, or should we consider other thresholds?**

Based on the stated objective of providing smaller issuers with a more efficient capital raising method, the proposed thresholds seem generally appropriate. We think that the two-tiered approach will result in significantly fewer requirements for smaller offerings.

We understand that the rationale behind connecting the scaled limits on the total amount that can be raised to market capitalization is to restrict issuers from unduly diluting their shareholders. We suggest that it might be appropriate to allow the 10% limit to be increased in circumstances where the increase is approved by shareholders.

We think that the \$5,000,000 and \$10,000,000 limits are appropriate for now, and the latter will lessen the impact on the short form prospectus system. We hope that the CSA will re-evaluate these thresholds periodically to ensure that they remain appropriate.

2. **In order for the CSA to measure and monitor the use of the Listed Issuer Financing Exemption, we propose that issuers would be required to file a report of exempt distribution within 10 days of the distribution date, as with most capital raising prospectus exemptions. However, issuers would not be required to provide the detailed confidential purchaser information required in Schedule 1. We are not proposing to require the completion of the purchaser-specific disclosure required under Schedule 1 because there are no limitations on the types of investors who may purchase under the exemption and we do not expect to require this information.**

- a. **Are there other elements of the report of exempt distribution that we should consider relaxing for distributions under the exemption?**

We think the CSA should consider not requiring a report of exempt distribution to be filed in connection with an offering relying on the Listed Issuer Financing Exemption. Instead, issuers could disclose relevant information (i.e., number and type of securities distributed; price; launch/closing date; compensation details; use of proceeds; use of Listed Issuer Financing Exemption etc.) in a news release. While the report of exempt distribution may reduce the administrative burden on CSA staff by providing structured access to data, it will likely have the opposite effect for issuers.

- b. **Would the requirement to file the report of exempt distribution in connection with the use of the exemption be unduly onerous in these circumstances? If so, why?**



We believe the requirement to file a report of exempt distribution may be unduly onerous. The relevant information required in the report of exempt distribution can be (and typically is) disclosed in news releases that are disseminated by issuers. We do not feel there is any need for issuers to have to file a separate report to disclose information which is already public.

- c. Should we consider an alternative means of reporting distributions under the exemption, such as including disclosure in an existing continuous disclosure document, such as Management's Discussion and Analysis or a specific form or report that is filed on SEDAR?**

As referenced above, a news release disseminated by the issuer with relevant information on the offering would likely suffice. Details could also be included in the relevant quarterly/annual MD&A.

- d. If alternative reporting is provided, what information should issuers be required to disclose, in addition to the following:**
  - i. the number and type of securities distributed,**
  - ii. the price at which securities are distributed,**
  - iii. the date of the distribution, and**
  - iv. the details of any compensation paid by the issuer in connection with the distribution and the identity of the compensated party?**

Issuers could also disclose the fact that the Listed Issuer Financing Exemption was relied upon and the use of proceeds.

- e. If alternative reporting is provided, how frequently should reporting be required?**

A news release could be disseminated when the offering is launched and closed, and disclosure could be included in the relevant quarterly/annual MD&A.

- 3. For jurisdictions that already charge capital market participation fees, would the imposition of an additional filing fee for a report of exempt distribution under the Listed Issuer Financing Exemption discourage use of the exemption?**

We think the answer to this question will largely depend on the quantum of any additional filing fee. However, as a general principle we think that the imposition of additional fees would discourage issuers from relying on the proposed Listed Issuer Financing Exemption. One of the primary stated objectives of the Listed Issuer Financing Exemption is to provide issuers with a more cost-efficient way of raising capital. The imposition of additional fees could have the opposite effect.

- 4. We propose that the securities eligible to be distributed under the Listed Issuer Financing Exemption would be limited to listed equity securities, units consisting of a listed equity security and a warrant exercisable into a listed equity security, or securities, such as subscription receipts, that are convertible into a unit consisting of a listed equity security and a warrant. These are securities that most investors would be familiar with and which are easier for an investor to understand. This list would allow for the Listed Issuer Financing Exemption to be used to distribute**



**convertible debt. Are there reasons we should exclude convertible debt from the exemption?**

We do not see any reasons to exclude convertible debt from the Listed Issuer Financing Exemption. However, we note that in our experience smaller issuers do not typically offer convertible debt.

5. **We designed the Listed Issuer Financing Exemption contemplating that it would be used, from time to time, for discrete private placements, with a single closing date. Do you expect issuers would want to use the exemption to provide continuous, non-fixed price offerings as well? If so, what changes would be necessary to permit continuous distributions under the exemption? Do you see any concerns with permitting continuous distributions?**

We do not expect that issuers would want to use the Listed Issuer Financing Exemption to provide continuous, non-fixed price offerings. In our experience, smaller issuers do not typically conduct these types of offerings.

6. **Over the last several years, the CSA has tried to address various capital raising challenges by introducing a number of streamlined prospectus exemptions targeted to reporting issuers with listed equity securities, including the existing security holder exemption and the investment dealer exemption. The use of these exemptions has been limited. We have heard from market participants that the existence of these rarely used prospectus exemptions may contribute to the complexity of the exempt market regime. If we adopt the proposed Listed Issuer Financing Exemption, should we consider repealing any of these other exemptions?**

We do not think there is any need to repeal other exemptions that are currently available to issuers. Although such exemptions may not be frequently used, they provide issuers with optionality, which can be important when raising capital.

7. **Investment dealers and exempt market dealers may participate in an offering under the proposed Listed Issuer Financing Exemption; however, there is no requirement for dealer or underwriter involvement. In addition, no exemption from the registration requirement is provided for acts related to distributions under the exemption, so any persons in the business of trading in securities will require registration or an available registration exemption for any activities undertaken in connection with distributions under the exemption.**

- a. **If adopted, do you anticipate that issuers would involve a dealer in offerings under the exemption?**

We do not anticipate that issuers would involve a dealer in offerings under the Listed Issuer Financing Exemption. In our experience, it is becoming increasingly rare for dealers to be involved in financings where an issuer is raising gross proceeds of less than \$5,000,000 or even \$10,000,000.

- b. **If not, how do you expect issuers will conduct their offerings, for example, via their own website?**



We expect issuers will conduct offerings pursuant to the Listed Issuer Financing Exemption in mostly the same way they currently conduct non-brokered offerings under other exemptions.

**8. We propose that distributions under the Listed Issuer Financing Exemption would be subject to secondary market liability and provide original purchasers with a contractual right of rescission against the issuer. We propose secondary market liability because the exemption is premised on the reporting issuer's continuous disclosure and limited to distributions of listed equity securities that are traded on the secondary market. Although the exemption provides for the distribution of freely tradeable securities to any class of purchaser, similar to a prospectus offering, the quantum of liability is more limited than it would be for a prospectus offering.**

**a. Does the proposed liability regime provide appropriate incentives for issuers to provide accurate and complete disclosure under the exemption and adequate investor protection or should we consider imposing prospectus level liability?**

We think the proposed liability regime provides appropriate incentives for issuers to provide accurate and complete disclosure under the Listed Issuer Financing Exemption and adequate investor protection.

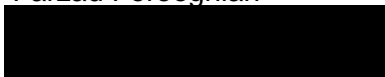
**b. Some of the key objectives of the exemption include reducing the costs to an issuer of accessing the public markets and providing investors with a briefer document that they are more likely to read. Would imposing prospectus-level liability impact the objectives of the exemption?**

We think that imposing prospectus-level liability may discourage smaller issuers from relying on the Listed Issuer Financing Exemption.

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The following lawyers at our firm participated in the preparation of this comment letter and may be contacted directly should you have any questions regarding our submissions.

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Yours truly,

**FOROOGHIAN + COMPANY LAW CORPORATION**

