AS PUBLISHED IN THE SUPPLEMENT OF THE BULLETIN OF DECEMBER 17, 2004, VOL. 1 N° 46

POLICY STATEMENT TO *REGULATION 45-106 RESPECTING PROSPECTUS AND REGISTRATION EXEMPTIONS*

POLICY STATEMENT TO *REGULATION 45-106 RESPECTING PROSPECTUS AND REGISTRATION EXEMPTIONS*

PART 1 INTRODUCTION

Regulation 45-106 respecting Prospectus and Registration Exemptions ("Regulation 45-106") provides exemptions from the prospectus and registration requirements and one exemption from the issuer bid requirement.

Text boxes have been included in Regulation 45-106 to help users understand the resale restrictions attached to securities acquired under a distribution exemption in Regulation 45-106. Users of Regulation 45-106 are reminded that these text boxes are guidance only, and Multilateral Instrument 45-102, *Resale of Securities* should still be referred to for statements of the law respecting resale restrictions.

1.1 Purpose

The purpose of this Policy is to help users understand how the provincial and territorial securities regulatory authorities and regulators interpret or apply certain provisions of Regulation 45-106. This Policy includes explanations, discussion and examples of various parts of Regulation 45-106.

1.2 Status in Yukon

Until such time as the Government of Yukon adopts Regulation 45-106 as a rule, it will consider applications for exemptions on a case-by-case basis and it will consider the provisions of Regulation 45-106 in exercising its discretionary authority.

1.3 All trades are subject to securities legislation

Market participants are reminded that the securities legislation of a local jurisdiction applies to any trade in a security in the local jurisdiction, whether or not the issuer of the security is a reporting issuer in that jurisdiction. Likewise, the definition of "trade" in securities legislation includes any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a trade. In Québec a trade also includes any act in furtherance of the business of dealing in securities. A person, who engages in these activities, or other trading activities, must comply with the securities legislation of each jurisdiction in which the trade occurs.

If a trade is exempted from the dealer registration requirement, so too is any act, solicitation or conduct in furtherance of that trade.

1.4 Multi-jurisdictional trades

Market participants are further reminded that a trade can occur in more than one jurisdiction. If it does, the person conducting the trade must comply with the securities legislation of each jurisdiction in which the trade occurs. For example, a trade from a person in Ontario to a purchaser in Alberta may be considered a trade in both jurisdictions.

1.5 Other exemptions

In addition to the exemptions in Regulation 45-106, exemptions may also be available to persons under securities legislation of each local jurisdiction. The Canadian Securities Administrators ("CSA") will issue a notice that lists other exemptions available under securities legislation.

1.6 Discretionary relief

In addition to the exemptions contained in Regulation 45-106 and those available under securities legislation of a local jurisdiction the securities regulatory authority or regulator in each jurisdiction has the discretion to grant exemptions from the prospectus requirement and the registration requirement.

1.7 Advisers

Subsection 1.4(2) of Regulation 45-106 provides that an exemption from the dealer registration requirement is deemed to be an exemption from the underwriter registration requirement. However, it is not deemed to be an exemption from the adviser registration requirement. The adviser registration requirement is distinct from the dealer registration requirement. In general terms, persons engaged in the business of, or holding themselves out as being in the business of, providing investment advice are required to be registered, or exempted from registration, under applicable securities legislation. Accordingly, only advisers registered or exempted from registration as advisers may act as advisers in connection with a trade made under Regulation 45-106.

1.8 Persons created to use exemptions ("syndication")

Certain provisions in Regulation 45-106 specifically prohibit syndications. A distribution of securities to a person that had no pre-existing purpose and is created solely or primarily to acquire securities under exemptions (a "syndicate") may also be considered a distribution of securities to the persons beneficially owning or controlling the syndicate.

For example, if an issuer wishes to distribute securities to potential purchasers under the offering memorandum exemption but the potential purchasers form a limited partnership and the issuer distributes its securities to the limited partnership, the issuer may be considered to be distributing its securities not only to the limited partnership, but also to each of the individual limited partners. Consequently, both the issuer and the limited partnership may need to comply with the requirements of the offering memorandum exemption. In circumstances where more than one issuer is involved care should be taken by the multiple issuers to ensure that the ultimate purchaser understands what securities the purchaser acquired and what rights are attached to those securities.

Syndication related concerns should not ordinarily arise if the purchaser under the exemption is a corporation, syndicate, partnership or other form of entity that is pre-existing and has a bona fide purpose other than investing in the securities being sold. However, it is an inappropriate use of an exemption that prohibits the use of a syndicate to use a syndicate to indirectly distribute securities when the exemption is not available to directly distribute securities to each person in the syndicate. In these instances where syndications have been created to acquire securities under an exemption the various securities regulators have historically taken enforcement action on the grounds of public policy concerns.

1.9 Responsibility for compliance

A person trading securities is responsible for determining when an exemption is available. In determining whether an exemption is available, a person may rely on factual representations by a purchaser, provided that the person has no reasonable grounds to believe that those representations are false. However, the person trading securities is responsible for determining whether, given the facts available, the exemption is available. Generally a person trading securities under an exemption should retain documents necessary to show that the person properly relied upon the exemption.

For example, an issuer distributing securities to a close personal friend of a director could require that the purchaser provide a signed statement describing the purchaser's relationship with the director. On the basis of that factual information, the issuer could determine whether the purchaser is a close personal friend of the director for the purposes of the exemption. The issuer should not rely merely on a representation: "I am a close personal friend of a director".

It is not appropriate for a person to assume an exemption is available. For instance an issuer should not accept a form of subscription agreement that only states that the purchaser is an accredited investor. Rather the issuer should request that the purchaser provide the details on how they fit within the accredited investor definition.

1.10 Prohibited activities

Securities legislation in certain jurisdictions prohibits any person from making certain representations to a purchaser, including an undertaking about the future value or price of the securities. In certain jurisdictions, these provisions also prohibit a person from making any statement that the person knows or ought reasonably to know is a misrepresentation. These prohibitions apply whether or not a trade is made under an exemption.

Misrepresentation is defined in securities legislation. The use of exaggeration, innuendo or ambiguity in an oral or written representation about a material fact, or other deceptive behaviour relating to a material fact, might be a misrepresentation.

PART 2 INTERPRETATION

2.1 Definitions

Unless defined in Regulation 45-106, terms used in Regulation 45-106 have the meaning given to them in local securities legislation or in Regulation entitled National Instrument 14-101, *Definitions*.

2.2 Executive officer ("policy making function")

The definition of "executive officer" in Regulation 45-106 is based on the definition of the same term contained in *Regulation 51-102 respecting Continuous Disclosure Obligations* (the "Regulation 51-102").

The definition includes someone who "performs a policy-making function" in respect of the issuer. The CSA is of the view that an individual who "performs a policy-making function" in respect of an issuer is someone who is responsible, solely or jointly with others, for setting the direction of the issuer and is sufficiently knowledgeable of the business and affairs of the issuer so as to be able to respond meaningfully to inquiries from investors about the issuer.

Paragraph (d) of the definition of "executive officer" includes individuals that are not employed by the issuer or any of its subsidiaries, but who perform a policy-making function in respect of the issuer.

2.3 Directors, executive officers and officers of non-corporate issuers

The term "director" is defined in Regulation 45-106 and it includes, for non-corporate issuers, individuals who perform functions similar to those of a director of a company.

When the term "officer" is used in Regulation 45-106, or any of the Regulation 45-106 forms, a non-corporate issuer should refer to the definitions in securities legislation. Securities legislation in most jurisdictions defines "officer" to include any individual acting in a capacity similar to that of an officer of a company. Therefore, non-corporate issuers must determine which individuals are acting in capacities similar to that of directors and officers of corporate issuers, for the purposes of complying with Regulation 45-106 and its forms.

For example, the determination of who is acting in the capacity of a director or officer may be important where a person intends to trade securities of a limited partnership under an exemption that is conditional on a relationship with a director or executive officer. The person must conclude that the purchaser has the necessary relationship with an individual who is acting in a capacity with the limited partnership that is similar to that of a director or executive officer of a company.

2.4 Founder

The definition of "founder" includes a requirement that, at the time of the trade, the person be actively involved in the business of the issuer. Accordingly, a person who takes the initiative in founding, organizing or substantially reorganizing the business of the issuer within the meaning of the definition but subsequently ceases to be actively engaged in the day to day operations of the business of the issuer would no longer be a "founder" for the purposes of Regulation 45-106, regardless of their degree of prior involvement with the issuer or the extent of their continued ownership interest in the issuer.

2.5 Investment fund

Generally, the definition of "investment fund" would not include a trust or other entity that issues securities that entitle the holder to net cash flows generated by: (i) an underlying business owned by the trust or other entity, or (ii) the income-producing properties owned by the trust or other entity. Examples of trusts or other entities that are not included in the definition are business income trusts, real estate investment trusts and royalty trusts.

2.6 Affiliate, control and related entity

(1) Affiliate

Section 1.2 of Regulation 45-106 contains rules for determining whether persons are affiliates for the purposes of Regulation 45-106, which may be different than those contained in other securities legislation.

(2) Control

The concept of control has two different interpretations in Regulation 45-106. For the purposes of Division 4 of Part 2 (trades to employees, executive officers, directors and consultants), the interpretation of control is contained in section 2.23(1). For the purposes of the rest of Regulation 45-106 the

interpretation of control is found at section 1.3 of Regulation 45-106. The reason for having two different interpretations of control is that the exemption for trades to employees, executive officers, directors and consultants requires a broader concept of control to accommodate the issuance of compensation securities in a wide variety of business structures than is considered necessary for the rest of the Rule.

The concept of control contained in section 1.3 is a narrower and more specific test, in that one person controls another person if: (i) the first person owns or exercises control over voting securities of the second person, which would entitle the first person to elect a majority of the board of directors of the second person; (ii) the second person is a partnership, other than a limited partnership, the first person holds more than 50% of the interests of the partnership; or (iii) the second person is a limited partnership, the general partner is the first person.

2.7 Close personal friend

For the purposes of both the private issuer exemption and the family, friends and business associates exemption, a "close personal friend" of a director, executive officer, founder or control person of an issuer is an individual who knows the director, executive officer, founder or control person well enough and has known them for a sufficient period of time to be in a position to assess their capabilities and trustworthiness. The term "close personal friend" can include a family member who is not already specifically identified in the exemptions if the family member satisfies the criteria described above.

The relationship between the individual and the director, executive officer, founder or control person must be direct. For example the exemption is not available to a close personal friend of a close personal friend of a director of the issuer.

An individual is not a close personal friend solely because the individual is:

(a) a relative,

(b) a member of the same organization, association or religious group, or

(c) a client, customer, former client or former customer.

2.8 Close business associate

For the purposes of both the private issuer exemption and the family, friends and business associates exemption, a "close business associate" is an individual who has had sufficient prior business dealings with a director, executive officer, founder or control person of the issuer to be in a position to assess their capabilities and trustworthiness. An individual is not a close business associate solely because the individual is a client, customer, former client or former customer of the issuer.

The relationship between the individual and the director, executive officer, founder or control person must be direct. For example, the exemption is not available for a close business associate of a close business associate of a director of the issuer.

PART 3 CAPITAL RAISING EXEMPTIONS

3.1 Soliciting purchasers

Part 2, Division 1, capital raising exemptions in Regulation 45-106 does not prohibit the use of registrants, finders, telemarketing or advertising in any form (for example, internet, e-mail, direct mail, newspaper or magazine) to solicit purchasers under any of the exemptions. However, use of any of these means to find purchasers under sections 2.4 or 2.5 (respectively, the private issuer exemption or the family, friends and business associates exemption) may give rise to a presumption that the relationship required for use of these exemptions is not present. If, for example, an issuer advertises or pays a commission or finder's fee to a third party to find purchasers under the family, friends and business associates exemption, it suggests that the precondition of a close relationship between the purchaser and the issuer may not exist and therefore the issuer cannot rely on the exemption.

Use of a finder by a private issuer to find an accredited investor, however, would not preclude the private issuer from relying upon the private issuer exemption, provided that all of the other conditions to that exemption are met.

Any solicitation activities that aim to identify a particular category of investor should clearly state the kind of investor being sought and the criteria that investors will be required to meet. Any print materials used to find accredited investors, for example, should clearly and prominently state that only accredited investors should respond to the solicitation.

3.2 Soliciting purchasers – Newfoundland and Labrador and Ontario

In Newfoundland and Labrador and Ontario, the exemptions from the dealer registration requirement set out in sections 2.44 and 3.9 of Regulation 45-106 are not available to a "market intermediary". A person is a market intermediary if the person is in the business of trading in securities as principal or agent. In Ontario the term "market intermediary" is defined in Ontario Securities Commission Rule 14-501, *Definitions*.

The Ontario Securities Commission takes the position that if an issuer retains an employee whose primary job function is to actively solicit members of the public for the purposes of selling the issuer's securities; the issuer and its employee are in the business of selling securities. Further, if an issuer and its employees are deemed to be in the business of selling securities the Ontario Securities Commission considers both the issuer and its employees to be market intermediaries. This applies whether the issuer and its employees are located in Ontario and solicit members of the public outside of Ontario or whether the issuer and its employees are located outside of Ontario and solicit members of the public in Ontario. Accordingly, in order to be in compliance with securities legislation, these issuers and their employees should be registered under the appropriate category of registration in Ontario.

3.3 Soliciting purchasers – Manitoba, New Brunswick and Québec

In Manitoba, New Brunswick and Québec the dealer registration exemptions in Regulation 45-106 are only available to dealers who limit their activity to trades in securities exempted by Regulation 45-106 and this activity is incidental to a dealer's primary activity. Therefore, it would be inappropriate for issuers to retain employees whose predominant purpose is to actively solicit numerous members of the public to determine their category of investor, for example their accredited investor status or their eligible investor status, and to sell them securities pursuant to an exemption.

3.4 Advertising

Regulation 45-106 does not restrict the use of advertising to solicit or find purchasers. However, issuers and selling security holders should review other securities legislation and securities directions for guidelines, limitations and prohibitions on advertising intended to promote interest in an issuer or its securities. For example, any advertising or marketing communications must not contain a misrepresentation and should be consistent with the issuer's public disclosure record.

3.5 Restrictions on finder's fees or commissions

The following restrictions apply with respect to certain exemptions under Regulation 45-106:

(1) no commissions or finder's fees may be paid to directors, executive officers, founders and control persons in connection with a trade made under the private issuer exemption or the family, friends and business associates exemption, except in connection with a trade to an accredited investor under the private issuer exemption; and

(2) in Northwest Territories, Nunavut and Saskatchewan, only a registered dealer may be paid a commission or finder's fee in connection with a trade to a purchaser in one of those jurisdictions under the offering memorandum exemption.

3.6 Accredited investor

(1) Individual qualification – financial tests

An individual is an "accredited investor" for the purposes of Regulation 45-106 if he or she satisfies, either alone or with a spouse, any of the financial asset test in paragraph (j), the net income test in paragraph (k) or the net asset test in paragraph (l) of the "accredited investor" definition in section 1.1 of Regulation 45-106.

These branches of the definition are designed to treat spouses as a single investing unit, so that either spouse qualifies as an "accredited investor" if the combined financial assets, net income or net assets of both spouses exceed the $1 000 000, $300 000 or $5 000 000 thresholds.

If the combined net income of both spouses does not exceed $300 000, but the net income of one of the spouses exceeds $200 000, only the spouse whose net income exceeds $200 000 qualifies as an accredited investor.

(2) Bright-line standards – individuals

The monetary thresholds in the "accredited investor" definition are intended to create "bright-line" standards. Investors who do not satisfy these monetary thresholds do not qualify as accredited investors under the applicable paragraph.

(3) Beneficial ownership of financial assets

Paragraph (j) of the "accredited investor" definition refers to an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $1 000 000. As a general matter, it should not be difficult to determine

whether financial assets are beneficially owned by an individual, an individual's spouse, or both, in any particular instance. However, financial assets held in a trust or in other types of investment vehicles for the benefit of an individual may raise questions as to whether the individual beneficially owns the financial assets in the circumstances. The following factors are indicative of beneficial ownership of financial assets:

(a) physical or constructive possession of evidence of ownership of the financial asset;

(b) entitlement to receipt of any income generated by the financial asset;

(c) risk of loss of the value of the financial asset; and

(d) the ability to dispose of the financial asset or otherwise deal with it as the individual sees fit.

For example, securities held in a self-directed RRSP, for the sole benefit of an individual are beneficially owned by that individual. In general, financial assets in a spousal RRSP would also be included for the purposes of the threshold test because paragraph (j) takes into account financial assets owned beneficially by a spouse. However, financial assets held in a group RRSP under which the individual would not have the ability to acquire the financial assets and deal with them directly would not meet these beneficial ownership requirements.

(4) Calculation of purchaser's net assets

To calculate a purchaser's net assets under paragraph (l) of the "accredited investor" definition, subtract the purchaser's total liabilities from the purchaser's total assets. The value attributed to assets should reasonably reflect their estimated fair value. Income tax should be considered a liability if the obligation to pay it is outstanding at the time of the trade.

(5) Financial statements

The minimum net asset threshold of $5 000 000 specified in paragraph (m) of the "accredited investor" definition must, in the case of a non-individual entity, be shown on the entity's "most recently prepared financial statements". The financial statements must be prepared in accordance with applicable generally accepted accounting principles.

(6) Time for assessing qualification

The financial tests prescribed in the accredited investor definition are to be applied only at the time of the trade. The person is not required to monitor the purchaser's continuing qualification as an accredited investor after the trade is completed.

(7) Designation as an Accredited Investor

Paragraph (v) of the "accredited investor" definition in Regulation 45-106 contemplates that a person may apply to be recognized or designated by the securities regulatory authorities as an accredited investor. The securities regulatory authorities will consider applications for accredited investor recognition or designation submitted by or on behalf of persons that do not meet any of the

other criteria for accredited investor status but nevertheless have the requisite sophistication or financial resources.

The securities regulatory authorities have not adopted any specific criteria for granting accredited investor recognition or designation to applicants as the securities regulatory authorities believe that the "accredited investor" definition generally covers all types of persons that do not require the protection of the prospectus requirement and dealer registration requirement. Accordingly, the securities regulatory authorities expect that applications for accredited investor recognition or designation will be utilized on a very limited basis. If a securities regulatory authority considers it appropriate in the circumstances it may grant accredited investor recognition or designation to a person on terms and conditions, including a requirement that the person apply annually for renewal of accredited investor recognition or designation.

3.7 Private issuer

(1) Meaning of "a member of the public"

Whether or not a person is a "member of the public" must be determined on the facts of each particular case. The courts have interpreted "the public" very broadly in the context of securities trading. Whether a person is a "member of the public" will be determined on the particular facts of each case, based on the tests that have developed under the relevant case law. A person who intends to trade securities in reliance upon the private issuer exemption in section 2.4 of Regulation 45-106 to a person not listed in paragraphs (a) through (j) of that section will have to satisfy itself that the purchaser is not a "member of the public" in the circumstances.

(2) Meaning of "close personal friends" and "close business associates"

See sections 2.7 and 2.8 of this Policy for a discussion of the meaning of "close personal friend" and "close business associate".

(3) Business combination of private issuers

Securities distributed in an amalgamation, merger, reorganization, arrangement or other statutory procedure involving two private issuers to holders of securities of those issuers is not a distribution to members of the public provided that the resulting issuer is a private issuer.

Similarly, securities distributed by a private issuer in a share exchange take over bid for another private issuer is not a distribution to the public provided the offeror remains a private issuer after completion of the bid.

(4) Acquisition of a private issuer

Persons relying on the private issuer exemption in Regulation 45-106 must be satisfied that the purchaser is not a member of the public. Generally, however, if the owner of a private issuer sells the business of the private issuer by way of a sale of securities, rather than assets, to another party who acquires all of the securities, the distribution will not be considered to have been to a member of the public.

(5) Ceasing to be a private issuer

The term “private issuer” is defined in section 1.1 of Regulation 45-106. A private issuer can distribute securities only to the persons listed in section 2.4(1) of Regulation 45-106. If a private issuer distributes securities to a person not listed in section 2.4(1), even under another exemption, it will no longer be a private issuer and will not be able to continue to use the private issuer exemption. For example, if a private issuer distributes securities under the offering memorandum exemption, it will no longer be a private issuer.

Issuers that cease to be private issuers will still be able to use other exemptions to distribute their securities. For example, such issuers could rely on the family, friends and business associates exemption (except in Ontario) or the accredited investor exemption. However, issuers that rely on these exemptions must file a report of exempt distribution with the securities regulatory authority in each jurisdiction in which the distribution took place.

3.8 Family, friends and business associates

(1) Number of purchasers

There is no restriction on the number of persons that the issuer may sell securities to under the family, friends and business associates exemption in section 2.5 of Regulation 45-106. However, an issuer selling securities to a large number of persons under this exemption may give rise to a presumption that not all of the purchasers are family, close personal friends or close business associates and that the exemption may not be available.

(2) Meaning of “close personal friends” and “close business associates”

See sections 2.7 and 2.8 of this Policy for a discussion of the meaning of “close personal friend” and “close business associate”.

(3) Risk acknowledgement – Saskatchewan

Under section 2.6(1) of Regulation 45-106, the family, friends and business associates exemption in section 2.5 of Regulation 45-106 cannot be relied upon in Saskatchewan for a trade based on close personal friendship or close business association unless the person obtains a signed “risk acknowledgement” in the required form from the purchaser and retains the form for eight years after the trade.

3.9 Offering memorandum

(1) Eligibility criteria - Alberta, Manitoba, Saskatchewan, Québec, Prince Edward Island, Northwest Territories and Nunavut

Alberta, Manitoba, Saskatchewan, Québec, Prince Edward Island, Northwest Territories and Nunavut impose eligibility criteria on persons investing under the offering memorandum exemption. In these jurisdictions, anyone can purchase up to $10 000 worth of securities under the offering memorandum exemption. However, the purchaser must be an eligible investor if the purchaser’s acquisition cost is more than $10 000.

In determining the acquisition cost to a purchaser who is not an eligible investor, include any future payments that the purchaser will be required to make.

Proceeds which may be obtained on exercise of warrants or other rights, or on conversion of convertible securities, are not considered to be part of the acquisition cost unless the purchaser is legally obligated to exercise or convert the securities. The $10 000 maximum acquisition cost is calculated per distribution.

Nevertheless, concurrent and consecutive closely timed offerings to the same purchaser will usually constitute one distribution. Consequently, when calculating the acquisition cost, all of these offerings by or on behalf of the issuer to the same purchaser who is not an eligible investor would be included. It would be inappropriate for an issuer to try to circumvent the $10 000 threshold by dividing a subscription in excess of $10 000 by one purchaser into a number of smaller subscriptions of $10 000 or less that are made directly or indirectly by the same purchaser.

A purchaser can qualify as an eligible investor under various categories of the definition, including if the purchaser has and has had in prior years either $75 000 pre-tax net income or has $400 000 worth of net assets. In calculating a purchaser's net assets, subtract the purchaser's total liabilities from the purchaser's total assets. The value attributed to assets should reasonably reflect their estimated fair value. Income tax should be considered a liability if the obligation to pay it is outstanding at the time of the trade. Another way a purchaser can qualify, as an eligible investor is to obtain advice from an eligibility adviser. An eligibility adviser is a person registered as an investment dealer (or in an equivalent category of unrestricted dealer in the purchaser's jurisdiction) that is authorized to give advice with respect to the type of security being distributed. In Saskatchewan and Manitoba, certain lawyers and public accountants may also act as eligibility advisers.

A registered investment dealer providing advice to a purchaser in these circumstances is expected to comply with the "know your client" and suitability requirements under applicable securities legislation and SRO rules and policies. Some dealers have obtained exemptions from the "know your client" and suitability requirements because they do not provide advice. An assessment of suitability by these dealers is not sufficient to qualify a purchaser as an eligible investor.

(2) Use of offering memorandum exemption by investment funds

Except in Newfoundland and Labrador, investment funds that are not reporting issuers or labour sponsored venture capital funds cannot use the offering memorandum exemption. In Saskatchewan, Manitoba and Québec, in addition to being a reporting issuer, an investment fund must be listed on a stock exchange or quoted on an over the counter market.

(3) Form of offering memorandum

There are two forms of offering memorandum: Form 45-106F3, which may be used by qualifying issuers, and Form 45-106F2, which must be used by all other issuers. Form 45-106F3 requires qualifying issuers to incorporate by reference their annual information form (AIF), management's discussion and analysis (MD&A), annual financial statements and subsequent specified continuous disclosure documents required under Regulation 51-102.

A qualifying issuer is a reporting issuer that has filed an AIF under Regulation 51-102 and has met all of its other continuous disclosure obligations, including those in Regulation 51-102, Regulation entitled National Instrument 43-101. *Standards of Disclosure for Mineral Projects*, and *Regulation 51-101 respecting Standards of Disclosure for Oil and Gas Activities*. Under Regulation 51-102, venture issuers are not required to file AIFs. However, if a venture issuer wants to use Form 45-106F3, the venture issuer must voluntarily file an AIF under Regulation 51-102 in order to incorporate that AIF into its offering memorandum.

(4) Date of certificate and required signatories

The issuer must ensure that the information provided to the purchaser is current and does not contain a misrepresentation. For example, if a material change occurs in the business of the issuer after delivery of an offering memorandum to a potential purchaser, the issuer must give the potential purchaser an update to the offering memorandum before the issuer accepts the agreement to purchase the securities. The update to the offering memorandum may take the form of an amendment describing the material change, a new offering memorandum containing up-to-date disclosure or a material change report, whichever the issuer decides will most effectively inform purchasers.

Whatever form of update the issuer uses, it must include a newly signed and dated certificate as required in subsection 2.9(11) of Regulation 45-106.

The certificate must be signed by each of the following: the chief executive officer and the chief financial officer of the issuer (or, if the issuer does not have a chief executive officer or chief financial officer, persons acting in those capacities), by all promoters of the issuer, and any two directors of the issuer. If the issuer has more than two directors, any two directors who are authorized to sign the certificate, other than the chief executive officer and chief financial officer, may sign on behalf of all of the directors. If the issuer does not have at least two directors other than the chief executive officer and chief financial officer, then all directors must sign the certificate.

“Promoter” is defined differently in provincial securities legislation across CSA jurisdictions. It is generally defined as meaning a person who has taken the initiative in founding, organizing or substantially reorganizing the business of the issuer or who has received consideration over a prescribed amount for services or property or both in connection with founding, organizing or substantially reorganizing the issuer. “Promoter” has not been defined in the *Securities Act* (Québec) and a broad interpretation is taken in Québec in determining who would be considered a promoter.

Under securities legislation, persons who receive consideration solely as underwriting commissions or in consideration of property and who do not otherwise take part in the founding, organizing or substantially reorganizing the issuer are not promoters. Simply selling securities, or in some way facilitating sales in securities, does not make a person a promoter under this exemption.

In the case of an exempt distribution by a limited partnership where the general partner is a corporation, the general partner is expected to sign as promoter and the chief executive officer, chief financial officer and directors of the general partner to sign in those capacities on behalf of the issuer.

(5) Consideration to be held in trust

The purchaser has the right to cancel the agreement to purchase the securities until midnight on the 2nd business day after signing the agreement. During this period, the issuer must arrange for the consideration to be held in trust on behalf of the purchaser.

It is up to the issuer to decide what arrangements are necessary to preserve the consideration received from the purchaser. The requirement to hold the consideration in trust may be satisfied if, for example, the issuer keeps the purchaser's cheque, without cashing or depositing it, until the expiration of the two business day cancellation period.

It is also the issuer's responsibility to ensure that whoever is holding the consideration promptly returns it to the purchaser if the purchaser cancels the agreement to purchase the securities.

(6) Filing of offering memorandum

The issuer is required to file the offering memorandum with the securities regulatory authority in each of the jurisdictions in which the issuer distributes securities under the offering memorandum exemption. The issuer must file the offering memorandum on or before the 10th day after the distribution.

If the issuer is conducting multiple closings, the offering memorandum must be filed on or before the 10th day after the first closing. Once the offering memorandum has been filed, there is no need to file it again after subsequent closings, unless it has been updated.

(7) Purchasers' rights

Unless securities legislation in a purchaser's jurisdiction provides a purchaser with a comparable right of cancellation or revocation, an issuer must give each purchaser under an offering memorandum a contractual right to cancel the agreement to purchase the securities by delivering a notice to the issuer not later than midnight on the 2nd business day after the purchaser signs the agreement.

Unless securities legislation in a purchaser's jurisdiction provides purchasers with statutory rights, the issuer must also give the purchaser a contractual right of action against the issuer in the event the offering memorandum contains a misrepresentation. This contractual right of action must be available to the purchaser regardless of whether the purchaser relied on the misrepresentation when deciding to purchase the securities. This right is similar to that given to a purchaser under a prospectus. The purchaser may claim damages or ask that the agreement be cancelled. If the purchaser wants to cancel the agreement, the purchaser must commence the action within 180 days after signing the agreement to purchase the securities. If the purchaser is seeking damages, the purchaser must commence the action within the earlier of 180 days after learning of the misrepresentation or 3 years after signing the agreement to purchase the securities.

The issuer is required to describe in the offering memorandum any rights available to the purchaser, whether they are provided by the issuer contractually as a condition to the use of the exemption or provided under securities legislation.

3.10 Minimum amount investment

An issuer may wish to trade more than one kind of security of its own issue, such as shares and debt, in a single transaction under the minimum investment amount exemption. Provided that the shares and debt are sold in units that have a total acquisition cost of not less than $150 000 paid in cash at the time of the trade**,** the exemption can be used notwithstanding that the acquisition cost of the shares and the acquisition cost of the debt, taken separately, are both less than $150 000.

PART 4 OTHER EXEMPTIONS

4.1 Employee, executive officer, director and consultant exemptions

Trustees, custodians or administrators who engage in activities contemplated by subsection 2.27(2) of Regulation 45-106 that bring together buyers and sellers of securities should have regard to the provisions of Regulation entitled National Instrument 21-101, *Marketplace Operation* respecting "marketplaces" and "alternative trading systems".

4.2 Business combination and reorganization

(1) Broad interpretation

The securities regulatory authorities interpret the phrase "statutory procedure" broadly and are of the view that the exemption can be used for all trades in securities of an issuer that are both part of the procedure and necessary to complete the transaction, regardless of when the trades occur.

(2) Statutory procedure

Section 2.11 of Regulation 45-106 exempts trades in securities in connection with an amalgamation, merger, reorganization or arrangement if the same is done "under a statutory procedure". The securities regulatory authorities are of the view that the references to statutory procedure in section 2.11 of Regulation 45-106 are to any statute of a jurisdiction or foreign jurisdiction under which the entities involved have been incorporated or created and exist or under which the transaction is taking place. This would include, for example, an arrangement under the *Companies' Creditors Arrangement Act* (Canada).

(3) Three-cornered amalgamations

Certain corporate statutes permit a so-called "three-cornered merger or amalgamation" under which two companies will amalgamate or merge and security holders of the amalgamating or merging entities will receive securities of a third party affiliate of one amalgamating or merging entity. Section 2.11 of Regulation 45-106 exempts these trades as the exemption applies to any trade made in connection with an amalgamation or merger done under a statutory procedure.

(4) Exchangeable shares

A transaction involving a procedure described in section 2.11 of Regulation 45-106 may include an exchangeable share structure to achieve certain tax-planning objectives. For example, where a non-Canadian company seeks to acquire a Canadian company under a plan of arrangement, an exchangeable share structure may be used to allow the Canadian shareholders of the company to be acquired to receive, in substance, shares of the non-Canadian company while avoiding the adverse tax consequences associated with exchanging shares of a Canadian company for shares of a non-Canadian company. Instead of receiving shares of the non-Canadian company directly the Canadian shareholders receive: shares of a Canadian company which, through various contractual arrangements, have economic terms and voting rights that are essentially identical to the shares of the non-Canadian company and permit the holder to exchange such shares, at a time of the holder's choosing, for shares of the non-Canadian company.

Historically, the use of an exchangeable share structure in connection with a statutory procedure has raised a question as to whether the exemption in section 2.11 of Regulation 45-106 was available for all trades necessary to complete the transaction. For example, in the case of the acquisition under a plan of arrangement noted above, the use of an exchangeable share structure may result in a delay of several months or even years between the date of the arrangement and the date the shares of the non-Canadian company are distributed to the former shareholders of the acquired company. As a result of this delay, some filers have questioned whether the distribution of the non-Canadian company's shares upon the exercise of the exchangeable shares may still be viewed as being "in connection with" the statutory transaction, and have made application for exemptive relief to address this uncertainty.

The securities regulatory authorities have taken the position that the statutory procedure exemption in section 2.11 of Regulation 45-106 is available for all trades of securities that are necessary to complete an exchangeable share transaction involving a procedure described in section 2.11, even where such trades occur several months or years after the transaction. In the case of the acquisition noted above, the investment decision of the shareholders of the acquired company at the time of the arrangement ultimately represented a decision to exchange their shares for shares of the non-Canadian company. The distribution of such shares upon the exercise of the exchangeable shares does not represent a new investment decision, but merely represents the completion of that original investment decision. Accordingly, additional exemptive relief is not warranted in these circumstances.

4.3 Asset acquisition - character of assets to be acquired

When issuing securities, issuers must comply with the requirements under applicable corporate or other governing legislation that the securities be issued for fair value. Where securities are issued for non-cash consideration such as assets or resource properties, it is the responsibility of the issuer and its board of directors to determine the fair market value of the assets or resource properties and to retain records to demonstrate how that fair market value was determined. In some situations cash assets that make up working capital could be considered in the total calculation of the fair market value.

4.4 Securities for debt - *bona fide debt*

A bona fide debt is one that was incurred for value, on commercially reasonable terms and that on the date the debt was incurred the parties believed would be repaid in cash.

A reporting issuer may distribute securities to settle a debt only after the debt becomes due, as evidenced by the creditor issuing an invoice, demand letter or other written statement to the issuer indicating that the debt is due. The securities for debt exemption may not be relied on for the issuance of securities by an issuer to secure a debt that will remain outstanding after the issuance.

4.5 Take-over bid and issuer bid

(1) Exempt bids

Issuers are reminded that the terms take-over bid and issuer bid, for the purposes of section 2.16 of Regulation 45-106, include an exempt take-over bid and exempt issuer bid.

(2) Bids involving exchangeable shares

The take over bid and issuer bid exemption is available for trades necessary to complete a take over bid or an issuer bid that involves an exchangeable share structure (as described under the heading Business combination and reorganization (statutory procedure)), even where such trades may occur several months or even years after the bid is completed.

4.6 Isolated trade

The isolated trade exemption in section 2.31 of Regulation 45-106 is limited to trades made by an issuer in a security of its own issue. A comparable exemption from the dealer registration requirement is available under section 3.3. The latter exemption is available for trades in any security but it is not available to issuers to trade a security of its own issue.

It is intended that the isolated trade exemptions will only be used rarely and are not available for registrants or others whose business is trading in securities. Reliance upon this exemption might be appropriate, for example, when a person who is not involved in the business of trading wishes to make a single trade of a security that person owns to another person. The exemption would not be available to a person for any subsequent trades for a period of time adequate to ensure that each transaction was truly isolated and unconnected.

4.7 Mortgages

Regulation 45-106 has specifically excluded syndicated mortgages from the mortgage exemption in section 2.37. In determining what constitutes a syndicated mortgage issuers will need to refer to the definition provided in Part 1 of Regulation 45-106.

The mortgage exemption does not apply to securities that secure mortgages by bond, debenture, trust deed or similar obligation. The mortgage exemption also does not apply to a trade in a security that represents an undivided co-ownership interest in a pool of mortgages, such as a pass-through certificate issued by an issuer of asset-backed securities.

4.8 Not for Profit Issuer

This exemption allows trades in securities of an issuer that is organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not for profit ("not for profit issuer"). To use this exemption, an issuer must be organized exclusively for one or more of the listed purposes and use the funds raised under this exemption for those purposes.

If an issuer is organized exclusively for one of the listed purposes, but its mandate changes so that it is no longer primarily engaged in the purpose it was organized for the issuer may no longer be able to rely on the exemption. For example, an issuer that is organized exclusively for educational purposes over time devotes more and more of its efforts to lending money, even if it is only to other educational entities, the lending issuer may be deemed unable to rely on this exemption The same would also be true if one of an issuer's mandates was to provide an investment vehicle for its members. An issuer that issues securities that pay dividends would also not be able to use this exemption, because no part of the issuer's net earnings can go to any security holder.

In Québec, not for profit issuers may still rely on the broad exemption available for not for profit issuers under section 3 of the *Securities Act* (Québec). However, not for profit issuers that distribute outside of Québec must rely on the exemption in section 2.39 of Regulation 45-106.

4.9 Exchange Contracts

The exemption for exchange contracts in section 3.2 of Regulation 45-106 is only available in Alberta, British Columbia, Quebec and Saskatchewan. In Manitoba and Ontario exchange contracts are governed by commodity futures legislation.

The registration exemption for exchange contracts in section 3.2(1)(b) of Regulation 45-106 allows for trades resulting from unsolicited orders placed with an individual resident outside the jurisdiction. However, while an unsolicited trade does not require registration, if the individual conducts further trades in the future, that individual will be deemed to be carrying on business in the jurisdiction and will not be able to rely on this exemption.

PART 5 FORMS

5.1 Report of exempt distribution

An issuer that has distributed a security of its own issue under any of the exemptions listed in section 6.1 of Regulation 45-106 is required to file Form 45-106F1 a "report of exempt distribution" on or before the 10th day after the distribution. The form contains detailed instructions on how to complete and file it.

The securities legislation of several provinces requires, in effect, that information filed with the securities regulatory authority or, where applicable, the regulator under such securities legislation, be made available for public inspection during normal business hours except for information that the securities regulatory authority or, where applicable, the regulator,

(a) believes to be personal or other information of such a nature that the desirability of avoiding disclosure thereof in the interest of any affected individual outweighs the desirability of adhering to the principle that information filed with the securities regulatory authority or the regulator, as applicable, be available to the public for inspection,

(b) in Alberta, considers that it would not be prejudicial to the public interest to hold the information in confidence, or

(c) in Quebec, considers that access to the information could result in serious prejudice.

Based on the above mentioned provisions of securities legislation, the securities regulatory authorities or the regulators, as applicable, have determined that the information listed in Form 45-106F1, *Report of Exempt Distribution,* Schedule I ("Schedule I") discloses personal or other information of such a nature that the desirability of avoiding disclosure of this personal information outweighs the desirability of making the information available to the public for inspection. In addition, in Alberta the regulator considers that it would not be prejudicial to the public interest to hold the information listed in Schedule I in confidence. In Quebec, the securities regulatory authority considers that access to Schedule I by the public in general could result in serious prejudice and consequently the information listed in Schedule I will not be made publicly available.

5.2 Forms required under the offering memorandum exemption

Regulation 45-106 designates two forms of offering memorandum the first, Form 45-106F2 is for non-qualifying issuers and the second, Form 45-106F3, can only be used by qualifying issuers (as defined in Regulation 45-106).

The required form of risk acknowledgment under section 2.9(1) or 2.9(2) of Regulation 45-106 is Form 45-106F4.

The British Columbia securities regulatory authority has specified the same offering memorandum forms (Form 45-106F2 and Form 45-106F3) and risk acknowledgment form (Form 45-106F4) for use in that jurisdiction under B.C. Policy 13-601, *Required Forms*.

5.3 Real estate securities

Certain jurisdictions impose alternative or additional disclosure requirements in relation to the distribution of real estate securities by offering memorandum. Refer to securities legislation in the jurisdictions where securities are being distributed.

5.4 Risk acknowledgement form respecting close personal friends and close business associates – Saskatchewan

In Saskatchewan, a risk acknowledgment is also required under section 2.6(1) of Regulation 45-106 if the person intends to rely upon the "family, friends and business associates exemption" in section 2.5 of Regulation 45-106 based on a relationship of close personal friendship or close business association. The form of risk acknowledgement required in these circumstances is Form 45-106F5.

PART 6 RESALE OF SECURITIES ACQUIRED UNDER AN EXEMPTION

6.1 Resale restrictions

In most jurisdictions, securities distributed under an exemption may be subject to restrictions on their resale. The particular resale, or "first trade", restrictions depend on the parties to the trade and the particular exemption that was relied upon to distribute the securities. In certain circumstances, no resale restrictions will apply and the securities acquired under an exempt trade will be freely tradable.

Resale restrictions are imposed under Multilateral Instrument 45-102, *Resale of Securities* (MI 45-102). While the Rule contains text boxes providing commentary on resale, these text boxes are intended as guidance only and are not a substitute for reviewing the applicable provisions in MI 45-102 to determine what resale restrictions, if any, apply to the securities in question.

The resale restrictions operate by triggering the prospectus requirement unless certain conditions are satisfied. Securities that are subject to such restrictions in circumstances where the conditions cannot be satisfied may nevertheless be traded under an exemption from the prospectus requirement, whether under Regulation 45-106 or other securities legislation.