PROSPECTORS & DEVELOPERS ASSOCIATION OF CANADA

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Me Philippe Lebel
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Sent via email to - lstreu@bcsc.bc.ca, consultation-en-cours@lautorite.qc.ca

Re: Proposed Amendments to National Instrument 45-106 Prospectus Exemptions to introduce the Listed Issuer Financing Exemption

As the voice of Canada's mineral exploration and development community, representing more than 4,400 corporate and individual members, the Prospectors and Developers Association of Canada (PDAC) takes an active interest in regulatory and policy initiatives that shape the mineral industry landscape. The mineral industry represents the largest cohort of public issuers in Canada and accounts for nearly 60% of the companies listed on the TSXV exchange.

PDAC applauds the Canadian Securities Administrators (CSA) for proposing the Listed Issuer Financing Exemption, a concept PDAC has long championed as we recognize the challenges small-cap issuers face in raising small amounts of capital. These issuers face disproportionately high financing costs compared to the amount being raised and often are prevented from raising capital via public offerings. The proposed exemption will enable any investor to participate and may make it more effective than current exemptions.

We provide recommendations and supporting rationale in the accompanying *Appendix A* that have been developed after careful consideration by PDAC committees. We highlight a number of considerations for CSA to ensure unnecessary burdens are not adopted in the exemption and we support the notion of allowing issuers to use the proposed mechanism for continuous distributions. Lastly, our view is that current exemptions, in particular the Friends, Family and Business Associates exemption, should stay in place following implementation of this newly proposed exemption.

We welcome continued engagement with CSA as this consultation progresses and please contact Jeff Killeen, PDAC's Director, Policy & Programs [redacted] if there are any questions or clarifications sought from the content provided in this letter.

Sincerely,

Lisa McDonald

Executive Director

Prospectors & Developers Association of Canada

APPENDIX A

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?

PDAC response: We have no concerns with respect to proposed thresholds (a) and (b). However, allowing up to 100% dilution of an issuer's outstanding shares through the proposed exemption could have unintended consequences and provide inadequate protections for current shareholders. PDAC recommends a lower dilution limit within the range of 25% - 50% should be considered at first and could be adjusted higher over time. To inform any adjustments to dilution limits, CSA should allocate sufficient resources to monitor the impact offerings in the upper end of this dilution range have on issuer volumes and market valuations, post transaction.

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?

PDAC response: The requirement to provide the purchaser-specific disclosure information in Schedule 1 of the 45-106F1 form is the most onerous one, and removing it will significantly reduce the burden associated with filing this form. Without this requirement, the filing process will be more streamlined and we do not recognise any other elements that CSA should consider relaxing.

    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?

PDAC response: If CSA relaxes the requirement to provide the purchaser-specific disclosure information in Schedule 1, filing the report will not be onerous.

    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?

PDAC response: Our view is that issuers using this exemption should provide disclosure in a timely manner and that a simple form or report filed on SEDAR are sufficient for this purpose. The MD&A, however, is a periodic disclosure document (published only once a quarter), and therefore will not achieve the goal of a timely disclosure to investors. We anticipate the majority of issuers will voluntary include a discussion on capital activities in the MD&A that would outline any fundraising, as it is typically material and an important part of the discussion on business development.

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

PDAC response: We recommend that any alternative reporting should require the issuer to publicly disclose any instance were the 10% holding threshold for an individual investor has been reached or may be reached by exercising convertible debt associated with issuances under this exemption. This way the exemption will be better aligned with the current requirements under the Early Warning Report system.

e) If alternative reporting is provided, how frequently should reporting be required?

PDAC response: A public press release to inform investors should be provided by the issuer in a timely manner after the financing is closed.

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?

PDAC response: When designing a mechanism that is aimed at providing cost-effective funding to small-cap issuers, the fee structure should be carefully considered by CSA and we believe that fees should be connected to the scale of the revision effort. The removal of Schedule 1 from the filing process should decrease the resources required to administer the proposed exemption, and in turn, should create a mechanism with a relatively lower fee structure compared to those associated with other exemptions.

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?

PDAC response: We think the proposed exemption could be effective for small issuers and that the types of securities that can be offered as a part of the exemption should reflect the common types of securities used by small issuers. We recognize that convertible debt and similar instruments can be an effective means of raising capital for pre-revenue companies and, as such, think these types of securities should be included in the proposed exemption.

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?

PDAC response: We note that in 2019 CSA changed the shelf prospectus rules to allow continuous, non-fixed at-the-market (ATM) price offerings. However, ATM financing still does not fit for smaller issuers or offerings below $10M due to the high costs associated with a shelf prospectus, but the concept is valid and acceptable to Canadian regulators.

We do not see any concerns with permitting continuous distributions under the proposed exemption and expect that issuers may choose to use this exemption to provide continuous, non-fixed price offerings, as it may enable greater flexibility to issuers in generating market interest and completing an offering.

We recommend that issuers should be required to publicly disclose the total anticipated size and the period during which the offering will be available when initially launched, as well as when the offering has closed, within a reasonable timeframe after the closing date.

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?

PDAC response: We recommend that even if the proposed Listed Issuer Financing Exemption is approved, current exemptions should stay in place, in particular the Friends, Family and Business Associates (FFBA). There are few reasons for this recommendation.

First, the FFBA is a key exemption used by many start ups and mineral exploration companies, particularly in their early stages (i.e. pre-IPO). For such companies, the proposed exemption will not be applicable, and we anticipate there will be a continued reliance on the FFBA in many offerings.

Moreover, many of the currently available exemptions were adopted in 2016, in the midst of a relatively bearish market cycle. It is possible that existing exemptions may be used more extensively in the future as market conditions change and we think it will be useful for regulators to continue monitor their usage.

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?

PDAC response: We do anticipate dealer involvement will occur in offerings under the new exemption, however, given the relatively small size of the prospective issuances and since a dealer or underwriter is not required, the nature of this involvement will likely require time to evolve to be effective. Companies should be free to explore different models of support from dealers, and be able to identify the most cost-effective way to raise capital.

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

PDAC response: As per the response to (a), we anticipate that hybrid models will evolve over time and while it is possible that issuers may conduct offerings independently, it is likely that market dealers will be involved to varying degrees. Therefore, we recommend CSA to consider ways to incentivize financial institutions to participate in such offerings, as it may help facilitate better access to market for issuers.

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?

PDAC response: In our view, the main incentive for issuers to provide accurate and complete disclosure is directly tied to their fiduciary duties and the need to earn investor and market trust. The vast majority of issuers are good actors and regulators should focus on enforcement efforts on bad actors in the market. Therefore, our view is that the proposed liability regime provides appropriate incentives for issuers to be in full compliance, and that prospectus liability level should not be imposed for this exemption.

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?

PDAC response: The spirit of this exemption is to provide a cost-effective and flexible source of financing for small-cap issuers. In this context, a prospectus-level liability regime may work against the objectives of the proposed exemption and likely result in issuers allocating internal resources that are above and beyond what is required, to ensure compliance.

c) Would the absence of statutory liability for dealers lead to lower standards of disclosure?

PDAC response: We do not think the absence of statutory liability will lead to lower standards of disclosure as dealers and issuers will still have liability risk and face potential civil action from investors if proper disclosures are not provided. Therefore, we expect dealers will continue to perform thorough due diligence to make sure there is no misrepresentation in offering documents.

d) One of the conditions of the exemption is that the issuer must provide a contractual right of rescission in the agreement to purchase the security with the purchaser. Would a requirement for the issuer to enter into an agreement with purchasers be unduly burdensome?

PDAC response: This requirement is likely to be problematic for pre-revenue companies, which rely on new issuances to fund their normal course of business. In the case where a purchaser exercises their contractual right of rescission after an extended period of time after the purchase, pre-revenue companies will likely be unable to comply with this requirement.