CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

Multilateral CSA Notice of Amendments to *Regulation 45-106 respecting Prospectus Exemptions* Relating to the Offering Memorandum Exemption

October 29, 2015

Introduction

The securities regulatory authorities in Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan (collectively, the **participating jurisdictions** or **we**) are amending *Regulation 45-106 respecting Prospectus Exemptions* (**Regulation 45-106**) in respect of the offering memorandum exemption in section 2.9 of Regulation 45-106 (the **OM exemption**). We are also making changes to *Policy Statement to Regulation 45-106 respecting Prospectus Exemptions* (**Policy Statement 45-106**) and certain consequential amendments to other regulations and one policy.

The participating jurisdictions have coordinated their efforts in finalizing the Regulation 45-106 amendments, related policy changes and other consequential regulation amendments (collectively, the **final amendments**). The final amendments are made or proposed by each participating jurisdiction. In some jurisdictions, ministerial approvals are required for these changes.

Provided all necessary ministerial approvals are obtained, the final amendments will come into force in Ontario on January 13, 2016 and in Alberta, New Brunswick, Nova Scotia, Québec and Saskatchewan on April 30, 2016.

Substance and purpose of the final amendments

The final amendments modify the existing OM exemption in Alberta, New Brunswick, Nova Scotia, Québec and Saskatchewan and introduce an OM exemption in Ontario. The final amendments do not modify the OM exemption that exists in any CSA jurisdiction other than the participating jurisdictions.

In Ontario, the introduction of the OM exemption will allow business enterprises, particularly small and medium sized enterprises (**SMEs**), to benefit from greater access to capital from investors than has been previously permitted under Ontario securities law. We believe the OM exemption will provide business enterprises with a cost-effective way to raise capital by allowing them to distribute securities under an offering memorandum, while maintaining an appropriate level of investor protection.

In Alberta, New Brunswick, Nova Scotia, Québec and Saskatchewan, the modifications to the existing OM exemption will introduce new investor protection measures to address concerns observed with the use of the OM exemption in certain of these jurisdictions.

Regulatory framework

The prospectus requirement

Generally, when distributing securities, an issuer must provide investors with a prospectus containing full, true and plain disclosure of all material facts relating to the securities to be

issued. Issuers that become reporting issuers are also required to provide prescribed periodic and timely disclosure. This disclosure is intended to provide both existing and potential new investors with the information necessary to make an informed decision regarding whether to buy, sell or hold the security. Due to the availability of ongoing material information, coupled with the initial disclosure provided through the prospectus, the outstanding securities are generally permitted to be freely tradeable. This combination of material information and free-trading securities then allows a market in the securities to develop.

Exemptions from the prospectus requirement
Prospectus exemptions are provided in circumstances where it is determined that the protections of a prospectus are not necessary. For example, certain prospectus exemptions, such as the accredited investor exemption and the family, friends and business associates exemption are based on factors such as:

- investor attributes, such as the investor having a certain level of sophistication, the ability to withstand financial loss and the financial resources to obtain expert advice, and
- the investor's relationship with certain principals of the issuer.

Investors who purchase securities of non-reporting issuers through prospectus exemptions do not generally have the benefits afforded by ongoing disclosure and free-trading securities.

The OM exemption
The OM exemption was designed to facilitate capital-raising by allowing issuers to solicit investments from a wider range of investors than they would be able to under other prospectus exemptions, provided that certain conditions are met. Some of these investors may not have the same level of sophistication, ability to withstand loss or relationship with management as those who qualify to purchase securities under other commonly used capital-raising exemptions, such as the accredited investor exemption or the family, friends and business associates exemption.

In the jurisdictions that currently have an OM exemption, investors are provided with a disclosure document at the point of sale (an offering memorandum), as well as a risk acknowledgement form in respect of their initial investment. However, under the OM exemption, less disclosure is required to be provided to investors by issuers at the point of sale relative to what is required to be included in a prospectus, and currently, no disclosure is required to be provided to investors under securities law by non-reporting issuers on an ongoing basis. In addition, securities acquired under the OM exemption are not freely tradeable. Together, these features of the OM exemption represent potential risks.

In light of the particular risks associated with the OM exemption and based on the experience of certain participating jurisdictions that currently have a version of the exemption in place, we believe that it is appropriate to introduce some new investor protection measures to the OM exemption. These include:

- requiring that non-reporting issuers provide to investors:
    - audited annual financial statements,
    - an annual notice on how the proceeds raised under the OM exemption have been used, and
    - in New Brunswick, Nova Scotia and Ontario, notice in the event of a discontinuation of the issuer's business, a change in the issuer's industry or a

change of control of the issuer,

- requiring that marketing materials be incorporated by reference into the offering memorandum to provide investors with the same rights of action in respect of all disclosure made under the OM exemption in the event of a misrepresentation, and
- imposing additional investment limits in respect of both eligible (i.e., investors who meet certain income or asset thresholds) and non-eligible investors that are individuals to limit the risks associated with an investment in securities acquired under the OM exemption.

New key features of the OM exemption

The following is a summary of the new key features of the OM exemption adopted by the participating jurisdictions.

(a) Investment limits

The participating jurisdictions have adopted investment limits for both eligible and non-eligible investors that are *individuals* (other than those that qualify as accredited investors or under the family, friends and business associates exemption). These limits will not apply to non-individual investors, whether eligible or non-eligible. The final amendments permit a higher investment threshold for eligible investors when a portfolio manager, investment dealer or exempt market dealer has made a positive suitability assessment.

The investment limits will apply to all securities acquired under the OM exemption as follows:

- in the case of a non-eligible investor that is an individual, the acquisition cost of all securities acquired by the purchaser under the OM exemption in the preceding 12 months cannot exceed $10,000,
- in the case of an eligible investor that is an individual, the acquisition cost of all securities acquired by the purchaser under the OM exemption in the preceding 12 months cannot exceed $30,000, and
- in the case of an eligible investor that is an individual and that receives advice from a portfolio manager, investment dealer or exempt market dealer that the investment above $30,000 is suitable, the acquisition cost of all securities acquired by the purchaser under the OM exemption in the preceding 12 months cannot exceed $100,000.

(b) New schedules to the risk acknowledgement form

The participating jurisdictions will continue to require all investors (including those who qualify as permitted clients) to complete and sign form 45-106F4 *Risk Acknowledgement*, which highlights for investors the key risks associated with investing in securities acquired under the OM exemption.

However, two new schedules have been added which must be completed by each investor that is an individual in conjunction with the risk acknowledgement form. One schedule asks investors to confirm their status, as an eligible investor, non-eligible investor, accredited investor or an investor who would qualify to purchase securities under the family, friends and business associates exemption. The other schedule requires confirmation that the investor is within the investment limits, where applicable. Investors that are not individuals do not have to complete these new schedules.

(c) Disclosure of audited annual financial statements, notice of use of proceeds and notice of specified key events

Non-reporting issuers that use the OM exemption will be required to provide audited annual financial statements to investors, as well as a notice that accompanies the financial statements which describes how the money raised under the OM exemption has been used. A new prescribed form has been introduced for the purposes of this disclosure.

In New Brunswick, Nova Scotia and Ontario, non-reporting issuers will also be required to provide notice to investors of the following events, within 10 days of the event occurring, in a new prescribed form:

- a discontinuation of the issuer's business,
- a change in the issuer's industry, or
- a change of control of the issuer.

(d) Marketing materials

Marketing materials used by issuers in distributions under the OM exemption must be incorporated by reference into the offering memorandum. As a result, the marketing materials will be subject to the same liability as the disclosure provided in the offering memorandum in the event of a misrepresentation.

(e) Other features

Issuers will be prohibited from relying on the OM exemption to distribute specified derivatives or structured finance products. In Alberta, Nova Scotia and Saskatchewan, the OM exemption will continue to be available to investment funds only if they are non-redeemable investment funds or mutual funds that are reporting issuers. In New Brunswick, Ontario and Québec, the OM exemption will not be available to investment funds.

Background

The participating jurisdictions other than the Nova Scotia Securities Commission (**NSSC**) previously requested comment (the **March 2014 materials**) on proposals reflected in the final amendments. On March 20, 2014, as part of a broad review of the exempt market, the Ontario Securities Commission (**OSC**) published a Notice and Request for Comment which included the proposed amendments to the OM exemption and related policy changes (the **OSC proposals**). On the same date, in response to concerns with the use of the OM exemption, the Alberta Securities Commission (**ASC**), Autorité des marchés financiers (**Autorité**), Financial and Consumer Affairs Authority of Saskatchewan (**FCAA**) and Financial and Consumer Services Commission (New Brunswick) (**FCNB**) published a Multilateral CSA Notice of Publication and Request for Comment regarding proposed amendments to the OM exemption and related policy changes (the **MI proposals**). The proposals of the ASC, AMF and FCAA were largely aligned, while the FCNB proposal was primarily harmonized with the OSC proposals.

On May 7, 2015, the NSSC published a Notice and Request for Comment (the **May 2015 materials**) which proposed changes to the OM exemption in Nova Scotia that are similar to the final amendments.

Summary of written comments received by the participating jurisdictions

The comment period for the March 2014 materials ended on June 18, 2014. The participating

jurisdictions that published the March 2014 materials collectively received written submissions from 1000 commenters regarding the OM exemption. Comment letters received by the following jurisdictions can be viewed on their websites:

- Autorité – www.lautorite.qc.ca
- OSC – www.osc.gov.on.ca
- ASC – www.albertasecurities.com

The comment period for the May 2015 materials ended on July 6, 2015. The NSSC received written submissions from four commenters. These comment letters can be viewed on the NSSC website at nssc.novascotia.ca.

We have considered the comments received and thank all of the commenters for their input.

A summary of the general themes raised in the comment letters that were received across the participating jurisdictions can be found under the heading "Key themes from the comment letters" below.

Key themes from the comment letters

There were several key themes expressed in the comment letters submitted to the participating jurisdictions. Below is a summary of these key themes.

Harmonization

A significant number of commenters expressed concern about a lack of harmonization in the OM exemption across CSA jurisdictions, with some indicating that harmonization of the OM exemption should be a primary goal of the CSA. Commenters indicated that lack of harmonization could result in:

- increased complexity for issuers in complying with the OM exemption,
- increased time and cost for market participants, and
- increased regulatory burden.

Some commenters suggested that a lack of harmonization could deter issuers, especially SMEs, from using the OM exemption.

As a starting point, we have worked with the version of the OM exemption that currently exists in certain participating jurisdictions, such as Alberta and Québec. Currently, there are two primary models of the OM exemption that exist across the CSA (other than Ontario, which has not previously had an OM exemption).

The participating jurisdictions have endeavoured to harmonize the proposed new OM exemption. While we have not achieved complete harmonization, we believe that, having regard to different local capital markets and experiences, we have achieved substantial harmonization on most of the key aspects of the OM exemption. Further, in relation to the non-participating jurisdictions, there remains harmonization in important areas, such as the forms of offering memorandum and risk acknowledgement.

The participating jurisdictions believe the changes being made to the OM exemption are necessary to address investor protection concerns.

Use of data

Many commenters suggested that securities regulators should gather and publish more data on the exempt market in order to inform policy initiatives. Some commenters expressed concern about whether the participating jurisdictions had access to sufficient data to support the amendments that were being proposed, and indicated that no such data had been published.

We believe that we have access to sufficient information to make the policy decisions that are reflected in the OM exemption set out in the final amendments. At this time, the primary source of data on the exempt market available to securities regulators is the information filed with us through reports of exempt distribution. For example, data on the use of the OM exemption is currently gathered in those CSA jurisdictions that have the OM exemption. The ASC previously published a summary of that data in the MI proposals published for comment on March 20, 2014.

In addition, we considered data or information from a number of sources to support our review:

- the results of a survey conducted by a third party service provider engaged by the OSC as part of its review of new capital raising prospectus exemptions that provided insight into retail investors' views on investing in SMEs,
- household balance sheet data from Ipsos Reid's 2012 Canadian Financial Monitor Survey,
- feedback from investors obtained through consultations and other informal means,
- information regarding complaints and enforcement activity related to the OM exemption in those participating jurisdictions that currently have the OM exemption,
- consultations conducted in certain participating jurisdictions with a variety of market participants, and
- comments received on the proposals published in OSC Staff Consultation Paper 45-710 *Considerations for New Capital Raising Prospectus Exemptions*.

The CSA recently announced an initiative to modernize and update the reports of exempt distribution in order to obtain more detailed information on activity in the exempt market. A revised report of exempt distribution was published for comment by the CSA on August 13, 2015. The revised report is intended to provide securities regulators with necessary information to facilitate more effective regulatory oversight of the exempt market and improve analysis for policy development purposes.

Investment limits

The March 2014 materials published by the FCNB and OSC included proposed investment limits of $10,000 for non-eligible investors that are individuals and $30,000 for eligible investors that are individuals for all securities acquired under the OM exemption in a 12-month period.

The March 2014 materials published by the ASC, AMF and FCAA included proposed investment limits of:

- $10,000 for all investors that are not eligible investors for all securities acquired under the OM exemption in a 12-month period, and
- $30,000 for eligible investors that are individuals and that are not accredited investors and do not qualify as specified family members, close personal friends or close business associates under the family, friends and business associates exemption in a 12-month period.

Most commenters were opposed to the proposed investment limits, and suggested that they would be overly restrictive and unfair to investors. In particular, the commenters noted the following:

- Investment limits would restrict investor choice and would reduce the ability of investors to appropriately design and diversify their investment portfolios.
- The investment limits are inflexible as they treat all eligible investors the same and do not take into account the particular financial circumstances of each individual investor.
- The investment limits would reduce the amount of capital available to issuers.
- *Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**Regulation 31-103**) provides an appropriate regulatory framework for the exempt market and securities regulators should rely on the know-your-client, know-your-product and suitability obligations of registrants, instead of imposing limits on investors.
- The investment limits would have unintended consequences. For instance, registrants would "sell to the cap" and the sales process would be at risk of becoming a "tick the box" exercise.
- The investment limits would be too small to enable dealers to offer investments under the OM exemption on a cost-effective basis.
- The investment limits do not account for the stage-based nature of private capital.
- The investment limits would result in the redesign of exempt market products in attempts to avoid the limits.

In addition, many commenters noted that there have been significant losses in the public markets, yet investors are not restricted with respect to how much they can invest in those markets. Others were of the view that the proposed investment limits would not address the actual reasons why investors may lose money in investments under the OM exemption, and accordingly would not serve to protect investors. Further, concern was expressed that by setting a limit of $30,000 for individual eligible investors, securities regulators appeared to be suggesting that this amount was an acceptable loss.

We continue to believe that investment limits are a necessary and appropriate investor protection tool that can help to reduce the risk associated with an investment in securities under the OM exemption, while still facilitating capital-raising by issuers.

However, in light of the feedback that we received, we considered different approaches to investment limits under the OM exemption and have made some changes to the investment limits that were proposed in the March 2014 materials. We believe that the revised approach to investment limits is more flexible, given that the category of "eligible investor" may include individual investors with very different financial circumstances, but still provides appropriate investor protection. The participating jurisdictions have also harmonized their positions since March 2014 so that the investment limits for both eligible and non-eligible investors do not apply to non-individual investors, such as corporations, partnerships or trusts. In addition, we have also made changes to the rule to prohibit the creation or use of an entity, such as a corporation or trust, solely for the purpose of relying on the OM exemption.

Disclosure requirements

The March 2014 materials proposed additional disclosure requirements for non-reporting issuers that distribute securities in reliance on the OM exemption. These requirements included the following:

- audited annual financial statements,
- a notice of the use of proceeds raised in reliance on the OM exemption, and
- in Ontario and New Brunswick, a notice of specified key events, to be provided within 10 days of the event occurring.

Commenters generally expressed support for requiring this disclosure to be provided by non-reporting issuers that use the OM exemption. However, some commenters did not support this requirement, on the basis that this would be a significant departure from current expectations for non-reporting issuers and would create additional costs for these issuers.

We believe that requiring non-reporting issuers raising money under the OM exemption to provide these items of disclosure to investors is necessary to provide investors with accurate and transparent information about their investment.

(a) Audited annual financial statements

Commenters generally supported requiring audited annual financial statements to be prepared in accordance with International Financial Reporting Standards (**IFRS**). However, some commenters suggested that these financial statements should only have to be audited by issuers that raise funds in reliance on the OM exemption above a certain threshold (with different thresholds being proposed by commenters). Some commenters did not support requiring an audit as this would impose an added cost that may be difficult for issuers, particularly SMEs, to bear which would not be justified given the limited utility of the financial statements. Other commenters stated that requiring the audited financial statements to be prepared in accordance with IFRS would also increase issuers' costs.

In considering this requirement, we noted that corporate legislation in many jurisdictions of Canada already requires shareholders to be provided with annual financial statements.

The final amendments retain the requirement for non-reporting issuers that rely on the OM exemption to provide audited annual financial statements prepared in accordance with IFRS. However, we are aware that the audit requirement could impose an additional burden on some smaller issuers, and we will continue to consider this matter during a future phase of our review.

Additionally, certain jurisdictions currently provide relief from the audit requirement as well as the requirement to prepare financial statements in accordance with IFRS in certain circumstances through blanket orders. In appropriate circumstances, securities regulators that do not currently provide relief through blanket orders may consider granting exemptive relief from these requirements, which would be considered on a case by case basis.

The final amendments also provide an extension to the filing deadline in certain limited circumstances for issuers that would be required to file annual financial statements for a financial year that ends prior to the issuer's first distribution under the OM exemption. This would allow issuers to file the financial statements on or before the later of the 60th day after the issuer

distributes securities under the OM exemption, and the deadline to file, deliver or make reasonably available the financial statements.

(b) Notice of discontinuation of the issuer's business, change of industry or change of control
Many commenters supported requiring non-reporting issuers to provide notice to investors of specified key events. However, some objected to this requirement because it would not be harmonized across all participating jurisdictions and it might result in increased costs for issuers.

In New Brunswick, Nova Scotia and Ontario, the final amendments require that non-reporting issuers must provide notice of specified key events to investors within 10 days of the event occurring. However, the notice will only be required with respect to the following events, which is a more limited list of events than the list set out in the March 2014 materials**:**

- a discontinuation of the issuer's business,
- a change in the issuer's industry, and
- a change of control of the issuer.

The FCNB, NSSC and OSC believe that this requirement will impose only a minimal administrative burden on issuers, given that the listed events will occur infrequently. We have also prescribed a form that sets parameters as to the nature and comprehensiveness of the information that will be required to be provided in the notice. At the same time, we believe that information on these key events would be of interest to investors and should be reported to them.

Role of related registrants
In the March 2014 materials, the FCNB and OSC proposed that registrants related to the issuer (i.e., affiliated registrants or registrants in the same corporate structure) would be prohibited from participating in a distribution of securities under the OM exemption.

Commenters expressed significant concern with this proposal. Some of the specific concerns raised by commenters included the following:

- Sales through a related registrant have long been accepted as part of the securities industry in Canada.
- All registrants are subject to the same regulatory oversight.
- There may be valid business reasons for an issuer to distribute securities through a related registrant, such as reduced costs.
- Excluding related registrants may negatively impact the ability of smaller issuers to raise capital under the OM exemption.
- Adequate safeguards relating to risks associated with the exempt market, including conflicts of interest, already exist.
- Excluding related registrants will negatively impact many registrants.

After considering the comments received, the FCNB and OSC have decided to remove the prohibition against related registrants participating in a distribution under the OM exemption. The existing regulatory framework requires registrants to identify and respond to material conflicts of interest that may affect their ability to meet their regulatory obligations, including conducting suitability assessments. We have included policy statement guidance to remind registrants of their responsibilities to address conflicts of interest in accordance with their regulatory obligations under Regulation 31-103 and *Regulation 33-105 respecting Underwriting*

Conflicts.

Exclusion of investment funds
Some commenters did not understand the policy rationale for the FCNB and OSC excluding investment funds from using the OM exemption as reflected in the March 2014 materials.

The FCNB and OSC continue to believe that it is appropriate to exclude investment funds from being able to distribute securities in reliance on the OM exemption. Since the end of the comment period on the March 2014 materials, the AMF has also decided to exclude investment funds from relying on the OM exemption.

Investment funds sold to retail investors are subject to significant and robust product regulation in regulations such as *Regulation 81-102 respecting Investment Funds* and *Regulation 81-107 respecting Independent Review Committee for Investment Funds*, including custodial requirements, voting requirements, conflict of interest provisions and investment restrictions. Mutual funds sold to retail investors are also required to provide investors with summary disclosure in a fund facts document. Additionally, the CSA is currently examining the fee structures of mutual funds sold to retail investors which may result in rulemaking initiatives. To permit investment funds to sell to retail investors under the OM exemption without the benefit of the disclosure and product regulation that applies to retail investment funds would be inconsistent with the principles underlying these existing rules and with three ongoing investment fund policy initiatives: modernization of investment fund regulation; point of sale disclosure for mutual funds; and the review of the cost of ownership of mutual funds. Further, the exclusion of investment funds is consistent with the objective of facilitating capital raising for business enterprises, particularly SMEs.

The ASC, FCAA and NSSC anticipate considering this issue in a later phase of the review of the OM exemption.

Summary of changes to the final amendments
After considering the comments received on the March 2014 materials and the May 2015 materials and consultations with stakeholders, we have made some changes to what was originally proposed. The changes are reflected in the final amendments.

Annex A contains a summary of key differences between the final amendments and the March 2014 materials. In addition to the changes described in Annex A, we have revised the policy statement guidance proposed in the March 2014 materials, as appropriate, to reflect the amendments to Regulation 45-106.

We do not consider the changes made since the publication for comment to be material and therefore are not republishing the final amendments for a further comment period, except in Québec, where some of the consequential amendments must be published for comment for a 30-day period and Saskatchewan, where some of the consequential amendments must be published for comment for a 60-day period.

Implementation of the final amendments
The final amendments will become effective on different dates in Ontario and the other participating jurisdictions. Subject to Ministerial approval where required, in Ontario, the final

amendments will become effective on January 13, 2016 and in Alberta, New Brunswick, Nova Scotia, Québec and Saskatchewan, the final amendments will become effective on April 30, 2016.

A large majority of the issuers currently using the OM exemption have a December 31 year-end. The April 30, 2016 effective date in Alberta, New Brunswick, Nova Scotia, Québec and Saskatchewan will allow these issuers to complete any offering that was initiated in these jurisdictions prior to the new requirements becoming effective and to decide whether they wish to continue using the OM exemption in its new form. It will also provide additional time for the non-December 31 year-end issuers that are currently using the OM exemption to transition to the new requirements.

Despite the delayed effective date in Alberta, New Brunswick, Nova Scotia, Québec and Saskatchewan, issuers must keep in mind that if they initiate a distribution or expand a distribution into Ontario once the OM exemption is available in Ontario, the issuer will be required to comply with all of the requirements of the OM exemption in Ontario, despite the later effective date in the other participating jurisdictions.

Consequential amendments

National and multilateral amendments

We are making consequential amendments to the following regulations:

- *Regulation 52-107 respecting Acceptable Accounting Principles and Auditing Standards*, and
- *Regulation 45-102 respecting Resale of Securities*.

The ASC, FCNB, NSSC, AMF and FCAA are also making consequential amendments to *Regulation 11-102 respecting Passport System*.

In Québec, the consequential amendments to the above regulations were published for comment on October 22, 2015, for a 30-day comment period. In Saskatchewan, the consequential amendments to the above regulations were published for comment today for a 60-day comment period. The consequential amendments are intended to come into force in Québec and Saskatchewan at the same time as the amendments to Regulation 45-106 come into force in Alberta, New Brunswick, Nova Scotia, Québec and Saskatchewan, on April 30, 2016.

We are also making a minor change to *Policy Statement 11-203 respecting Process for Exemptive Relief Applications in Multiple Jurisdictions* to reflect the changes being made to the OM exemption.

Local amendments

Any changes to local regulations or policies will be identified in a local notice, where applicable.

Local matters

An annex is being published in any local jurisdiction that is making related changes to local securities laws and sets out any additional information that is relevant to that jurisdiction only, including information about any applicable approval processes.

Questions

Please refer your questions to any of the following:

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Annex A
Summary of Key Changes to the March 2014 Materials

Investment limits

The March 2014 materials published by the FCNB and OSC provided that the acquisition cost of all securities acquired by an investor under the OM exemption in the preceding 12 months could not exceed:

- in the case of a non-eligible investor that is an individual, $10,000, and
- in the case of an eligible investor that is an individual, $30,000.

The March 2014 proposals published by the ASC, AMF and FCAA provided that the acquisition cost of all securities acquired by an investor under the OM exemption in the preceding 12 months could not exceed:

- in the case of an investor that is not an eligible investor, $10,000, and
- in the case of an eligible investor that is an individual and that is not an accredited investor and does not qualify as a specified family member, close personal friend or close business associate under the family, friends and business associates exemption, $30,000.

The OSC proposals provided that the above limits would apply to *individuals* that were not accredited investors. The MI proposal provided that the $10,000 limit for non-eligible investors would apply to both individual and non-individuals and the $30,000 limit would apply only to *individuals*, excluding accredited investors or those that would qualify under the family, friends and business associates exemption.

Based on the feedback that we received, we considered various options for investment limits under the OM exemption. The final amendments introduce investment limits for individual investors other than those that would qualify as accredited investors or investors that would qualify to invest under the family, friends and business associates exemption substantially as follows:

- in the case of an non-eligible investor that is an individual, the acquisition cost of all securities acquired by the purchaser under the OM exemption in the preceding 12 months cannot exceed $10,000,
- in the case of an eligible investor that is an individual, the acquisition cost of all securities acquired by the purchaser under the OM exemption in the preceding 12 months cannot exceed $30,000,
- in the case of an eligible investor that is an individual and that receives advice from a portfolio manager, investment dealer or exempt market dealer that the investment is suitable, the acquisition cost of all securities acquired by the purchaser under the OM exemption in the preceding 12 months cannot exceed $100,000.

The investment limits will not apply to non-individuals, whether eligible or non-eligible investors. The final amendments also prohibit reliance on the OM exemption by an entity, such as a corporation or trust, that was created solely for the purpose of acquiring securities under the OM exemption.

Eligibility criteria
The March 2014 materials provided that an investor could qualify as an eligible investor by receiving suitability advice from a registered investment dealer (a member of the Investment Industry Regulatory Organization of Canada). This is consistent with the eligibility criteria set out in paragraph (h) of the existing definition of "eligible investor" in section 1.1 of Regulation 45-106.

The final amendments do not retain this category of eligible investor. Consistent with the approach to investment limits under the final amendments, we believe that the relevance of suitability advice should apply to whether an eligible investor can exceed the $30,000 investment limit, rather than to whether they would qualify as an eligible investor.

Risk acknowledgment form
The OSC proposal contemplated only requiring individual investors (other than individual investors who are permitted clients) to sign a new risk acknowledgment form that was based on the risk acknowledgment form for individual accredited investors. The MI proposals did not propose a change to the risk acknowledgement form but proposed not requiring permitted clients to have to sign the risk acknowledgment form.

The final amendments retain the requirement to have all investors purchasing securities under the OM exemption sign a risk acknowledgment form, which is the status quo in those jurisdictions that currently have the OM exemption. The required form is the same as the existing form of risk acknowledgement for the OM exemption (Form 45-106F4). In the future, we may consider updating the risk acknowledgement form and will seek to work with other CSA jurisdictions that have the same requirement. The final amendments also introduce two new schedules to the risk acknowledgement form to be completed only by investors that are individuals, as follows:

- one schedule asking an investor to confirm whether and how the investor meets the criteria of an eligible investor, and
- a second schedule asking an investor to confirm that the investor is investing within the appropriate investment limit or is not subject to an investment limit, whichever is applicable.

The second schedule also requires that information be provided with respect to any registrant that has provided advice to the investor. Investors that are not individuals do not have to complete these new schedules.

Notice of use of proceeds
The March 2014 materials contemplated that non-reporting issuers would be required to provide a notice disclosing in reasonable detail the use of the aggregate gross proceeds raised by the issuer in distributions under the OM exemption.

The final amendments retain this requirement, and have added a prescribed form – Form 45-106F16 *Notice of Use of Proceeds* – for providing notice of the use of proceeds. We think that a prescribed form will improve consistency in reporting, and will also provide guidance to issuers as to the nature of the information that should be provided, which will in turn support compliance.

Notice of discontinuation of the issuer's business, change of industry or change of control
In New Brunswick and Ontario, the March 2014 materials contemplated that non-reporting issuers would be required to provide notice to investors of the following specified key events within 10 days of the event occurring:

- a fundamental change in the nature, or a discontinuation, of the issuer's business,
- a significant change to the issuer's capital structure,
- a major reorganization, amalgamation or merger involving the issuer,
- a take-over bid, issuer bid or insider bid involving the issuer,
- a significant acquisition or disposition of assets, property or joint venture interests, and
- changes to the issuer's board of directors or executive officers, including the departure of the issuer's chief executive officer, chief financial officer, chief operating officer or president or persons acting in similar capacities.

The final amendments require that in New Brunswick, Nova Scotia and Ontario, non-reporting issuers provide notice to investors of a streamlined list of events within 10 days of the event occurring, as follows:

- a discontinuation of the issuer's business,
- a change in the issuer's industry, and
- a change of control of the issuer.

The final amendments also prescribe a form – Form 45-106F17 *Notice of Specified Key Events* – that sets parameters as to the nature and comprehensiveness of the information that is required to be provided to investors.

Offering memorandum – filing requirement in Ontario and New Brunswick
The March 2014 materials contemplated that the offering memorandum would be *delivered* to the securities regulatory authorities in Ontario and New Brunswick and not placed on the public record.

The final amendments require that the offering memorandum and any marketing materials incorporated by reference into the offering memorandum be *filed* with the securities regulatory authorities in these jurisdictions and placed on the public record. This aligns with the existing requirement to file the offering memorandum in the other participating jurisdictions.

Annual financial statements – timing
The March 2014 materials proposed that non-reporting issuers that distribute securities under the OM exemption would be required to prepare audited annual financial statements and, on or before the 120th day after the end of its most recently completed financial year, file or deliver those statements to the securities regulatory authorities in Alberta, New Brunswick, Ontario, Québec and Saskatchewan, as applicable. In Nova Scotia, these statements are not required to be filed or delivered to the securities regulatory authority, but must be made reasonably available to investors.

The final amendments permit additional time to file audited annual financial statements in certain circumstances. This would allow issuers to file the financial statements on or before the

later of the 60th day after the issuer distributes securities under the OM exemption, and the deadline to file, deliver or make reasonably available the financial statements, as applicable.

Change in financial year end
The final amendments introduce certain requirements that non-reporting issuers must comply with in the event of a change in financial year end that were not contemplated in the March 2014 materials. These requirements are based on the requirements for reporting issuers that are set out in *Regulation 51-102 respecting Continuous Disclosure Obligations*.

Role of related registrants
In New Brunswick and Ontario, the March 2014 materials proposed that registrants related to the issuer (i.e., affiliated registrants or registrants in the same corporate structure) would be prohibited from participating in a distribution of securities under the OM exemption.

The final amendments do not prohibit related registrants from participating in a distribution under the OM exemption. The existing regulatory framework requires registrants to identify and respond to material conflicts of interest that may affect their ability to meet their regulatory obligations, including conducting suitability assessments. We have included companion policy guidance to remind registrants of their responsibilities to address conflicts of interest in accordance with their regulatory obligations under Regulation 31-103 and *Regulation 33-105 respecting Underwriting Conflicts.*

Investment funds
The March 2014 materials excluded investment funds from being able to distribute securities in reliance on the OM exemption in Ontario and New Brunswick. In the final amendments, Québec has also decided to adopt the same exclusion. The exclusion of investment funds is consistent with the objective of the OM exemption to facilitate capital raising for SMEs.

Marketing materials
There has been no change to the original proposal made in the March 2014 materials to require marketing materials to be incorporated by reference into an offering memorandum. This requirement has been adopted by all of the participating jurisdictions.

The final amendments prohibit portfolio managers, investment dealers and exempt market dealers from distributing marketing materials in connection with a distribution under the OM exemption unless the marketing materials have been approved in writing by the issuer. This prohibition has been added to address concerns around liability for issuers in respect of marketing materials they did not prepare.