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POLICY STATEMENT TO REGULATION 45-106 RESPECTING PROSPECTUS EXEMPTIONS

PART 1 INTRODUCTION

Regulation 45-106 respecting Prospectus Exemptions (chapter V-1.1, r. 21) ("Regulation 45-106") provides: (i) exemptions from the prospectus requirement and (ii) one exemption from the issuer bid requirements. It does not provide exemptions from the requirement to be registered as a dealer, adviser or investment fund manager. Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations (chapter V-1.1, r. 10) ("Regulation 31-103") contains some exemptions from the registration requirement.

1.1. Purpose

The purpose of this Policy Statement 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 Statement includes explanations, discussion and examples of the application of various parts of Regulation 45-106.

1.2. All distributions and other trades are subject to securities legislation

The securities legislation of a local jurisdiction applies to any trade in, or distribution of, 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. A person who engages in these activities, or other trading activities, must comply with the securities legislation of each jurisdiction in which the trade or distribution occurs.

1.3. Multi-jurisdictional distributions

A distribution can occur in more than one jurisdiction. If it does, the person conducting the distribution must comply with the securities legislation of each jurisdiction in which the distribution occurs. For example, a distribution from a person in Alberta to a purchaser in British Columbia may be considered a distribution in both jurisdictions.

1.4. 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.

1.5. 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.

1.6. Registration business trigger for trading and advising

Securities legislation requires certain persons to be registered if they are any of the following:

- *in the business of trading*
- *in the business of advising*
- *holding themselves out as being in the business of trading or advising*
- *acting as an underwriter*
- *acting as an investment fund manager*

Regulation 31-103 sets out the requirements for registration as well as certain exemptions from these registration requirements.

Issuers relying on prospectus exemptions to distribute securities, or any selling agents they use, may be required to be registered. Policy Statement to Regulation 31-103 gives guidance to issuers on how to apply the registration business trigger.

1.7. Underwriters

Underwriters should not sell securities to the public without providing a prospectus. If an underwriter purchases securities with a view to distribution, the underwriter should purchase the securities under the prospectus exemption in section 2.33 of Regulation 45-106. If the underwriter purchases securities under this exemption, the first trade in the securities will be a distribution. As a result, the underwriter will only be able to resell the securities if it can rely on another exemption from the prospectus requirement, or if a prospectus is delivered to the purchasers of the securities.

There may be legitimate transactions where a dealer purchases securities under a prospectus exemption other than the exemption in section 2.33 of Regulation 45-106; however, these transactions are only appropriate when the dealer purchases the securities with investment intent and not with a view to distribution.

If a dealer purchases securities through a series of exempt transactions in order to avoid the obligation to deliver a prospectus, the transactions will be viewed as a whole to determine if they constitute a distribution. If a transaction is in effect an indirect distribution, a prospectus will be required to qualify the sale of the securities despite the fact that each interim step in the transaction could otherwise be completed under a prospectus exemption. Such indirect distributions cannot be legitimately structured under Regulation 45-106.

1.8. Persons created to use exemptions ("syndication")

Sections 2.3(5), 2.4(1), 2.9(3), 2.9(3.0.1) and 2.10(2) of Regulation 45-106 specifically prohibit syndications. A distribution of securities to a person that had no pre-existing purpose and is created or used solely to purchase or hold securities under exemptions (a "syndicate") may be considered a distribution of securities to the persons beneficially owning or controlling the syndicate.

For example, a newly formed company with 15 shareholders is set up with the intention of purchasing $150 000 worth of securities under the minimum amount investment exemption. Each shareholder of the newly formed company contributes $10 000. In this situation the shareholders of the newly formed company are indirectly investing $10 000 when the exemption requires that they each invest $150 000. Consequently, both the newly formed company and its shareholders may need to comply with the requirements of the minimum amount investment exemption, or find an alternative exemption to rely on.

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 these exemptions to indirectly distribute securities when the exemption is not available to directly distribute securities to each person in the syndicate.

1.9. Responsibility for compliance and verifying purchaser status

(1) Determining whether an exemption is available

The prospectus exemptions in Regulation 45-106 set out specific terms and conditions that must be satisfied in order for the person relying on the exemption to distribute securities. The person relying on a prospectus exemption is responsible for determining whether the terms and conditions of the prospectus exemption are met. That person should retain all necessary documents to demonstrate that they properly relied on the exemption.

Some of the prospectus exemptions in Regulation 45-106 are available to both issuers and selling security holders. For purposes of this section, the term "seller" refers

to the person relying on a prospectus exemption, whether an issuer or a selling security holder.

(2) Registration related requirements

Registered dealers and representatives have specific obligations under Regulation 31-103, including the "know your client," "know your product" and suitability obligations. These obligations apply to securities traded on a marketplace, distributed under a prospectus or distributed under a prospectus exemption.

Registered dealers or representatives may be involved in distributions under prospectus exemptions in different ways. The registered dealer or representative may be acting on behalf of a seller in connection with a distribution using a prospectus exemption.

In both cases, the registered dealer or representative must not only establish that a prospectus exemption is available, it must also comply with its registration obligations. For example, even if a registered dealer or representative has determined that a purchaser qualifies as an accredited investor or eligible investor, the registered dealer or representative must still assess whether the investment is suitable for the purchaser.

(3) Exemptions based on purchaser characteristics

Some of the prospectus exemptions in Regulation 45-106 require the purchaser of the securities to meet certain characteristics or have certain relationships with a director, executive officer, founder or control person of the issuer. These exemptions include:

- *Exemptions based on income or asset tests - The accredited investor exemption and the "eligible investor" test in the offering memorandum exemption in some jurisdictions require a purchaser to meet certain income or asset tests in order for securities to be sold in reliance on the exemption.*

- *Exemptions based on relationships - The private issuer exemption, the family, friends and business associates exemption and the "eligible investor" test in the offering memorandum exemption in some jurisdictions require a relationship between the purchaser and a director, executive officer, founder or control person of the issuer, such as that of a family member, close personal friend, or close business associate.*

When distributing securities under these exemptions, the seller will have to obtain information from the purchaser in order to determine whether the purchaser has the requisite income, assets or relationship to meet the terms of the exemption.

It will not be sufficient for the seller to accept standard representations in a subscription agreement or an initial beside a category on Form 45-106F9 Form for Individual Accredited Investors unless the seller has taken reasonable steps to verify the representations made by the purchaser.

(4) Reasonable steps

Described below are procedures that a seller could implement in order to reasonably confirm that the purchaser meets the conditions for a particular exemption. Whether the types of steps are reasonable will depend on the particular facts and circumstances of the purchaser, the offering and the exemption being relied on, including:

- *how the seller identified or located the potential purchaser*
- *what category of accredited investor or eligible investor the purchaser claims to meet*
- *what type of relationship the purchaser claims to have and with which director, executive officer, founder or control person of the issuer*
- *how much and what type of background information is known about the purchaser*
- *whether the person who meets with, or provides information to, the purchaser is registered*

We expect a seller to be in a position to explain why certain steps were not taken or to be able to explain how alternative steps were reasonable in the circumstances. It is the seller that is relying on the prospectus exemption and it is the seller that is responsible to ensure the terms of the exemption are met. If the seller has any reservations about whether the purchaser qualifies under the exemption, the seller should not sell securities to the purchaser in reliance on that exemption.

(a) Understand the terms and conditions of the exemption

The seller should fully understand the terms and conditions of the exemption being relied on. "Understanding" includes being able to:

- *Explain the terms and conditions - The seller must be able to explain to a purchaser the meaning of the terms and conditions of the particular exemption, including the difference between alternative qualification criteria for the same exemption.*

For example, the accredited investor definition uses the terms "financial assets" and "net assets". In some jurisdictions, the offering memorandum exemption also uses the term "net assets" as part of the eligible investor definition. A seller should be capable of explaining the meaning and differences between the 2 terms, including describing the specific assets and liabilities that form part of each calculation.

- *Apply the specific facts of the purchaser to the terms and conditions - The terms "close personal friend" and "close business associate" used in some exemptions are difficult to define and can mean different things to different people. Sections 2.7 and 2.8 of this Policy Statement provide guidance on the key elements necessary to establish these types of relationships. We have not provided a "bright line" test for these relationships. A seller should understand the key elements of these relationships and be*

able to evaluate whether the relationship claimed by the purchaser meets those key elements.

(b) Establish appropriate policies and procedures

The seller is also responsible for confirming that all parties acting on behalf of the seller in a distribution understand the conditions that must be satisfied to rely on the exemption. This includes any employee, officer, director, agent, finder or other intermediary (whether registered or not) involved in the transaction.

We expect a seller to have policies and procedures in place to confirm that these other parties understand the exemption being relied on, are able to describe the terms of the exemption to purchasers and know what information and documentation must be obtained from purchasers to confirm the conditions of the exemption have been satisfied.

(c) Verify the purchaser meets the criteria set out in the exemption

Before discussing the details of an investment with a prospective purchaser, we expect the seller to obtain information that confirms the purchaser meets the criteria set out in the exemption. It would not be sufficient for a seller to rely solely on a form of subscription agreement or other document that only states: "I am an accredited investor" or "I am a friend of a director".

We would also have concerns if a seller only accepted detailed representations or an initial beside a category on the Form 45-106F9 Form for Individual Accredited Investors from the purchaser. In both cases, we expect the seller to take additional steps to confirm that the purchaser understood the meaning of what the purchaser was signing or initialing and that the purchaser was truthful in making the representation or initialing the category.

For example:

- *Exemptions based on income or asset tests - To assess whether a purchaser is an accredited investor or eligible investor, we expect the seller to ask questions about the purchaser's net income, financial assets or net assets, or to ask other questions designed to elicit details about the purchaser's financial circumstances.*

If the seller has concerns about the purchaser's responses, the seller should make further inquiries about the purchaser's financial circumstances. If the seller still questions the purchaser's eligibility, the seller could ask to see documentation that independently confirms the purchaser's claims.

- *Exemptions based on relationships - If an exemption is based on the existence of a specific relationship between the purchaser and a principal of the issuer (such as that of a family member, "close personal friend" or "close business associate"), we expect the seller to ask questions designed to confirm the nature and length of the relationship. The*

seller should also confirm the nature and length of the relationship with the director, executive officer, founder or control person identified by the purchaser.

For example, if the purchaser claims to be a close personal friend of a director of an issuer, the seller could ask the purchaser for the name of the director and a description of the nature and length of the purchaser's relationship with the director. The seller could verify with the director that the information is accurate. Based on that factual information, the seller could determine whether the purchaser is a close personal friend of the director for the purposes of the family, friends and business associates exemption.

(d) Keep relevant and detailed documentation

The seller should consider what documentation it needs to retain or collect from a purchaser to evidence the steps the seller followed to establish the purchaser met the conditions of the exemption.

The seller should consider whether it is necessary to have the purchaser sign that documentation before distributing securities to that purchaser. For example, if the purchaser claims to be a close personal friend of a director of the issuer, the seller could ask the purchaser to sign a statement giving the name of the director and describing the nature and length of the purchaser's relationship with the director. The seller could also ask the director to sign the statement confirming the relationship. In other cases, the seller may determine it is not necessary for the purchaser to sign the documentation, for example, if the seller is using meeting notes and email communications to demonstrate its verification efforts.

The seller should retain this documentation to evidence the steps the seller has taken to verify the availability of the exemption. Certain exemptions require the seller to obtain a signed risk acknowledgement form from the purchaser and to retain that risk acknowledgement for 8 years after the distribution. The 8-year period reflects the longest limitation period under securities legislation in Canada. The seller should consider local legislation concerning limitation periods when deciding how long to retain other documentation it considers necessary to demonstrate that it complied with the exemption.

The seller should also consider and comply with the requirements under provincial or federal legislation concerning the protection of personal information when collecting and retaining purchaser information.

1.10. Prohibited activities

Securities legislation in certain jurisdictions prohibits any person from making certain representations to a purchaser of securities, 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 or distribution 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 14-101 respecting Definitions (chapter V-1.1, r. 3).

The term "contract of insurance" in the definition of "financial assets" has the meaning assigned to it in the legislation for the jurisdiction referenced in Appendix A of Regulation 45-106.

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 (chapter V-1.1, r. 24) ("Regulation 51-102").

Paragraph (c) of the definition "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.

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.

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, in most jurisdictions, 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 executive officer may be important where a person intends to distribute 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 distribution of a security 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 the person's degree of prior involvement with the issuer or the extent of the person's 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 1.3 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 2 different interpretations in Regulation 45-106. For the purposes of Division 4 of Part 2 (employee, executive officer, director and consultant exemptions), 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 in section 1.4 of Regulation 45-106. The reason for having 2 different interpretations of control is that the exemptions for distributions of securities to employees, executive officers, directors and

consultants require a broader concept of control than is considered necessary for the rest of Regulation 45-106 to accommodate the issuance of compensation securities in a wide variety of business structures.

2.7. Close personal friend

For purposes of both the private issuer exemption in section 2.4 of Regulation 45-106 and the family, friends and business associates exemption in section 2.5 of Regulation 45-106, 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 and to obtain information from them with respect to the investment. 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.

We consider the following factors as relevant to this determination:

(a) the length of time the individual has known the director, executive officer, founder or control person,

(b) the nature of the relationship between the individual and the director, executive officer, founder or control person including such matters as the frequency of contacts between them and the level of trust and reliance in the other circumstances, and

(c) the number of "close personal friends" of the director, executive officer, founder or control person to whom securities have been distributed in reliance on the private issuer exemption or the family, friends and business associates exemption.

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

(a) a relative,

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

(c) a co-worker, colleague or associate at the same workplace,

(d) a client, customer, former client or former customer,

(e) a mere acquaintance, or

(f) connected through some form of social media, such as Facebook, Twitter or LinkedIn.

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.

We would not consider a relationship that is primarily founded on participation in an Internet forum to be that of a close personal friend.

The person relying on the exemption is responsible for determining that the purchaser meets the characteristics required under the exemption. See section 1.9 of this Policy Statement for guidance on how to verify and document purchaser status.

2.8. Close business associate

For the purposes of both the private issuer exemption in section 2.4 of Regulation 45-106 and the family, friends and business associates exemption in section 2.5 of Regulation 45-106, 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 and to obtain information from them with respect to the investment.

We consider the following factors as relevant to this determination:

(a) the length of time the individual has known the director, executive officer, founder or control person,

(b) the nature of any specific business relationships between the individual and the director, executive officer, founder or control person, including, for each relationship, when it began, the frequency of contact between them and when it terminated if it is not ongoing, and the level of trust and reliance in the other circumstances,

(c) the nature and number of any business dealings between the individual and the director, executive officer, founder or control person, the length of the period during which they occurred, and the nature and date of the most recent business dealing, and

(d) the number of "close business associates" of the director, executive officer, founder or control person to whom securities have been distributed in reliance on the private issuer exemption or the family, friends and business associates exemption.

An individual is not a close business associate solely because the individual is:

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

(b) a co-worker, colleague or associate at the same workplace,

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

(d) a mere acquaintance, or

(e) connected through some form of social media, such as Facebook, Twitter or LinkedIn.

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

We would not consider a relationship that is primarily founded on participation in an internet forum to be that of a close business associate.

The person relying on the exemption is responsible for determining that the purchaser meets the characteristics required under the exemption. See section 1.9 of this Policy Statement for guidance on how to verify and document purchaser status.

2.9. Indirect interest

Under paragraph (t) of the definition of "accredited investor" in section 1.1 of Regulation 45-106, an "accredited investor" includes a person in respect of which all of the owners of interests in that person, direct, indirect or beneficial, are accredited investors. The interpretive provision in section 1.2 of Regulation 45-106 is needed to confirm the meaning of indirect interest in British Columbia.

PART 3 CAPITAL RAISING EXEMPTIONS

3.1. Soliciting purchasers

1) Soliciting purchasers – Alberta, British Columbia, Manitoba, News Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Québec, Saskatchewan and Yukon

Part 2, Division 1 (capital raising exemptions) in Regulation 45-106 does not prohibit the use of registrants, finders, 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 the private issuer exemption in section 2.4 of Regulation 45-106 or under the family, friends and business associates exemption in section 2.5 of Regulation 45-106, 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 this 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.

(2) Soliciting purchasers -- Ontario

Part 2, Division 1 (capital raising exemptions) in Regulation 45-106 does not prohibit the use of registrants, finders, or advertising in any form (for example, Internet, e-mail, direct mail, newspaper or magazine) to solicit purchasers under any of the exemptions.

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.

The Ontario Securities Commission considers the use of registrants, finders or advertising to find or attract purchasers to be inconsistent with the use of the family, friends and business associates exemption in section 2.5 of Regulation 45-106 and the private issuer exemption in section 2.4 of Regulation 45-106 for distributions to family members, close personal friends or close business associates. Since advertising should not be required to find a family member, close personal friend or close business associate, the Ontario Securities Commission does not expect that advertising would be used to find or attract purchasers for distributions made solely under section 2.5 of Regulation 45-106 or to identify purchasers for distributions made in reliance on that exemption. The Ontario Securities Commission also does not expect that advertising would be used for distributions made solely to family members, close personal friends or close business associates under section 2.4 of Regulation 45-106 or to identify those types of purchasers for distributions made in reliance on that exemption.

If a distribution is being made in reliance on one or more other prospectus exemptions, advertising in connection with those other exemptions does not prevent concurrent reliance on the family, friends and business associates exemption in section 2.5 or the private issuer exemption in section 2.4 of Regulation 45-106. Similarly, use of a finder by a private issuer to find an accredited investor would not preclude the private issuer from relying upon the private issuer exemption under section 2.4 of Regulation 45-106 provided that all of the other conditions to that exemption are met.

3.2. Soliciting purchasers – Ontario

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. 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.

3.3.1. Advertising and marketing materials under the offering memorandum exemption

In Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, an offering memorandum prepared in accordance with the offering memorandum exemption in section 2.9(2.1) of Regulation 45-106 must incorporate by reference any marketing materials used in relation to a distribution under the offering memorandum exemption. Subsection 2.9(8) of Regulation 45-106 requires the issuer to sign a certificate that indicates that the offering memorandum does not contain a misrepresentation. As marketing materials are incorporated by reference into the offering memorandum, the issuer must also ensure that the information contained in marketing materials does not contain a misrepresentation.

In these jurisdictions, an issuer or registrant that uses marketing materials as part of an offering made in reliance on the offering memorandum exemption must review the marketing materials to confirm that they are consistent with the offering document and are fair, balanced and not misleading. In addition, these jurisdictions expect an issuer or registrant to determine whether any claims set out in marketing materials adequately refer to information to support these claims and representations. For example, if benchmarks are used for comparison purposes, the issuer or registrant should assess whether the benchmarks are relevant and comparable to the investment in question and confirm the marketing materials:

(a) adequately explain differences between the benchmark and the investment,

(b) make reference to the source of the benchmark and identify the date to which the information is current, and

(c) where relevant, caution purchasers that historical performance is not necessarily indicative of future results.

Issuers that prepare offering memoranda in accordance with Form 45-106F2 Offering Memorandum for Non-Qualifying Issuers, are also required to comply with requirements relating to forward-looking information, which are described in Instructions A.12 and B.14 of Form 45-106F2. Issuers cannot disseminate material forward-looking information unless it is contained within the offering memorandum. Additionally, forward-looking information contained in an offering memorandum must comply with certain requirements in Regulation 51-102 respecting Continuous Disclosure Obligations (chapter V-1.1, r. 24). These requirements also extend to marketing materials that are used in connection with a distribution under the offering memorandum exemption.

In these jurisdictions, if an issuer or registrant intends to rely on marketing materials prepared by a third party, such as an analyst report that rates a security or compares a security with securities of other issuers, the issuer or registrant is expected to perform its own assessment of the marketing materials to confirm that they are fair, balanced and not misleading. For example, if the report has been paid for by the issuer, or if there are other relationships between the analyst and the issuer, it would be inappropriate to describe the report as being an "independent" report. The report should also prominently disclose the fees paid and relationships between the analyst and the issuer. An issuer or registrant should not rely on marketing materials prepared by a third party without independently reviewing the materials prior to use.

A registrant should be aware of other CSA guidance on the review and use of marketing materials and reliance on marketing materials prepared by third parties.

3.4. 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, officers, founders and control persons in connection with a distribution made under the private issuer exemption or the family, friends and business associates exemption, except in connection with a distribution of a security to an accredited investor under the private issuer exemption; and

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

3.4.01 Payment of Finder's Fees or Commissions to Any Person

Subsection 2.5(2) of NI 45-106 prohibits the payment of commissions or finder's fees to any director, officer, founder or control person of an issuer or an affiliate of an issuer in connection with a distribution under the family, friends and business associates exemption.

The Ontario Securities Commission considers the payment of fees or commissions to any person, including registrants or finders, to identify, find or introduce one's family members, close personal friends or close business associates to be inconsistent with the family, friends and business associates exemption. However, the Ontario Securities Commission recognizes that fees may be paid to a person in connection with a distribution under the family, friends and business associates exemption in certain circumstances.

For example:

- Documentation and certain other activities -- Fees may be paid for the documentation and other activities relating to the closing of the distribution.

- Concurrent reliance on other prospectus exemptions -- If distributing securities on the same terms concurrently under one or more other prospectus exemptions in respect of which fees or commissions are being paid, then such fees and commissions may also be paid in respect of securities distributed under the family, friends and business associates exemption.

3.4.1. Reinvestment plans

(1) When is a plan administrator acting "for or on behalf of the issuer"?

Section 2.2 of Regulation 45-106 contains a prospectus exemption for distributions of securities by a trustee, custodian or administrator acting for or on behalf of the issuer. If the trustee, custodian or administrator is engaged by the issuer, the plan administrator acts "for or on behalf of the issuer" and therefore falls within the language contained in section 2.2(1). The fact that the plan administrator may act on or in accordance with instructions of a plan participant, under the plan, does not preclude the administrator from relying on the exemption contained in section 2.2 of Regulation 45-106.

(2) Providing a description of material attributes and characteristics of securities

The reinvestment plan exemption in section 2.2(5) of Regulation 45-106 includes a requirement, effective September 28, 2009, that if the securities distributed under a reinvestment plan are of a different class or series than the securities to which the dividend or distribution is attributable, the issuer or plan agent must have provided the plan participants with a description of the material attributes and characteristics of the securities being distributed. An issuer or plan agent with an existing reinvestment plan can satisfy this requirement in a number of ways. If plan participants have previously

signed a plan agreement or received a copy of a reinvestment plan that included this information, the issuer or plan agent does not need to take any further action for current plan participants. (Future participants should receive the same type of information before their first trade of a security under the plan.)

If plan participants have not received this information in the past, the issuer or plan agent can provide the required information or a reference to a website where the information is available with other materials sent to holders of that class of securities, for example with proxy materials.

(3) Interest payments

The exemption in section 2.2 of Regulation 45-106 may be available where a person invests interest payable on debentures or other similar securities into other securities of the issuer. The words "distributions out of earnings…or other sources" cover interest payable on debentures.

3.5. Accredited investor

(1) Individual qualification – financial tests

An individual is an "accredited investor" for the purposes of Regulation 45-106 if the individual satisfies one of 4 tests set out in the "accredited investor" definition in section 1.1 of Regulation 45-106:

- *the $1 000 000 financial asset test in paragraph (j)*
- *the $5 000 000 financial asset test in paragraph (j.1)*
- *the net income test in paragraph (k)*
- *the net asset test in paragraph (l)*

Three branches of the definition (in paragraphs (j), (k) and (l)) are designed to treat spouses as a single investing unit, so that either spouse qualifies as an "accredited investor" if the combined financial assets of both spouses exceed $1 000 000, the combined net income of both spouses exceeds $300 000, or the combined net assets of both spouses exceeds $5 000 000.

The fourth branch, the $5 000 000 financial asset test, does not treat spouses as a single investing unit. If an individual meets the $5 000 000 financial asset test, they also meet the test to be a "permitted client" under Regulation 31-103. Permitted clients are entitled to waive the "know your client" and suitability obligations of registered dealers and advisers under Regulation 31-103. Under subsection 2.3(7) of Regulation 45-106, an issuer distributing securities under the accredited investor exemption to an individual who meets the $5 000 000 financial asset test in paragraph (j.1) under the definition of "accredited investor" is not required to obtain a signed risk acknowledgement in Form 45-106F9 Form for Individual Accredited Investors from that individual.

For the purposes of the financial asset tests in paragraphs (j) and (j.1), "financial assets" are defined in Regulation 45-106 to mean cash, securities, or a contract of insurance, a deposit or an evidence of a deposit that is not a security for the purposes of securities legislation. These financial assets are generally liquid or relatively easy to liquidate. The value of a purchaser's personal residence is not included in a calculation of financial assets.

By comparison, the net asset test under paragraph (l) means all of the purchaser's total assets minus all of the purchaser's total liabilities. Accordingly, for the purposes of the net asset test, the calculation of total assets would include the value of a purchaser's personal residence and the calculation of total liabilities would include the amount of any liability (such as a mortgage) in respect of the purchaser's personal residence.

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

Paragraphs (j) and (j.1) of the "accredited investor" definition refer to the beneficial ownership of financial assets. 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, in the case where financial assets are held in a trust or in another type of investment vehicle for the benefit of an individual there may be questions as to whether the individual beneficially owns the financial assets. 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 $1 000 000 financial asset

test in paragraph (j) because it takes into account financial assets owned beneficially by a spouse. However, financial assets in a spousal RRSP would not be included for purposes of the $5 000 000 financial asset test in paragraph (j.1). Financial assets held in a group RRSP under which the individual does not have the ability to acquire the financial assets and deal with them directly would not meet the beneficial ownership requirements in either paragraph (j) or paragraph (j.1).

(4) Calculation of an individual purchaser's net assets

To calculate a purchaser's net assets under the net asset test in 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 distribution of the security.

(4.1) Risk acknowledgement from individual investors

Persons relying on the accredited investor exemption in section 2.3 of Regulation 45-106 and section 73.3 of the Securities Act (Ontario) to distribute securities to individual accredited investors described in paragraphs (j), (k) and (l) of the "accredited investor" definition must obtain a completed and signed risk acknowledgement from that individual accredited investor.

"Individual" is defined in the securities legislation of certain jurisdictions to mean a natural person. The definition specifically excludes partnerships, unincorporated associations, unincorporated syndicates, unincorporated organizations and trusts. It also specifically excludes a natural person acting in the capacity of trustee, executor, administrator or personal or other legal representative.

(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 distribution of the security. The person is not required to monitor the purchaser's continuing qualification as an accredited investor after the distribution of the security is completed.

(7) Recognition or 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 as an accredited investor by the securities regulatory authorities or, except in Ontario and Québec, the regulators. The securities regulatory authorities or regulators have not adopted any specific criteria for granting accredited investor recognition or designation to applicants, as the securities regulatory authorities or regulators believe that the "accredited investor" definition generally covers all types of persons that do not require the protection of the prospectus requirement. Accordingly, the securities regulatory authorities or regulators expect that applications for accredited investor recognition or designation will be utilized on a very limited basis. If a securities regulatory authority or regulator 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.

(8) Verifying accredited investor status

Persons relying on the accredited investor exemption are responsible for determining whether a purchaser meets the definition of "accredited investor". See section 1.9 of this Policy Statement for guidance on how to verify and document purchaser status.

3.6. Private issuer

(1) Meaning 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 part 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 distribute securities in reliance upon the private issuer prospectus exemption in section 2.4(2) of Regulation 45-106 to a person not listed in paragraphs (a) through (j) of that section will have to satisfy itself that the distribution of the security is not to the public.

(2) Meaning of "close personal friend" and "close business associate"

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

(2.1) Meaning of "non-convertible debt securities"

Paragraph (b) of the definition of private issuer has a number of restrictions that apply to the securities, other than non-convertible debt securities, of a private issuer. Non-convertible debt securities are debt securities that do not have a right or obligation to exchange or convert into another security of the issuer.

(3) Business combination of private issuers

A distribution of securities in connection with an amalgamation, merger, reorganization, arrangement or other statutory procedure involving 2 private issuers to holders of securities of those issuers is not a distribution of a security to the public, provided that the resulting issuer is a private issuer.

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

(4) Acquisition of a private issuer

Persons relying on a 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 sale will not be considered to have been to the public.

(5) Ceasing to be a private issuer

The term "private issuer" is defined in section 2.4(1) of Regulation 45-106. A private issuer can distribute securities only to the persons listed in section 2.4(2) of Regulation 45-106. If a private issuer distributes securities to a person not listed in section 2.4(2), even under another exemption, it will no longer be a private issuer and will not be able to continue to use the private issuer prospectus exemption in section 2.4(2). 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 do not automatically become "reporting issuers". They are simply no longer able to rely on the private issuer exemption in section 2.4(1). Such issuers would still be able to use other exemptions to distribute their securities. For example, such issuers could rely on the family, friends and business associates prospectus exemption (except in Ontario) or the accredited investor prospectus exemption. However, issuers that rely on these prospectus exemptions must file a report of exempt distribution with the securities regulatory authority or regulator in each jurisdiction in which the distribution took place.

An issuer that completes a going private transaction (for example, by way of an amalgamation, squeeze out or a takeover bid with a subsequent statutory compulsory acquisition) can use the private issuer exemption after a going private transaction.

3.7. 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 friend" and "close business associate"

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

(3) Risk acknowledgement - Saskatchewan

Under section 2.6 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 distribution of securities based on a 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 distribution of securities.

3.8. Offering memorandum

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

Manitoba, Northwest Territories, Nunavut, Prince Edward Island and Yukon impose eligibility criteria on persons investing under the offering memorandum exemption. In these jurisdictions, 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 that 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 of security.

Nevertheless, concurrent and consecutive, closely-timed offerings to the same purchaser will usually constitute one distribution of a security. 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 profit 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 distribution of a security.

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 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.

(1.1) Eligibility criteria and investment limits – Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan

(a) Eligibility criteria

Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan impose eligibility criteria on persons investing under the offering memorandum exemption.

The qualification criteria for becoming an eligible investor are substantially the same as in the jurisdictions identified in subsection (1), above. Note, however, that in Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, it is not possible to qualify as an eligible investor by receiving advice from an "eligibility advisor".

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 profit 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 distribution of a security.

(b) Investment limits for individual eligible and non-eligible investors

Both eligible investors and purchasers that do not qualify as eligible investors (non-eligible investors) who are individuals are subject to investment limits under the offering memorandum exemption. In these jurisdictions, non-eligible investors who are individuals are subject to an investment limit of $10 000 and eligible investors who are individuals are subject to an investment limit of $30 000. In both cases, the investment limits apply to all securities acquired by the purchaser under the offering memorandum exemption in the preceding 12 months.

However, an individual purchaser that qualifies as an eligible investor because the investor is an accredited investor or is a person described in the family, friends and business associates exemption, is not subject to an investment limit under the offering memorandum exemption.

The fact that investment limits have been established for eligible and non-eligible investors who are individuals does not mean that these amounts are suitable investments in all cases. If a registrant is involved in a transaction, the registrant must still conduct a suitability assessment to determine that the amount of the investment and the investment itself is suitable for the purchaser. This may result in a lower investment amount for a purchaser.

The $30 000 investment limit may be exceeded by an eligible investor who receives advice from a portfolio manager, investment dealer or exempt market dealer that exceeding the investment limit of $30 000 and the investment itself is suitable for the eligible investor. In this case, the investment limit for all securities acquired by the purchaser under the offering memorandum exemption in the preceding 12 months is $100 000.

In determining the acquisition cost to a purchaser subject to investment limits, include any future payments that the purchaser will be required to make. Proceeds that 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.

"Individual" is defined in the securities legislation of certain jurisdictions to mean a natural person. The definition specifically excludes partnerships, unincorporated associations, unincorporated syndicates, unincorporated organizations and trusts. It also specifically excludes a natural person acting in the capacity of trustee, executor, administrator or personal or other legal representative.

(c) Circumstances when investment limits can be exceeded

The fact that higher investment limits apply to individual eligible investors than individual non-eligible investors does not mean these higher amounts will be suitable

in all cases for eligible investors. It is a condition of the offering memorandum exemption that, in order to exceed the $30 000 investment limit, a registrant must determine that an investment above the $30,000 investment limit is suitable for the purchaser. Unless a registrant determines that exceeding the $30 000 investment limit is suitable for the purchaser, the issuer cannot accept a subscription in excess of $30 000 from the purchaser. In this case, the registrant could also not proceed to take instructions from the purchaser to exceed the $30 000 investment limit.

(d) Investment limits apply over a 12-month period

The investment limits for both individual eligible and non-eligible investors apply to the aggregate of all investments made by a purchaser in distributions by different issuers (or multiple offerings by the same issuer) under the offering memorandum exemption during the preceding 12 months, which may or may not be a calendar year. For example, if a purchaser wishes to acquire securities of an issuer under the offering memorandum exemption on January 15, the issuer must include in the calculation all investments made by the purchaser under the offering memorandum exemption beginning on January 16 of the prior year, up to and including the date of the proposed investment.

On each distribution, the issuer must confirm that the amount invested by a purchaser who is an individual does not exceed the applicable limit and should take reasonable steps to do so. This will require the issuer to first understand whether or not the purchaser is an eligible investor. As described above in section 1.9, the issuer should gather information that confirms the purchaser meets the criteria set out in the exemption. As part of this exercise, the issuer should also discuss with the purchaser the investment limits that apply to the purchaser.

In making a determination as to whether a purchaser is within the applicable investment limit, an issuer should obtain appropriate representations from the purchaser that confirm the purchaser has not exceeded the applicable investment limit over the relevant period. Note that we would have concerns if an issuer simply accepted standard representations from a purchaser without taking steps to verify the representations made by the purchaser. For instance, inquiries could be made with respect to other investments made under the offering memorandum exemption during the 12-month period preceding the current investment.

Notwithstanding the representations made by a purchaser in the schedules to the risk acknowledgement form, we expect an issuer to be able to explain what steps were taken to verify the representations made by the purchaser. We recognize that in many circumstances, a registrant may act as agent on behalf of an issuer for this process. In both cases, the guidance in section 1.9 above may also be instructive for this purpose.

(1.2) Role of registrant in providing suitability advice and conflicts of interest

A registrant involved in a distribution of securities pursuant to a prospectus exemption must not only establish that the prospectus exemption is available, it must also comply with its registrant obligations, including know-your-client, know-your-product and suitability. In assessing the level of investment that may be suitable for a purchaser under the offering memorandum exemption, registrants should take into consideration guidance published by the CSA on best practices for conducting a suitability assessment, which includes considering the level of concentration of investments in the client's portfolio.

Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations (chapter V-1.1, r. 10) and the related policy statement provide a framework that requires registrants to identify and respond to material conflicts of interest that may affect their ability to meet their regulatory obligations, including suitability.

Where a registrant is providing suitability advice to a purchaser in respect of an offering by a related or connected issuer, we expect the registrant that is related or connected to the issuer to be aware of the material conflicts that arise in these circumstances, and to take appropriate steps to respond to the conflicts to ensure it is fulfilling its regulatory obligations. We expect a registrant to be able to demonstrate that it is addressing the conflicts by avoiding or managing and disclosing the conflicts of interest appropriately to ensure compliance with its obligation to deal fairly, honestly and in good faith with clients.

We expect all registrants to be aware of other CSA guidance on registrant obligations with respect to know-your-client, know-your-product and suitability, and identify and respond to conflicts of interest.

(2) Form of offering memorandum

There are 2 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 43-101 respecting Standards of Disclosure for Mineral Projects (chapter V-1.1, r. 15), and Regulation 51-101 respecting Standards of Disclosure for Oil and Gas Activities (chapter V-1.1, r. 23). 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.

(3) 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 the applicable subsection 2.9(9), (10), (10.1), (10.2), (10.3), (11), (11.1), or (12) of Regulation 45-106.

"Promoter" is defined differently in provincial and territorial 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 (chapter V-1.1) 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 the offering memorandum exemption.

(4) Consideration to be held in trust

The purchaser has, or must be given, 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 2 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.

(5) Filing of offering memorandum

The issuer is required to file the offering memorandum with the securities regulatory authority or regulator in each of the jurisdictions in which the issuer distributes securities under an 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.

(5.1) Filing of marketing materials

In Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, marketing materials used in the context of an offering made in reliance on the offering memorandum exemption must also be filed with the securities regulatory authority. Once the marketing materials have been filed, there is no need to file them again after subsequent closings, unless there is a change to the marketing materials.

(6) 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 comparable 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.

(7) Types of securities that can be distributed under the exemption – Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan

In Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, issuers are prohibited from distributing certain types of securities under the offering memorandum exemption, including specified derivatives and structured finance products. Note that this is in addition to the prohibition in subsection 2.9(3.1) against distributions of short-term securitized products under the offering memorandum exemption.

These types of securities have been excluded because the purpose of the exemption is for raising capital and it is not intended to be used to distribute complex or novel securities to purchasers. We would have concerns if issuers relied on the offering memorandum exemption to distribute novel or complex securities, even if they do not fall within the prohibited categories.

(8) Ongoing disclosure – Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan

In Alberta, New Brunswick, Ontario, Québec and Saskatchewan, non-reporting issuers that issue securities under the offering memorandum exemption are required, in respect of each financial year, to file or deliver (as applicable) to the securities regulatory authority and make available to purchasers, audited annual financial statements within 120 days from the issuer's financial year end. In Nova Scotia, issuers are not required to file or deliver these financial statements to the securities regulatory authority, but are only required to make them available to purchasers that acquired securities under the offering memorandum exemption.

The following table illustrates when the first audited annual financial statements of an issuer would be due, as required by subsections (17.4), (17.5) and (17.6), following an initial distribution of securities under the offering memorandum exemption. The examples in the table take into account the extension to the filing deadline provided by subsection (17.7).

The following examples assume the issuer's financial year end is December 31.

Date of formation	***Date of first distribution under subsection 2.9(2.1)***	***Deadline for first annual financial statements under subsections 2.9(17.4), (17.5) and (17.6)***	***Financial periods included in annual financial statements***	***Notes***
January 1, 20X3	*April 15, 20X7*	*June 14, 20X7*	*December 31, 20X6 and December 31, 20X5*	*The issuer completes its first distribution under the offering memorandum exemption in subsection 2.9(2.1) before the filing deadline for annual*

Date of formation	*Date of first distribution under subsection 2.9(2.1)*	*Deadline for first annual financial statements under subsections 2.9(17.4), (17.5) and (17.6)*	*Financial periods included in annual financial statements*	*Notes*
				financial statements, which would be April 30, 20X7. Since the distribution was completed so close to the filing deadline, the issuer can take advantage of the extension in subsection 2.9(17.7) and file the statements on June 14, 20X7.
January 1, 20X7	*April 15, 20X7*	*April 30, 20X8*	*December 31, 20X7*	*The issuer completes its first distribution under the offering memorandum exemption in subsection 2.9(2.1) before the filing deadline for annual financial statements, which would be April 30, 20X7. However, since the issuer has not completed a financial year, the issuer would not be required to file annual financial statements until April 30, 20X8 for the financial year ended December 31, 20X7.*

Date of formation	*Date of first distribution under subsection 2.9(2.1)*	*Deadline for first annual financial statements under subsections 2.9(17.4), (17.5) and (17.6)*	*Financial periods included in annual financial statements*	*Notes*
January 1, 20X3	*June 15, 20X7*	*April 30, 20X8*	*December 31, 20X7 and December 31, 20X6*	*The issuer completes its first distribution under the offering memorandum exemption in subsection 2.9(2.1) after the filing deadline for annual financial statements in 20X7. The offering memorandum would already include audited annual financial statements for the year ended December 31, 20X6. The next audited annual financial statements of the issuer would be required to be filed by April 30, 20X8 for the year ended December 31, 20X7.*

The requirement to file or deliver (as applicable) to the securities regulatory authority and make available to purchasers annual financial statements continues to apply each year after the initial distribution under subsection 2.9(2.1) until the earlier of (1) the date the issuer becomes a reporting issuer and (2) the date the issuer ceases to carry on business.

(9) Ongoing disclosure – notice of specified key events – New Brunswick, Nova Scotia and Ontario

In addition to audited annual financial statements and a notice of how the proceeds raised under the offering memorandum exemption have been used, non-reporting issuers that issue securities in reliance on the offering memorandum exemption in New Brunswick, Nova Scotia and Ontario must also make available to investors a notice of certain key events, within 10 days of the occurrence of the event. These events are considered to be significant changes in the business of the issuer of which purchasers should be notified. This requirement is in addition to any similar requirement under corporate law and also applies to non-reporting issuers with non-corporate structures, such as trusts or partnerships.

In making a determination as to whether an issuer's industry has changed, issuers may consider whether they would identify a different industry category on Form 45-106F1 Report of Exempt Distribution than the category previously identified.

A non-reporting issuer must continue to provide notice of the specified events, if applicable, until the earlier of (i) the date the issuer becomes a reporting issuer or (ii) the date the issuer ceases to carry on business.

(10) Meaning of "make reasonably available"

In Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, disclosure documents will be considered to have been made reasonably available to each holder of a security acquired under the offering memorandum exemption if the documents are mailed to security holders, or if security holders receive notice that the disclosure documents can be viewed on a public website of the issuer or a website accessible by all holders of securities acquired under subsection 2.9(2.1) of the issuer (such as a password protected website). Issuers should take reasonable steps to enable purchasers to receive or access these documents promptly.

3.9. Minimum amount investment

(1) Baskets of securities

An issuer may wish to distribute 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 distribution of a security, the exemption can, if otherwise available, 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.

(2) Not available for distributions to individuals or syndicates

The minimum amount investment exemption in section 2.10 of Regulation 45-106 is not available for distributions to individuals. "Individual" is defined in the securities legislation of certain jurisdictions to mean a natural person. The definition specifically excludes partnerships, unincorporated associations, unincorporated syndicates, unincorporated organizations and trusts. It also specifically excludes a natural person acting in the capacity of trustee, executor, administrator or personal or other legal representative.

Subsection 2.10(2) of Regulation 45-106 specifically prohibits using the minimum amount investment exemption to distribute to persons created or used solely to rely on this exemption. See section 1.8 of this Policy Statement for a discussion of the "anti-syndication" provisions in Regulation 45-106.

3.10. Rights offering - reporting issuer

(1) Offer available to all security holders in Canada

One of the conditions of the rights offering exemption for reporting issuers in section 2.1 of Regulation 45-106 is that the issuer must make the basic subscription privilege available on a pro rata basis to every security holder in Canada of the class of securities to be distributed on exercise of the rights, regardless of how many security holders reside in a local jurisdiction.

(2) Market price and fair value

Paragraph 2.1(3)(g) of Regulation 45-106 provides that if there is no published market for the securities, the subscription price must be lower than fair value unless the issuer restricts all insiders from increasing their proportionate interest in the issuer through the rights offering or a stand-by commitment. If there is no published market for the securities and the issuer restricts all insiders from increasing their proportionate interest in the issuer, the subscription price may be set at any price. Under section 13 of Form 45-106F15, an issuer must explain in its rights offering circular how it determined the fair value of the securities. For these purposes, an issuer could consider a fairness opinion or a valuation.

For the purposes of paragraph 2.1(3)(g) of Regulation 45-106, insiders will not be prohibited from participating in the offering if the published market price or fair value of the securities falls below the subscription price following filing of the rights offering notice.

The rights offering exemption is not intended to be used by insiders or related parties for the purpose of increasing their proportionate interest in the issuer, although we recognize that as a potential outcome. One of the reasons for the above pricing restrictions, and the similar restrictions in paragraph 2.1(3)(g) for issuers with a published market, is to prevent insiders and other related parties from using the rights offering exemption as a means of taking control of the issuer.

(3) Stand-by commitments

To provide the confirmation in subparagraph 2.1(3)(i)(ii) of Regulation 45-106 that the stand-by guarantor has the financial ability to carry out its obligations under the stand-by commitment, the issuer could consider the following:

- *a statement of net worth attested to by the stand-by guarantor*
- *a bank letter of credit*
- *the most recent annual audited financial statements of the stand-by guarantor.*

A registered dealer that acquires a security of an issuer as part of the stand-by commitment may use the exemption in section 2.1.1 of Regulation 45-106. However, we

would have concerns if a dealer or other person uses the exemption in section 2.1.1 in a situation where the dealer or other person

(a) is acting as an underwriter with respect to the distribution, and

(b) acquires the security with a view to distribution.

If (a) and (b) apply, the dealer or other person should acquire the security under the exemption in section 2.33 of Regulation 45-106. Please refer to section 1.7 of this Policy Statement.

(4) Calculation of number of securities

In calculating the number of outstanding securities for purposes of paragraph 2.1(6)(a) of Regulation 45-106, CSA staff generally take the view that

(a) if

x = the number or amount of securities of the class of the securities that may be or have been issued upon the exercise of rights under all rights offerings made by the issuer in reliance on the exemption during the previous 12 months,

y = the maximum number or amount of securities that may be issued upon exercise of rights under the proposed rights offering, and

z = the number or amount of securities of the class of securities that is issuable upon the exercise of rights under the proposed rights offering that are outstanding as of the date of the rights offering circular;

then $\frac{x+y}{z}$ *must be equal to or less than 1, and*

(b) if the convertible securities that may be acquired under the proposed rights offering may be converted before 12 months after the date of the proposed rights offering, the potential increase in outstanding securities, and specifically, "y" in paragraph (a), should be calculated as if the conversion of those convertible securities had occurred,

(c) despite paragraph (b), if the convertible security is a warrant that forms part of a unit and the warrant has nominal or no value, the potential increase in outstanding securities, and specifically, "y" in paragraph (a), should not be calculated as if the conversion of the warrant had occurred.

One of the conditions of the exemption is that the issuer must make the basic subscription privilege available on a pro rata basis to each security holder of the class of securities to be distributed on exercise of the rights. For clarity, this means that an issuer cannot use a rights offering to distribute a new class of securities.

(5) Investment funds

As a reminder, pursuant to section 9.1.1 of Regulation 81-102 respecting Investment Funds (chapter V-1.1, r. 39) ("Regulation 81-102"), investment funds that are subject to Regulation 81-102 are restricted from issuing warrants or rights.

3.11. Rights offering – issuer with a minimal connection to Canada

It may be difficult for an issuer to determine beneficial ownership of its securities as a result of the book-based system of holding securities. We are of the view that, for the purpose of determining beneficial ownership to comply with the exemption in section 2.1.2 of Regulation 45-106, procedures comparable to those found in Regulation 54-101 respecting Communication with Beneficial Owners of Securities of a Reporting Issuer (chapter V-1.1, r. 29), or any successor regulation, are appropriate.

In section 2.1.2(1)(a), the issuer must determine the number of beneficial security holders in Canada and the number of securities held by those security holders "to the issuer's knowledge after reasonable enquiry". We think an issuer could generally satisfy this requirement by relying on its most recently-conducted beneficial ownership search procedures conducted for the purpose of distributing proxy material for a shareholders meeting that occurred within the last 12 months, unless the issuer has reason to believe that it would no longer meet the test in section 2.1.2 of Regulation 45-106. For example, if, after the previous search procedures, the issuer conducted a financing in Canada that could affect the results, they may not be able to rely on those procedures.

PART 4 OTHER EXEMPTIONS

4.1. Employee, executive officer, director and consultant exemptions

Trustees, custodians or administrators who engage in activities, contemplated in the prospectus exemption in section 2.27 of Regulation 45-106, that bring together purchasers and sellers of securities should have regard to the provisions of Regulation 21-101 respecting Marketplace Operation (chapter V-1.1, r. 5) respecting "marketplaces" and "alternative trading systems".

The employee, executive officer, director and consultant exemptions are based on the alignment of economic interests between an issuer and its employees. They may, where available, be used to provide employees and other similar persons with an opportunity to participate in the growth of the employer's business and to compensate persons for the services they provide to an issuer. The securities regulatory authorities or regulators will generally not grant exemptive relief analogous to these exemptions except in very limited circumstances.

4.2. Business combination and reorganization

(1) Statutory procedure

The securities regulatory authorities and regulators interpret the phrase "statutory procedure" broadly and are of the view that the prospectus exemption contained in section 2.11 of Regulation 45-106 applies to all distributions of securities of an issuer that are both part of the procedure and necessary to complete the transaction, regardless of when the distribution of a security occurs.

The prospectus exemption contained in section 2.11 of Regulation 45-106 exempts distributions of securities in connection with an amalgamation, merger, reorganization or arrangement if the same is done "under a statutory procedure". The securities regulatory authorities or regulators are of the view that the references to statutory procedure in sections 2.11 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 (R.S.C. 1985, c. C-36).

(2) Three-cornered amalgamations

Certain corporate statutes permit a so-called "three-cornered merger or amalgamation" under which 2 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. The prospectus exemption contained in section 2.11 of Regulation 45-106 refers to these distributions of a security when they refer to a distribution of a security made in connection with an amalgamation or merger done under a statutory procedure.

(3) Exchangeable shares

A transaction involving a procedure described in the prospectus exemption contained 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 now contained in section 2.11 of Regulation 45-106 was available for all distributions 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 or regulators take the position that the statutory procedure exemption contained in section 2.11 of Regulation 45-106 refers to all distributions of securities that are necessary to complete an exchangeable share transaction involving a procedure described in section 2.11, even where such distributions 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 represented a decision to, ultimately, 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 circumstances where the original transaction was completed in reliance on this exemption.

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 also 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

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 exemptions refer to all distributions necessary to complete a take-over bid or an issuer bid that involves an exchangeable share structure (as described under section 4.2 of this Policy Statement), even where such distributions may occur several months or even years after the bid is completed.

4.6. Isolated distribution

The exemption contained in section 2.30 of Regulation 45-106 is limited to a distribution of a security made by an issuer in a security of its own issue. It is intended that this exemption will only be used rarely and not to distribute securities to multiple purchasers.

4.6.1. Short-term securitized products

(1) Types of short-term securitized products

Section 2.35.1 is a prospectus exemption for the distribution of short-term securitized products. Short-term securitized products distributed in Canada are generally asset-backed commercial paper.

(2) Definition of "asset pool"

The term "cash-flow generating assets" in the definition of "asset pool" refers to the bonds, mortgages, leases, loans, receivables, or royalties in which a conduit has a direct or indirect ownership or security interest. It does not refer to a security or other instrument through which a conduit obtains an indirect ownership or security interest in underlying cash-flow generating assets. For example, a conduit may enter into an asset transaction whereby it purchases a note from a trust that owns a pool of mortgages, thereby acquiring an indirect ownership or security interest in that pool of mortgages. In this scenario, the "cash-flow generating assets" are the mortgages, not the note.

(3) Interaction of conditions with credit ratings

In order for the short-term securitized products prospectus exemption to be available, the short-term securitized product must satisfy certain conditions relating to credit ratings as set out in subparagraphs 2.35.2(a)(i) and (ii). The short-term securitized

product and issuing conduit must also satisfy other conditions regarding liquidity support, series or class seniority and asset pool composition as set out in subparagraphs 2.35.2(a)(iii) and (iv) and paragraphs 2.35.2(b) and (c).

Short-term securitized products that satisfy the conditions in the prospectus exemption relating to liquidity support, series or class seniority and asset pool composition may not necessarily satisfy the credit-rating conditions; particularly the requirement in subparagraph 2.35.2(a)(i) that one of the 2 credit ratings must be at the highest rating category. Designated rating organizations each have their own rating methodologies and may require features that go beyond those specified in the prospectus exemption in order for a short-term securitized product to obtain a credit rating in the highest category.

(4) Liquidity provider

Clause 2.35.2(a)(iv)(B) requires a liquidity provider to be a deposit-taking institution regulated or approved to carry on business in Canada by the Office of the Superintendent of Financial Institutions (OSFI) or a Canadian federal or provincial government department or regulatory authority. This provision allows a foreign bank to be a liquidity provider if it is a Schedule II or Schedule III bank that is regulated by OSFI or approved by OSFI to carry on business in Canada.

(5) Exceptions relating to liquidity agreements

The intention of subsection 2.35.3(2) is to permit a liquidity agreement to provide that a liquidity provider need not advance funds in respect of assets that have defaulted and that are not covered by any applicable credit enhancement. For purposes of paragraph 2.35.3(2)(a), we expect that the aggregate value of the non-defaulted assets would be the book value, unless some other method of determining the value is specified by the provisions of the applicable liquidity agreement, e.g. discounted value or market value.

(6) Disclosure – meaning of "make reasonably available"

Section 2.35.4 requires that each information memorandum and reports on Form 45-106F7 and Form 45-106F8 be made reasonably available both to securities regulators and purchasers of a short-term securitized product.

This requirement could generally be satisfied by a conduit posting the document on a website maintained by it or on its behalf. If a password is used to limit access to the website, we would expect that the password would be promptly provided upon application. We generally would not object if a prospective purchaser, before being provided access to a website on which the documents are posted, would have to agree to keep the information on the website confidential or that it would not provide others with access to the website or the documents available on it.

4.7. Mortgages

In British Columbia, Alberta, Manitoba, New Brunswick, Québec and Saskatchewan, Regulation 45-106 specifically excludes syndicated mortgages from the mortgage prospectus exemption in section 2.36. In determining what constitutes a syndicated mortgage, issuers will need to refer to the corresponding definition provided in section 2.36(1) of Regulation 45-106.

The mortgage prospectus exemption does not apply to distributions in securities that secure mortgages by bond, debenture, trust deed or similar obligation. The mortgage prospectus exemption also does not apply to a distribution of 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

(1) Eligibility to use this exemption

This exemption applies to distributions of 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 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 this exemption. For example, if an issuer 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 unable to rely on these exemptions. 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 these exemptions, because no part of the issuer's net earnings can go to any security holder. However, if the securities are debt securities and the issuer agrees to repay the principal amount with or without interest, the security holders are not considered to be receiving part of the net earnings of the issuer. The debt securities may be secured or unsecured.

If investors could receive any special treatment as a result of purchasing securities, the security holders are not typically receiving part of the net earnings of the issuer and the sale may still fit within these exemptions. For example, if the not for profit issuer runs a golf course and offers security holders a waiver of greens fees for three years, it could still rely on this exemption, provided all other conditions are met (and the exemption remains available in the relevant jurisdiction(s)).

If, at the time of the distribution of the security, the purchaser has an entitlement to the assets of the issuer on the basis that they would be getting part of the net earnings of the issuer, then the sale would not fit within this exemption.

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 (chapter V-1.1).

(2) Meaning of "no commission or other remuneration"

Section 2.38(b) provides that "no commission or other remuneration is paid in connection with the sale of the security". This is intended to ensure that no one is paid to find purchasers of the securities. However, the issuer may pay its legal and accounting advisers for their legal or accounting services in connection with the sale.

PART 5 FORMS

5.1. Report of exempt distribution

(1) Requirement to file

An issuer that has distributed a security of its own issue under any of the prospectus exemptions listed in section 6.1 of Regulation 45-106 is required to file a report of exempt distribution, on or before the 10th day after the distribution. Alternatively, if an underwriter distributes securities acquired under section 2.33 of Regulation 45-106, either the issuer or the underwriter may complete and file the form. If there is a syndicate of underwriters, the lead underwriter may file the form on behalf of the syndicate or each underwriter may file a form relating to the portion of the distribution it was responsible for. In certain circumstances, two or more issuers distribute a single security. In these circumstances, only one report of exempt distribution is required to be filed for the distribution, which may be completed and filed by any one of the co-issuers. The required form of report is Form 45-106F1 Report of Exempt Distribution. In determining if it is required to file a report in a particular jurisdiction, the issuer or underwriter should consider the following questions:

(a) Is there a distribution in the jurisdiction? (Please refer to the securities legislation and securities directions of the jurisdiction for guidance, if any, on when a distribution occurs in the jurisdiction.)

(b) If there is a distribution in the jurisdiction, what exemption from the prospectus requirement is the issuer relying on for the distribution of the security?

(c) Does the exemption referred to in paragraph (b) trigger a reporting requirement? (Reports of exempt distribution are required for distributions made in reliance on the prospectus exemptions provided in section 6.1 of Regulation 45-106, Regulation 45-108 respecting Crowdfunding (chapter V-1.1, r. 21.02) and certain local rules and orders.)

A distribution may occur in more than one jurisdiction. In this case, the issuer may complete a single report identifying all purchasers, and file the report in each Canadian jurisdiction where the distribution has occurred.

(2) Access to information

The securities legislation of several provinces requires 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, and

(c) in Québec, 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 regulators, as applicable, have determined that the information listed in Schedule 1 and Schedule 2 of Form 45-106F1, discloses personal or other information of such a nature that the desirability of avoiding disclosure of this 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 these schedules in confidence. In Québec, the securities regulatory authority considers that access to these schedules by the public in general could result in serious prejudice and consequently, the information listed in these schedules will not be made publicly available.

(3) Electronic filing of Form 45-106F1

Form 45-106F1 is required to be filed electronically in all CSA jurisdictions as described below.

For filings made in British Columbia, issuers are required to file Form 45-106F1 and pay the fees associated with that filing electronically using BCSC eServices. This requirement only applies to filings that are required to be made within 10 days of the distribution. It does not apply to filings made annually by investment funds under

subsection 6.2(2) of Regulation 45-106. Please refer to BC Instrument 13-502 Electronic Filing of Reports of Exempt Distribution for further information.

For filings made in Ontario, issuers are required to file Form 45-106F1 electronically through the OSC's Electronic Filing Portal and pay the applicable fees. The electronic filing requirement applies to all issuers that file Form 45-106F1 including investment fund issuers that file annually in accordance with subsection 6.2(2) of the Regulation. Please see OSC Rule 11-501 Electronic Delivery of Documents to the Ontario Securities Commission and OSC Rule 13-502 Fees for further information.

For filings made in any Canadian jurisdiction except for British Columbia and Ontario, issuers, other than certain foreign issuers, are required to file Form 45-106F1 and pay the fees associated with that filing electronically through the System for Electronic Document Analysis and Retrieval (SEDAR). The electronic filing requirement also applies to investment fund issuers that file annually in accordance with subsection 6.2(2) of Regulation 45-106. Please refer to Regulation 13-101 respecting System for Electronic Document Analysis and Retrieval (SEDAR) (chapter V-1.1, r. 2) and Regulation 13-102 respecting System fees for SEDAR and NRD (chapter V-1.1, r. 21) for further information. Foreign issuers that are not required to file Form 45-106F1 electronically through SEDAR should file the report and pay the applicable fees in each of the jurisdictions in which a distribution is made at the addresses listed at the end of the report.

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 sections 2.9(1), 2.9(2) and 2.9(2.1) of Regulation 45-106 is Form 45-106F4.

In Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, Form 45-106F4, required under subsection 2.9(2.1), includes Schedule 1 Classification of Investors Under the Offering Memorandum Exemption, with respect to eligibility of individual investors, and Schedule 2 Investment Limits for Investors Under the Offering Memorandum Exemption, with respect to investment limits of individual investors.

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 for distributions to close personal friends and close business associates in 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, which is 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.

5.5. Risk acknowledgement form for distributions to individual accredited investors

A person relying on the accredited investor exemption in section 2.3 of Regulation 45-106 and section 73.3 of the Securities Act (Ontario) to distribute securities to an individual must obtain a signed risk acknowledgement from that individual accredited investor. Under subsection 2.3(7) of Regulation 45-106, this requirement does not apply if the individual accredited investor meets the highest threshold to be an individual accredited investor, that is, the individual owns $5 000 000 of financial assets as set out in paragraph (j.1) of the definition of "accredited investor" in section 1.1 of Regulation 45-106. The required form of risk acknowledgement for the accredited investor exemption is Form 45-106F9 Form for Individual Accredited Investors.

PART 6 RESALE OF SECURITIES ACQUIRED UNDER AN EXEMPTION

6.1. Resale restrictions

In most jurisdictions, securities distributed under a prospectus exemption may be subject to restrictions on their resale. The particular resale, or "first trade", restrictions depend on the parties to the distribution 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 distribution will be freely tradable.

Resale restrictions are imposed under Regulation 45-102 respecting Resale of Securities (chapter V-1.1, r. 20) ("Regulation 45-102"). While Regulation 45-106 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 Regulation 45-102 to determine what resale restrictions, if any, apply to the securities in question.

The resale restrictions operate by the resale transaction 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 distributed under an exemption from the prospectus requirement, whether under Regulation 45-106 or other securities legislation.

PART 7 TRANSITION

7.1. Transition - Application of IFRS amendments

The amendments to Regulation 45-106 and this Policy Statement which came into effect on January 1, 2011 only apply in respect of an offering memorandum or an amendment to an offering memorandum of an issuer which includes or incorporates by reference financial statements of the issuer in respect of periods relating to financial years beginning on or after January 1, 2011.

Decision 2015-PDG-0038, 2015-03-17
Bulletin de l'Autorité : 2015-04-30, Vol. 12 n° 17

Amendments

Decision 2015-PDG-0043, 2015-03-24
Bulletin de l'Autorité: 2015-04-30, Vol. 12 n ° 17

Decision 2015-PDG-0169, 2015-10-26
Bulletin de l'Autorité : 2015-12-03, Vol. 12 n° 48

Decision 2016-PDG-0003, 2016-01-11
Bulletin de l'Autorité: 2016-02-11, Vol. 13 n° 6

CSA Staff Notice 11-330, 2016-06-16
Bulletin de l'Autorité : 2016-06-16, Vol. 13, n° 24

Decision 2016-PDG-0069, 2016-05-18
Bulletin de l'Autorité : 2016-06-23, Vol. 13 n° 25

CSA Staff Notice 11-334
Bulletin de l'Autorité : 2017-01-19, Vol. 14 n° 2

Decision 2018-PDG-0061, 2018-08-27
Bulletin de l'Autorité: 2018-10-04, Vol. 15, n° 39