Canadian Securities Administrators
Autorités canadiennes en valeurs mobilières

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

July 28, 2021

Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are publishing for a 90 day comment period proposed amendments to National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**) to introduce a new prospectus exemption available to reporting issuers that are listed on a Canadian stock exchange (the **Listed Issuer Financing Exemption**). We are also publishing consequential amendments to National Instrument 13-101 *System for Electronic Document Analysis and Retrieval* (**NI 13-101**) and National Instrument 45-102 *Resale of Securities* (**NI 45-102** and, collectively with the proposed amendments to NI 45-106 and NI 13-101, the **Proposed Amendments**).

We are also publishing for comment proposed changes to Companion Policy 45-106CP (**45-106CP**).

If adopted, the Proposed Amendments would create a new capital raising method for reporting issuers listed on a Canadian stock exchange.

The text of the Proposed Amendments is contained in Annexes A through E of this notice and will also be available on websites of CSA jurisdictions, including:

www.lautorite.qc.ca
www.albertasecurities.com
www.bcsc.bc.ca
nssc.novascotia.ca
www.fcnb.ca
www.osc.ca
www.fcaa.gov.sk.ca
mbsecurities.ca

Substance and Purpose

We are proposing the Listed Issuer Financing Exemption to provide a more efficient method of capital raising for reporting issuers that have securities listed on a Canadian stock exchange and that have filed all timely and periodic disclosure documents required under Canadian securities legislation.

The proposed exemption relies on the issuer's continuous disclosure record, as supplemented with a short offering document, and would allow these issuers to distribute freely tradeable listed equity securities to the public. Issuers would generally be limited to raising the greater of $5,000,000 or 10% of the issuer's market capitalization to a maximum total dollar amount of $10,000,000. In order to use the exemption, the issuer must have been a reporting issuer for at least 12 months.

The offering document would be a "core document" under Canadian securities legislation, forming part of the issuer's continuous disclosure record for purposes of secondary market civil liability. In the event of a misrepresentation in the offering document or in the issuer's continuous disclosure record for a prescribed period, purchasers under the Listed Issuer Financing Exemption would have the same rights of action under secondary market civil liability as purchasers on the secondary market. In addition, purchasers under the exemption would have a contractual right of rescission against the issuer for a period of 180 days following the distribution in the event of a misrepresentation. The offering document would not be reviewed by CSA staff before use.

Background

One of the fundamental pillars of securities legislation is that an issuer distributing a security must file and obtain a receipt for a prospectus. The prospectus must contain full, true and plain disclosure of all material facts relating to the securities being offered. Investors who purchase securities under a prospectus are provided certain statutory rights.

The short form prospectus regime was designed to facilitate efficient capital raising for reporting issuers while providing investors with all the protections of a prospectus, including statutory rights of withdrawal, rescission and damages.

The CSA has heard from many stakeholders that the time and cost to prepare a short form prospectus may be an impediment to capital raising, particularly for smaller issuers.

In CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers,* staff noted we were considering whether conditions were right to revisit the merits of an alternative prospectus offering model for reporting issuers. In the comment period, we heard support from several commenters for this project, as well as some support for alternative prospectus concepts previously proposed, but not implemented, such as the Integrated Disclosure System (IDS)[1] and Continuous Market Access (CMA)[2].

[1] In 2000, the CSA published for comment a concept proposal called Integrated Disclosure System (IDS). Under the IDS, reporting issuers would have been required to provide investors with more comprehensive and timely continuous disclosure by using an abbreviated offering document integrating the reporting issuer's disclosure base.

[2] In 2002, the British Columbia Securities Commission published for comment a proposal on a system called Continuous Market Access (CMA). This regime was designed to replace the existing prospectus regime. CMA provided reporting issuers with access to markets by disclosing the offering in a press release. No offering document was required, but reporting issuers were subject to an enhanced continuous disclosure regime and the obligation to disclose all material information about the reporting issuer.

As a result of the responses to CSA Consultation Paper 51-404, in early 2018[3] the CSA undertook a research project on potential alternative offering models. That project included research of alternative regimes in foreign jurisdictions, targeted consultations with market participants, a general survey of issuers listed on Canadian exchanges, a targeted survey of costs associated with short form prospectus offerings, and analysis of data on all prospectus and private placement offerings conducted in 2017 by issuers listed on Canadian exchanges.

What we found from our market consultations and research of public offering regimes in Europe, Australia and the United States, is that our prospectus regime generally works well for larger offerings and that it strikes a good balance between issuer disclosure requirements and investor protection. However, we heard that for smaller offerings (that is, under $10 million), the system can be onerous, the costs associated with preparing a prospectus can be prohibitive, and that dealers have limited interest in smaller offerings. Consequently, issuers are not as inclined to access public markets for smaller offerings.

The MiG Report data for 2020 illustrates that smaller issuers are much less likely to use prospectuses than larger issuers. In 2020, TSX Venture Exchange-listed reporting issuers raised $1.9 billion by way of prospectus as compared to $4.5 billion by way of private placement. In contrast, Toronto Stock Exchange-listed reporting issuers raised $19.4 billion by way of prospectus as compared to only $10 billion by way of private placement[4]. Data from FP Advisor also suggests that most short form prospectuses are filed to raise greater than $10 million. In the five year period from 2016 to 2020, of the 657 short form prospectus offerings by issuers listed on a Canadian exchange, 44 prospectuses (7%) raised $5 million or less, 95 prospectuses (14%) raised between $5-$10 million and 518 prospectuses (79%) raised greater than $10 million through the sale of equity securities[5].

During our consultations, we heard that the costs of completing a short form prospectus offering are a barrier for issuers who want to raise smaller amounts of capital. Issuers cited underwriter and legal costs as the most significant expenditures. Our costs survey also showed that the costs of a prospectus offering were disproportionate to the amounts raised.

To respond to this reality, we propose creating the Listed Issuer Financing Exemption, a prospectus exemption for small offerings that, although available to all issuers, would benefit smaller issuers more specifically. The Listed Issuer Financing Exemption recognizes the comprehensive continuous disclosure regime for reporting issuers, supported by certification requirements and secondary market liability, and the fact that any investor can acquire securities of a reporting issuer on the secondary market.

We think the Listed Issuer Financing Exemption would

- reduce the cost of accessing public markets;

[3] See CSA Staff Notice 51-353 *Update on CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers.*

[4] The MiG Report, Toronto Stock Exchange and TSX Venture Exchange, December 2020.

[5] Based on FP Advisor, New Issues - Financial Post Data as of June 11, 2021 and OSC Calculations. Data represents Canadian dollar-denominated short form prospectus offerings for equity securities completed between 2016 and 2020 (excluding offerings under the base shelf system).

- allow smaller issuers access to public markets and retail investors;
- provide retail investors with a greater choice of investments available in the primary public markets;
- result in better and more current disclosure in the market for those smaller issuers that previously only used the private placement system; and
- provide an incentive for all issuers raising smaller amounts of capital to do so by public offering instead of by private placement.

We have developed this proposal with our mission in mind: increasing market efficiency while ensuring investor protection.

Summary of the proposed Listed Issuer Financing Exemption

The Listed Issuer Financing Exemption is subject to the following key conditions:

	Condition	**Rationale**
Qualifications	The issuer must have • securities listed on a Canadian stock exchange • been a reporting issuer for 12 months in at least one jurisdiction in Canada • filed all timely and periodic disclosure documents as required under the continuous disclosure requirements in Canadian securities legislation • active business operations	• Ensures oversight of pricing and discounts • Recognizes comprehensive continuous disclosure regime for reporting issuers • Limits use to issuers who have established a continuous disclosure record and are in compliance with their continuous disclosure filing requirements • Limits use of the exemption to only those issuers that have a business
Total dollar amount	The total dollar amount that an issuer may raise using the exemption during any 12 month period may not exceed: • the greater of $5 million or 10% of the aggregate market value of the issuer's listed equity securities, to a maximum total dollar amount of $10 million; or • 100% dilution	• Connecting scaled limits on the total amount that can be raised to market capitalization restricts issuers from unduly diluting their shareholders • Addresses comments received that we need a two-tiered approach with significantly fewer requirements for smaller offerings • Limits the impact on the short form prospectus system as the majority of issuers using short form prospectuses raise more than $10 million • The limitation on the amount raised will restrict an issuer from

	Condition	Rationale
		using the exemption for larger transactions that may involve a significant change in the issuer's business
Type of offering document	The issuer must prepare and file a short offering document, proposed new Form 45-106F* *Listed Issuer Financing Document*, containing prescribed disclosure highlighting: • any new developments in the issuer's business, • the issuer's financial condition, including confirmation that the issuer will have sufficient funds to last 12 months after the offering, • how proceeds from the current offering will be used, and • how proceeds from any other offering in the previous 12 months were actually used	• Recognizes that investors may be more likely to read a brief document that contains the key information necessary for making an investment decision than a much longer prospectus • For venture issuers that do not currently use the short form prospectus system, results in better and more current disclosure to the market than if they used other prospectus exemptions
Liability	• The issuer must certify that the offering document, together with the continuous disclosure of the issuer for the past 12 months, contains disclosure of all material facts about the issuer or the securities being distributed and does not contain a misrepresentation • The offering document would be prescribed as a "core document" in the issuer's continuous disclosure record, subject to statutory secondary market civil liability in the event of a misrepresentation • Purchasers under the exemption would have two options for recourse in the event of a misrepresentation:	• Ensures the quality and reliability of the disclosure in the offering document and in the issuer's continuous disclosure • Secondary market civil liability puts purchasers under the Listed Issuer Financing Exemption on the same footing as investors in the secondary market • Having a contractual right of rescission against the issuer ensures the issuer is not unfairly enriched as a result of its misrepresentation • Addresses the concern that applying primary liability would increase underwriter due diligence costs and result in a much longer offering document, defeating our intention to provide a more efficient means of capital raising

	Condition	**Rationale**
	• rights of action under secondary market civil liability • a contractual right of rescission against the issuer	for issuers having an up-to-date continuous disclosure record
Restriction on use of proceeds	• Exemption not available if the issuer is planning to use the proceeds for a significant acquisition or restructuring transaction, such that the issuer would be required to provide additional financial statements under prospectus rules	• Restricts use of the exemption in situations where greater disclosure and scrutiny may be required
Type of securities	• Securities must be listed equity securities or securities convertible into listed equity securities • Subscription receipts may be issued if not used in connection with a significant acquisition, restructuring transaction or other type of transaction that would require security holder approval	• Exemption is meant to mirror investors' ability to purchase securities on the secondary market without a hold period • Exemption is limited to listed equity securities that are easier for investors to understand and that have the benefit of a market valuation
Resale restrictions	• Securities would not be subject to a hold period	• No hold period necessary as the issuer is required to disclose all material facts at time of offering • Addresses comments from stakeholders that the hold period continues to be a deterrent for private placement investment
Underwriter/ registrant involvement	• While investment dealers and exempt market dealers may participate, there is no requirement for an underwriter to be involved • No registration exemption	• Will reduce cost of offerings • Market participants noted that issuers will likely use dealers for larger offerings and to reach new investors • Dealers would have to satisfy their obligations, including suitability (KYC and KYP), to place clients in the offering

	Condition	Rationale
Report of exempt distribution	• The issuer would be required to report use of the exemption by filing a Form 45-106F1 *Report of Exempt Distribution* • The issuer would not be required to complete Schedule 1 – Confidential Purchaser Information.	• Report will allow us to obtain structured data on the offering including type and amount of securities issued and any dealer or finder involvement • Purchaser information not necessary where there are no limits on the type of investor that may participate • Not requiring purchaser information will reduce the administrative burden for the issuer

Consequential Amendments

National Instruments

We propose to make the following housekeeping amendments to the rights offering exemption in NI 45-106 to correct:

- subparagraphs 2.1(3)(b)(ii) and (iii), such that issuers must have filed all periodic and timely disclosure required by any order issued by, or undertaking made to, the regulator or securities regulatory authority; and
- the calculation of total funds available required in the use of available funds table in section 18 of Form 45-106F15 *Rights Offering Circular for Reporting Issuers.*

We propose to consequentially amend NI 45-102 to add the proposed Listed Issuer Financing Exemption to Appendix E Seasoning Period Trades, which would mean securities issued under the exemption would be subject to a seasoning period. Given one of the conditions to use of the proposed exemption is that the issuer must have been a reporting issuer for 12 months, this means that, for practical purposes, no hold period will apply to the securities.

We also propose to amend NI 13-101 to include the new form of offering document in the list of required filings.

Local Matters

Annex E is being published in Ontario.

Request for Comments

We welcome your comments on the Proposed Amendments and the changes to 45-106CP. In addition to any general comments you may have, we also invite comments on the following specific questions.

1. Under the Proposed Amendments, the total dollar amount that an issuer can raise using the Listed Issuer Financing Exemption would be subject to the following thresholds:

    (a) the greater of 10% of an issuer's market capitalization and $5,000,000

    (b) the maximum total dollar limit of $10,000,000

    (c) a 100% dilution limit.

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

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

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

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

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

    (d) If alternative reporting is provided, what information should issuers be required to disclose, in addition to the following:

    - the number and type of securities distributed,
    - the price at which securities are distributed,
    - the date of the distribution, and
    - the details of any compensation paid by the issuer in connection with the distribution and the identity of the compensated party?

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

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

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

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

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

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

   (a) If adopted, do you anticipate that issuers would involve a dealer in offerings under the exemption?

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

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

prospectus offering, the quantum of liability is more limited than it would be for a prospectus offering.

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

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

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

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

Please submit your comments in writing on or before **October 26, 2021**.

Address your submission to all of the CSA as follows:

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

Deliver your comments only to the addresses below. Your comments will be distributed to the other participating CSA.

Larissa Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Fax: 604-899-6581
lstreu@bcsc.bc.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2460, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax : 514-864-8381
consultation-en-cours@lautorite.qc.ca

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the Autorité des marchés financiers at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.gov.on.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Contents of Annexes

The following annexes form part of this CSA Notice:

Annex A:	Proposed amendments to National Instrument 45-106 *Prospectus Exemptions*, including new Form 45-106F* *Listed Issuer Financing Exemption Offering Document*
Annex B:	Proposed changes to Companion Policy 45-106CP
Annex C:	Proposed amendments to National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)*
Annex D:	Proposed amendments to National Instrument 45-102 *Resale of Securities*
Annex E:	Local Matters – Ontario

Questions

Please refer your questions to any of the following:

Larissa Streu Senior Legal Counsel, Corporate Finance British Columbia Securities Commission 604-899-6888 lstreu@bcsc.bc.ca	**Leslie Rose** Senior Legal Counsel, Corporate Finance British Columbia Securities Commission 604-899-6654 lrose@bcsc.bc.ca
David Surat Senior Legal Counsel, Corporate Finance Ontario Securities Commission 416-593-8052 dsurat@osc.gov.on.ca	**Jessie Gill** Senior Legal Counsel, Corporate Finance Ontario Securities Commission 416-593-8114 jessiegill@osc.gov.on.ca
Tracy Clark Senior Legal Counsel Alberta Securities Commission 403-355-4424 Tracy.Clark@asc.ca	**Gillian Findlay** Senior Legal Counsel Alberta Securities Commission 403-297-3302 Gillian.Findlay@asc.ca
Ella-Jane Loomis Senior Legal Counsel, Securities Financial and Consumer Services Commission (New Brunswick) 506-453-6591 ella-jane.loomis@fcnb.ca	**Diana D'Amata** Senior Regulatory Advisor Autorité des marchés financiers 514-395-0337, ext. 4386 diana.damata@lautorite.qc.ca
Heather Kuchuran Director, Corporate Finance Financial and Consumer Affairs Authority of Saskatchewan, Securities Division 306-787-1009 Heather.kuchuran@gov.sk.ca	**Wayne Bridgeman** Deputy Director, Corporate Finance The Manitoba Securities Commission, Securities Division 204-945-4905 wayne.bridgeman@gov.mb.ca
Abel Lazarus Director, Corporate Finance Nova Scotia Securities Commission 902-424-6859 abel.lazarus@novascotia.ca	

Annex A

PROPOSED AMENDMENTS TO
NATIONAL INSTRUMENT 45-106 *PROSPECTUS EXEMPTIONS*

The text box in this Instrument located above section 5A.2 does not form part of this Instrument.

1. ***National Instrument 45-106 Prospectus Exemptions is amended by this Instrument.***

2. ***Section 1.1 is amended in subparagraph (o) of the definition of "accredited investor" by deleting "*, in Québec,*".***

3. ***Section 2.1 is amended in subparagraphs (3)(b)(ii) and (iii) by deleting "*, in Québec,*".***

4. ***The Instrument is amended by adding the following part after Part 5:***

PART 5A: LISTED ISSUER FINANCING EXEMPTION

Interpretation

5A.1 In this Part,

"listed equity security" means a security of a class of equity securities of an issuer listed for trading on an exchange recognized by a securities regulatory authority in a jurisdiction of Canada;

"secondary market liability provisions" means the provisions of securities legislation set out in Appendix D opposite the name of the local jurisdiction.

Listed issuer financing exemption

Refer to Appendix E of National Instrument 45-102 *Resale of Securities*. First trades are subject to a seasoning period on resale.

5A.2 (1) The prospectus requirement does not apply to a distribution by an issuer of a security of the issuer's own issue if all of the following apply:

(a) the issuer is and has been a reporting issuer in at least one jurisdiction of Canada for the 12 months immediately before the date that the issuer files the news release referred to in paragraph (j);

(b) the issuer has a class of securities listed for trading on an exchange recognized by a securities regulatory authority in a jurisdiction of Canada;

(c) the issuer's operations have not ceased or its principal asset is not cash or cash equivalents, or its exchange listing;

(d) the issuer has filed all periodic and timely disclosure documents that it is required to have filed by each of the following:

(i) applicable securities legislation;

(ii) an order issued by the regulator or securities regulatory authority;

(iii) an undertaking to the regulator or securities regulatory authority;

(e) at the time of the distribution, the issuer does not plan to use the proceeds from the distribution towards

(i) an acquisition that is a significant acquisition under Part 8 of National Instrument 51-102 *Continuous Disclosure Obligations*;

(ii) a restructuring transaction as such term is defined in National Instrument 51-102 *Continuous Disclosure Obligations*;

(iii) any other transaction that requires approval of any security holder under the corporate law of the jurisdiction in which the issuer is incorporated or continued, any requirement of the exchange on which the issuer's listed equity securities are listed for trading, or the issuer's constating documents;

(f) the total dollar amount of the distribution, combined with the dollar amount of all other distributions made by the issuer under this section during the 12 months immediately before the date of the issuance of the news release referred to in paragraph (j), will not exceed the greater of the following:

(i) $5,000,000;

(ii) 10% of the aggregate market value of the issuer's listed securities, on the date the issuer issues the news release announcing the offering, to a maximum total dollar amount of $10,000,000;

(g) the distribution, combined with all other distributions made by the issuer under this section during the 12 months immediately before the date of the issuance of the news release referred to in paragraph (j), will not result in an increase of more than 100% of the number, or, in the case of debt, of the principal amount, of the issuer's issued and outstanding securities, as of the date that is 12 months before the date of the news release;

(h) at the time of the distribution, the issuer reasonably expects that, on completion of the distribution, the issuer will have sufficient available funds to meet its business objectives and all liquidity requirements for a period of 12 months;

(i) the securities being distributed are any of the following:

(i) a listed equity security;

(ii) a unit consisting of a listed equity security and a warrant;

(iii) a security convertible into a listed equity security or a unit consisting of a listed equity security and a warrant;

(j) before soliciting an offer to purchase from a purchaser, the issuer

(i) issues and files a news release that

(A) announces the offering; and

(B) states that a purchaser can access the offering document for the distribution under the issuer's profile on SEDAR+ and on the issuer's website, if the issuer has a website;

(ii) files a completed Form 45-106F[x] *Listed Issuer Financing Document*;

(iii) if the issuer has a website, posts the completed Form 45-106F[x] *Listed Issuer Financing Document* to its website;

(k) the completed Form 45-106F[x] *Listed Issuer Financing Document* referred to in paragraph (j) is filed before soliciting an offer to purchase and no later than 3 business days after the date of the form;

(l) the completed Form 45-106F[x] *Listed Issuer Financing Document* referred to in paragraph (j), together with any document filed under securities legislation in a jurisdiction of Canada on or after the earlier of the date that is 12 months before the date of the document and the date that the issuer's most recent audited annual financial statements were filed, contains disclosure of all material facts about the issuer and the securities being distributed under this section and does not contain a misrepresentation;

(m) in Québec, the completed Form 45-106F[x] *Listed Issuer Financing Document* is prepared in French or French and English;

(n) the agreement to purchase the security contains the contractual right of rescission referred to in subsection (3);

(o) the distribution ends no later than the 45th day after the issuer issues the news release referred to in paragraph (j).

(2) For the purposes of subparagraph (1)(f)(ii), the aggregate market value of an issuer's listed securities is calculated by multiplying the total number of listed securities outstanding, by the closing price of the listed securities on the exchange in Canada on which the class of listed securities is principally traded.

(3) For the purposes of paragraph (1)(n), the contractual right of rescission in the agreement to purchase the security must provide for all of the following:

(a) that the purchaser may exercise the right if the Form 45-106F[x] Listed Issuer Financing Document filed under paragraph (1)(j) contains a misrepresentation;

(b) that the purchaser may exercise the right without regard to whether the purchaser relied on the misrepresentation;

(c) that the purchaser may exercise the right by delivering a notice to the issuer within a period that is no less than 180 days after the purchaser signs the agreement to purchase the security;

(d) that the purchaser is entitled in connection with the rescission to a full refund of all consideration paid to the issuer on the acquisition of the security;

(e) that the right is in addition to, and does not detract from, any other right the purchaser has under the law.

Material changes during distribution

5A.3 If an issuer issues a news release announcing its intention to make a distribution under section 5A.2, and a material change occurs in the affairs of the issuer before the completion of a distribution, the issuer must cease the distribution until the issuer

(a) complies with National Instrument 51-102 *Continuous Disclosure Obligations* in connection with the material change,

(b) files an amendment to the previously filed Form 45-106F[x] *Listed Issuer Financing Document*, and

(c) issues and files a news release that states that an amendment to the Form 45-106F[x] *Listed Issuer Financing Document* addressing the material change has been filed.

Listed issuer financing exemption – civil liability for secondary market disclosure

5A.4(1) The secondary market liability provisions apply to the acquisition of an issuer's security pursuant to the exemption from the prospectus requirement set out in section 5A.2.

(2) A document that purports or appears to be completed in accordance with Form 45-106F[x] *Listed Issuer Financing Document* and is filed with respect to a distribution referred to in section 5A.2 is a "core document" pursuant to the secondary market liability provisions.

(3) For greater certainty, in British Columbia,

(a) purchases of securities under a distribution referred to in section 5A.2 are a prescribed class of acquisitions under paragraph 140.2(b) of the Securities Act (British Columbia); and

(b) documents that purport or appear to be completed in accordance with 45-106F[x] *Listed Issuer Financing Document*, and are filed with respect to a distribution referred to in section 5A.2 are a prescribed class of documents for the purpose of the definition of "core document" under section 140.1 of the *Securities Act* (British Columbia)..

5. Subsection 2.42 is amended in paragraphs (2)(a) and (b) by deleting ", in Québec,***".'***

6. Subsection 6.1(1) is amended by:

(a) ***replacing "." with ";" in paragraph (j), and***

(b) ***adding the following paragraph:***

(k) section 5A.2 [*Listed issuer financing exemption*]..

7. Section 6.3 is amended by adding the following subsection:

(3) Despite subsection (1), an issuer is not required to complete Schedule 1 of Form 45-106F1 in connection with a distribution made under section 5A.2 [*Listed issuer financing exemption*]..

8. Form 45-106F1 **Report of Exempt Distribution** ***is amended in Schedule 1, under the heading*** **"INSTRUCTIONS FOR SCHEDULE 1"*****, by adding the following instruction as the last paragraph:***

"**Reports filed under paragraph 6.1(1)(k) [*Listed issuer financing exemption*]** – For reports filed under paragraph 6.1(1)(k) [*Listed issuer financing exemption*] of NI 45-106, the issuer is not required to complete Schedule 1.".

9. Form 45-106F15* Rights Offering Circular for Reporting Issuers *is amended in section 18 by replacing the table with the following:

		Assuming minimum offering or stand-by commitment only	Assuming 15% of offering	Assuming 50% of offering	Assuming 75% of offering	Assuming 100% of offering
A	Amount to be raised by this offering	$	$	$	$	$
B	Selling commissions and fees	$	$	$	$	$
C	Estimated offering costs (e.g., legal, accounting, audit)	$	$	$	$	$
D	Available funds: D = A - (B+C)	$	$	$	$	$
E	Working capital as at most recent month end (deficiency)	$	$	$	$	$
F	Additional sources of funding	$	$	$	$	$
G	Total: G = D+E+F	$	$	$	$	$

10. The following form is added after Form 45-106F[x]:

Form 45-106F[x]
Listed Issuer Financing Document

INSTRUCTIONS

1. Overview of the offering document

This Form 45-106F[x] *Listed Issuer Financing Document* is the form of offering document you must use for a distribution under subsection 5A.2(1) of National

Instrument 45-106 *Prospectus Exemptions*. In this form it is referred to as the "offering document".

In this form, the issuer is sometimes also referred to as "you".

The objective of the offering document is to provide information about the offering.

Prepare the offering document using a question-and-answer format.

2. Incorporating information by reference

You must not incorporate information into the offering document by reference.

3. Plain language

Use plain, easy to understand language in preparing the offering document. Avoid technical terms but if they are necessary, explain them in a clear and concise manner.

4. Format

Except as otherwise stated, use the questions presented in this form as headings in the offering document. To make the document easier to understand, present information in tables.

5. Date of information

Unless this form indicates otherwise, present the information in this form as of the date of the offering document.

6. Forward-looking information

If you disclose forward-looking information in the offering document, you must comply with Part 4A.3 of National Instrument 51-102 *Continuous Disclosure Obligations*.

PART 1 SUMMARY OF OFFERING

1. Basic disclosure about the distribution
State the following with the bracketed information completed:

"Offering Document under the Listed Issuer Financing Exemption [Date]

[Name of Issuer]"

2. Details of the offering
State the following in bold:

"What are we offering?"

Provide the following details about the offering:

(a) the type and number of securities you are offering, and a description of all significant attributes of the securities,
(b) the offering price,
(c) the minimum and maximum amount of securities that you may offer,
(d) whether the offering may close in one or more closings and the date by which the offering is expected to close (if known),
(e) the exchange(s) and quotation system(s), if any, on which the securities are listed, traded or quoted, and
(f) the closing price of your securities on the most recent trading day before the date of the offering document.

3. Required statement
State in bold, at the bottom of the cover page, the information referred to in paragraphs (a) and (b), with the bracketed information completed:

(a) Representations:

"No securities regulatory authority or regulator has assessed the merits of these securities or reviewed this document. Any representation to the contrary is an offence.

[Name of issuer] is conducting a listed issuer financing under section 5A.2 of National Instrument 45-106 *Prospectus Exemptions*. In connection with this offering, we represent the following is true:

- **We have active operations and our principal asset is not cash or cash equivalents or our exchange listing.**
- **We have filed all periodic and timely disclosure documents that we are required to have filed.**

- **The total dollar amount of this offering, in combination with the dollar amount of all other offerings made under the listed issuer financing exemption in the 12 months immediately before the date of this offering document, will not exceed [Insert either "$5,000,000" or the amount that is equal to 10% of your market capitalization, to a maximum total dollar amount of $10,000,000].**
- **We will not close this offering unless we reasonably believe we have raised sufficient funds to meet our business objectives and all liquidity requirements for a period of 12 months.**
- **We will not allocate proceeds from this offering to an acquisition that is a "significant acquisition" or "restructuring transaction" under securities law or to any other transaction that requires security holder approval".**

(b) Certification:

"This offering document, together with any document filed under Canadian securities legislation on or after [insert the date which is the earlier of the date that is 12 months before the date of this offering document and the date that the issuer's most recent audited annual financial statements were filed], contains disclosure of all material facts about the issuer and the securities being distributed and does not contain a misrepresentation."

PART 2 SUMMARY DESCRIPTION OF BUSINESS

4. Summary description of business

State the following in bold:

"What is our business?"

Provide a brief summary of the business you carry on or intend to carry on.

5. Recent developments

State the following in bold:

"Recent developments"

Provide a brief summary of key recent developments involving or affecting the issuer.

6. Material facts

If there is a material fact about the issuer or the securities being distributed that has not been disclosed elsewhere in this offering document or in any other document filed since the date that is the earlier of the date that is 12 months before the date of this offering document and the date that the issuer's most recent audited annual financial statements were filed, disclose that material fact.

7. Business objectives and milestones

State the following in bold:

"What are the business objectives that we expect to accomplish using the available funds?"

State the business objectives that you expect to accomplish using the available funds disclosed under item 8. Describe each significant event that must occur for the business objectives described to be accomplished and state the specific time period in which each event is expected to occur and the cost related to each event.

PART 3 USE OF AVAILABLE FUNDS

8. Available funds

State the following in bold:

"What will our available funds be upon the closing of the offering?"

Using the following table, disclose the available funds after the offering. If you plan to combine additional sources of funding with the offering proceeds to achieve your principal purpose for raising capital, provide details about each additional source of funding.

If there has been a significant decline in working capital since the most recently audited annual financial statements, explain those changes.

		Assuming minimum offering only	Assuming 100% of offering
A	Amount to be raised by this offering	$	$
B	Selling commissions and fees	$	$
C	Estimated offering costs (e.g., legal, accounting, audit)	$	$

D	Net proceeds of offering: D = A - (B+C)	$	$
E	Working capital as at most recent month end (deficiency)	$	$
F	Additional sources of funding	$	$
G	Total available funds: G = D+E+F	$	$

9. Use of available funds

State the following in bold:

"How will we use the available funds?"

Using the following table, provide a detailed breakdown of how you will use the available funds. Describe in reasonable detail each of the principal purposes, with approximate amounts.

Description of intended use of available funds listed in order of priority	Assuming minimum offering only	Assuming 100% of offering
	$	$
	$	$
Total: Equal to G in the available funds in item 8	$	$

Instructions:

1. *If you will use more than 10% of available funds to reduce or retire indebtedness and the indebtedness was incurred within the two preceding years, describe the principal purposes for which the indebtedness was used. If the creditor is an insider, associate or affiliate of the issuer, identify the creditor and the nature of the relationship to the issuer and disclose the outstanding amount owed.*

2. *If you will use more than 10% of available funds to acquire assets, describe the assets. If known, disclose the particulars of the purchase price being paid for or being allocated to the assets or categories of assets, including intangible assets. If the vendor of the asset is an insider, associate or affiliate of the issuer, identify the vendor and nature of the relationship to the issuer, and disclose the method used to determine the purchase price.*

3. *If any of the available funds will be paid to an insider, associate or affiliate of the issuer, disclose in a note to the table the name of the insider, associate or affiliate, the relationship to the issuer, and the amount to be paid.*

4. *If you will use more than 10% of available funds for research and development of products or services,*

   a. *describe the timing and stage of research and development that management anticipates will be reached using the funds,*

   b. *describe the major components of the proposed programs you will use the available funds for, including an estimate of anticipated costs,*

   c. *state if you are conducting your own research and development, are subcontracting out the research and development or are using a combination of those methods, and*

   d. *describe the additional steps required to reach commercial production and an estimate of costs and timing.*

5. *If your most recently filed audited annual financial statements or interim financial report included a going concern note, disclose that fact and explain how this offering is anticipated to address any uncertainties that affect the decision on whether a going concern note is included in your next annual financial statements.*

10. Use of funds from previous financings

State the following in bold:

"How have we used the other funds we have raised in the past 12 months?"

Provide a comparison, in tabular form, of disclosure you previously made about how you were going to use available funds or proceeds from any financing in the past 12 months, an explanation of the variances, and the impact of the variances, if any, on your ability to achieve your business objectives and milestones.

PART 4 FEES AND COMMISSIONS

11. Involvement of dealers or finders and their fees

State the following in bold:

"Who are the dealers or finders that we have engaged in connection with this offering, if any, and what are their fees?"

If any dealer, finder or other person has or will receive any compensation (e.g., commission, corporate finance fee or finder's fee) in connection with the offering, provide the following information to the extent applicable:

a) the name of the dealer, finder, or other person;
b) a description of each type of compensation and the estimated amount to be paid for each type;
c) if a commission is being paid, the percentage that the commission will represent of the gross proceeds of the offering (assuming both the minimum and maximum offering);
d) details of any broker's warrants or agent's option (including number of securities under option, exercise price and expiry date);
e) if any portion of the compensation will be paid in securities, details of the securities (including number, type and, if options or warrants, the exercise price and expiry date).

12. Dealer conflicts

If you have engaged a dealer in connection with the offering, state the following in bold:

"Does [identify dealer(s)] have a conflict of interest?"

If disclosure is required under National Instrument 33-105 *Underwriting Conflicts*, include that disclosure.

PART 5 PURCHASERS' RIGHTS

13. Purchasers' Rights

State the following:

"If you purchase the securities distributed under this offering document from the issuer, you will have certain rights, some of which are described below. For advice about your rights, you should consult a lawyer.

If there is a misrepresentation in this offering document and you purchased securities from us under the listed issuer financing exemption, you have a contractual right to rescind your agreement to buy these securities.

The contractual right to rescind the agreement to buy the securities is available to you whether or not you relied on the misrepresentation.

If you intend to rely on the contractual right of rescission, you must exercise that right within strict time limitations. You must notify us of your intention to exercise your right to rescind the agreement within [state the period that is 180 days or greater, as set out in the purchase agreement] after you signed the agreement to purchase the securities.

In addition to this contractual right, you also have secondary market civil liability rights set out in securities legislation in Canada if there is a misrepresentation in this offering document or in any document filed by the issuer on or after [state the date that is the earlier of the date that is 12 months prior to the date of this offering document and the date that the issuer's most recent audited annual financial statements were filed.]"

PART 6 ADDITIONAL INFORMATION

14. Additional information
State the following in bold:

"Where can you find more information about us?"

Provide the SEDAR+ website address and state that a security holder can access the issuer's continuous disclosure from that site. If applicable, provide the issuer's website address..

11. This instrument comes into force on •.

Annex B

PROPOSED CHANGES TO
COMPANION POLICY 45-106CP
PROSPECTUS EXEMPTIONS

1. Companion Policy 45-106CP Prospectus Exemptions is changed by this Document.

2. Part 3 Capital Raising Exemptions is changed by adding the following section:

3.12 Listed issuer financing exemption

(1) Issuer eligibility

The listed issuer financing exemption in section 5A.2 of NI 45-106 provides an exemption from the prospectus requirement for reporting issuers that have securities listed on an exchange recognized by a securities regulatory authority in a jurisdiction of Canada. The exemption is intended to allow an issuer to raise limited amounts of capital from any person based on the issuer's continuous disclosure filings. For this reason, the issuer must have been a reporting issuer in at least one jurisdiction of Canada for at least 12 months preceding the offering. In addition, the issuer must have filed all periodic and timely disclosure documents it is required to have filed.

In addition to the listing requirement, under paragraph 5A.2(1)(c), the exemption cannot be used by an issuer whose operations have ceased or whose principal asset is cash, cash equivalents or its exchange listing. Further, under paragraph 5A.2(1)(e), the exemption is not available to an issuer that intends to use the proceeds from the offering to complete a significant acquisition, a restructuring transaction or any other transaction that requires security holder approval. The purpose of these requirements is to ensure that an issuer using the exemption has an operating business that is already described in the issuer's current disclosure. If an issuer is intending to raise capital to finance a significant acquisition or a restructuring transaction by distributing securities to retail investors, we would expect the issuer to use the prospectus regime in order to ensure potential purchasers have full, true and plain disclosure about the intended use of proceeds.

(2) Listed equity securities

Under the listed issuer financing exemption, the issuer is restricted to offering listed equity securities, securities convertible into listed equity securities, such as warrants, or securities convertible into units comprised of listed equity securities and warrants, such as special warrants or subscription receipts. However, a distribution of subscription receipts that are convertible only upon the issuer completing a significant acquisition, a restructuring transaction or any other transaction that requires security holder approval under corporate law, exchange requirements or the issuer's constating documents, would not be permitted under paragraph 5A.2(1)(e).

(3) Sufficient available funds and minimum offering amount

There is no requirement to have a minimum offering amount under the listed issuer financing exemption. However, if, following completion of the offering, the issuer will not have sufficient available funds to meet the issuer's business objectives and all liquidity requirements for a period of 12 months, the issuer must set a minimum offering amount such that, following completion of the distribution, the issuer will have sufficient available funds to meet its business objectives and all liquidity requirements for a period of 12 months.

(4) Filing of Form 45-106F[x] *Listed Issuer Financing Document*

Before soliciting purchasers under the listed issuer financing exemption, the issuer must file both the news release announcing the distribution and the completed Form 45-106F[x] *Listed Issuer Financing Document* (Form 45-106F[x]). The issuer must file these documents with the regulator or securities regulatory authority in each jurisdiction where the offering is being conducted, even if the issuer is not a reporting issuer in that jurisdiction.

(5) Material facts and material changes

The issuer must ensure that the information provided to the purchaser in the completed Form 45-106F[x] and certain of the issuer's continuous disclosure discloses all material facts about the issuer and the securities being offered and does not contain a misrepresentation. The continuous disclosure that is subject to this requirement is any document filed by the issuer under Canadian securities legislation on or after the date which is the earlier of (i) the date that is 12 months prior to the date of the issuer's completed Form 45-106F[x], and (ii) the date that the issuer's most recent audited annual financial statements were filed.

Under securities legislation, a "material fact" in respect of a security issued or proposed to be issued is generally defined as a fact that would reasonably be expected to have a significant effect on the market price or value of the security. Issuers should refer to section 4.3 of National Policy 51-201 *Disclosure Standards* for examples of the type of events or information that may be material.

Section 5A.3 of NI 45-106 requires that, in the event that a material change occurs in the business of the issuer after filing the news release announcing the offering and before completion of the distribution, the issuer must cease the distribution until, amongst other things, it has amended the Form 45-106F[x] and issued a news release stating that the Form 45-106F[x] has been amended. The issuer is also required to comply with its obligations under Part 7 of NI 51-102. Material change is defined in Canadian securities legislation.

(6) Liability for misrepresentation

If a completed Form 45-106F[x] contains a misrepresentation, purchasers of securities distributed under the listed issuer financing exemption have a contractual right of rescission against the issuer. We remind issuers that they are required to certify on the first page of Form 45-106F[x] that it, together with any document filed by the issuer under Canadian securities legislation on or after the date which is the earlier of the date that is 12 months before the date of the completed Form 45-106F[x] and the date that the issuer's most recent audited annual financial statements were filed, contains disclosure of all material facts about the issuer and the securities being offered and does not contain a misrepresentation. If any of the issuer's disclosure filed during this period contains a misrepresentation, then the certification is also a misrepresentation, providing purchasers under the listed issuer financing exemption a contractual right to rescind their agreement to purchase the securities.

The issuer would also be liable under secondary market liability provisions in Canadian securities legislation, both to any purchasers on the secondary market as well as to purchasers under the listed issuer financing exemption.

(7) Materials to be filed after distribution

Within 10 days of distributing securities under the listed issuer financing exemption, the issuer must file a report of exempt distribution in Form 45-106F1 *Report of Exempt Distribution* in every jurisdiction in which a distribution has been made. See section 5.1 of this Companion Policy for more information about filing a report of exempt distribution.

Subsection 6.3(3) of NI 45-106 provides an exemption from the requirement to complete Schedule 1 [*Confidential purchaser information*] of Form 45-106F1 for distributions made under the listed issuer financing exemption.

(8) Backdoor underwriting

Securities distributed under the listed issuer financing exemption are not subject to resale restrictions under National Instrument 45-102 *Resale of Securities*. An issuer can use the exemption to distribute securities to anyone; the exemption is not limited to a particular class of investor.

In securities legislation, the definition of distribution includes any transaction or series of transactions involving a purchase and sale or a repurchase and resale in the course of or incidental to a distribution. In Québec, the definition of distribution is broad enough to include these transactions.

In cases where the exemption is used to distribute securities to one purchaser or to a small group of related purchasers and those purchasers immediately resell the securities in the secondary market, it may appear that the purchasers did not have a *bona fide* intention to invest in the issuer. The distribution under the exemption and the subsequent resale may be considered in substance a single distribution. In order to comply with securities legislation, the subsequent purchasers should have the benefit of the issuer's completed Form 45-106F[x] and the rights provided under the exemption.

In addition, purchasers that purchase with an intention to immediately resell the securities in the secondary market should consider the definition of underwriter in securities legislation and whether they are required to be registered. Section 1.7 of this Companion

Policy provides guidance on the expectations on underwriters when purchasing securities under prospectus exemptions with a view to immediately resell (or distribute) those securities.

(9) Registration business trigger for trading and advising

The listed issuer financing exemption does not require the purchaser to have purchased the securities through a dealer. The exemption is an exemption from the prospectus requirement only; it does not provide an exemption from the dealer registration requirement.

An issuer conducting its own offering using the exemption should consider whether it, or any selling agents the issuer uses, may be required to be registered. See section 1.6 of this Companion Policy. Companion Policy 31-103CP gives guidance to issuers on how to apply the registration business trigger.

(10) Use of registered dealer in an offering under the listed issuer financing exemption

An issuer may engage a registered investment dealer or exempt market dealer to assist in the issuer's offering under the listed issuer financing exemption.

Exempt market dealers are permitted to facilitate distributions under the exemption because it is a prospectus-exempt distribution. However, once the distribution is complete, an exempt market dealer cannot facilitate resale of the securities because this activity is trading in listed securities contrary to subparagraph 7.1(2)(d)(ii) of NI 31-103.

(11) Role of registrant in an offering under the listed issuer financing exemption

A registrant involved in a distribution of securities under the exemption must comply with its registrant obligations, including know-your-client, know-your-product and suitability. 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.

3.13 Preparing the Form 45-106F[x]

Numbering system and general guidance

The numbering of this section corresponds to the numbering of Parts and Items in Form 45-106F[x].

Instructions, Item 1 *Overview of the offering document*

When preparing Form 45-106F[x], issuers should keep in mind that it is meant to be a concise, easy to understand disclosure document. Generally, we do not expect it to be longer than about 5 pages.

Part 1, Item 2 *Details of the offering*

Item 2 of Part 1 of Form 45-106F[x] requires details about the offering, including the date by which the offering is expected to close (if known). We remind issuers that under paragraph 5A.2(1)(o) of NI 45-106, the final closing of the offering must occur no later than the day that is 45 days after the date the issuer issues and files the news release announcing the offering.

Part 1, Item 3 *Required statement,* paragraph (a) *Representations*

Item 3 of Part 1 of Form 45-106F[x] requires the issuer to state certain representations. The issuer and its management must ensure that the representations in paragraph (a) are true and will continue to be true until the closing of the offering as they are conditions to using the exemption.

Part 1, Item 3 *Required statement,* paragraph (b) *Certification*

Item 3 of Part 1 of Form 45-106F[x] requires the issuer to certify that the Form, together with the issuer's continuous disclosure filings made on or after the date which is the earlier of the date that is 12 months prior to the date of the Form 45-106F[x] and the date that the issuer's most recent audited annual financial statements were filed, contains disclosure of all material facts about the issuer and securities being distributed and does not contain a misrepresentation.

We remind issuers that purchasers under the listed issuer financing exemption have contractual rights of rescission in the event of a misrepresentation in the issuer's Form 45-106F[x] or in the issuer's continuous disclosure filed in the specified period.

In addition, we remind issuers and their executives that they are liable under secondary market liability provisions for the disclosure in the Form 45-106F[x], both to purchasers under the exemption and to purchasers in the secondary market.

Part 2, Item 6 *Material facts*

Item 6 of Part 2 of Form 45-106F[x] requires disclosure of any material fact about the issuer or the securities being distributed that has not already been disclosed in the Form 45-106F[x] or in any other document filed by the issuer during the specified period. See subsection 3.12(5) for guidance on material facts.

If a person or company beneficially owns, or controls or directs, directly or indirectly, voting securities carrying 10% or more of the voting rights attached to any of the issuer's voting securities, that information may be a material fact under securities legislation. If the issuer has not disclosed information about the person or company during the 12 months immediately before the date of the Form 45-106F[x], the issuer should consider including disclosure of the following for any such person or company:

(a) the person or company's name,
(b) the number or amount of securities beneficially owned, controlled or directed by the person or company, and

(c) the number or amount of securities of the issuer of any class to be beneficially owned, controlled or directed by the person or company after the distribution, and the percentage that number or amount represents of the total securities of the issuer that are outstanding.

Part 3, Item 8 *Available funds*

Item 8 of Part 3 of Form 45-106F[x] requires the issuer to provide an explanation if there has been a significant decline in working capital since the issuer's most recently audited annual financial statements. Working capital is the issuer's current assets (as of the most recent month end) less the issuer's current liabilities (as of the most recent month end).

We would consider a significant decline to include a change in the working capital that results in material uncertainty regarding the issuer's going concern assumption, or a change in the working capital balance from positive to deficiency.

Item 8 of Part 3 of Form 45-106F[x] requires the issuer to complete a table disclosing the amount and source of the funds available to the issuer after completion of the offering. It is a condition of the listed issuer financing exemption that an issuer cannot close the offering using the exemption unless, on completion of the offering, the issuer reasonably expects it will have sufficient available funds to meet its business objectives and all liquidity requirements for a period of 12 months. This means that the total dollar amount the issuer discloses in row G under the column "*Assuming minimum offering only*", or under the column "*Assuming 100% of offering*" in the table, if the minimum offering is the entire offering, must be sufficient to meet the issuer's business objectives (as disclosed in item 7 of Part 2 of Form 45-106F[x]) and all liquidity requirements for a period of 12 months.

Part 3, Item 9 *Use of available funds*

Item 9 of Part 3 of Form 45-106F[x] requires the issuer to disclose how it will use the available funds identified in item 8. Under the terms of the listed issuer financing exemption, the issuer cannot allocate proceeds from the distribution towards an acquisition that is a significant acquisition under Part 8 of NI 51-102, a restructuring transaction as such term is defined in NI 51-102, or any other transaction that requires approval of any security holder under corporate law, any exchange requirement or the issuer's constating documents.

Part 5, Item 13 *Purchasers' rights*

Item 13 of Part 5 of Form 45-106F[x] requires the issuer to provide mandated disclosure about purchasers' rights under the listed issuer financing exemption. See subsection 3.12(6) for a description of these contractual rights and rights under secondary market liability in Canadian securities legislation..

3. These changes become effective on •.

Annex C

PROPOSED AMENDMENTS TO
NATIONAL INSTRUMENT 13-101
SYSTEM FOR ELECTRONIC DOCUMENT ANALYSIS AND RETRIEVAL (SEDAR)

1. National Instrument 13-101 System for Electronic Document Analysis and Retrieval (SEDAR) is amended by this Instrument.

2. Subsection II.E "Exempt Market Offerings and Disclosure" of Appendix A is amended by adding the following:

7. Offering document required to be filed or delivered by an issuer under section 5A.2 of National Instrument 45-106 *Prospectus Exemptions*.

3. This instrument comes into force on •.

Annex D

**PROPOSED AMENDMENTS TO
NATIONAL INSTRUMENT 45-102 *RESALE OF SECURITIES***

1. National Instrument 45-102 Resale of Securities is amended by this Instrument.

2. Appendix E is amended by adding, after "section 2.42 [*Conversion, exchange or exercise – security of a reporting issuer*] for a security being traded in the circumstances referred to in clause (b) of subsection 2.42 (1);***" the following paragraph:***

- section 5A.2 [*Listed Issuer Financing Exemption*]; **.**

3. This instrument comes into force on •.

Annex E

LOCAL MATTERS

There are no local matters to consider at this time.

FAIR
Canadian Foundation *for* Advancement *of* Investor Rights
Fondation canadienne *pour* l'avancement *des* droits *des* investisseurs

November 5, 2021

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

Sent via email to:

Larissa Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Fax: 604-899-6581
lstreu@bcsc.bc.ca

Me Philippe Lebel, Corporate Secretary and Executive Director, Legal Affairs
Autorité des marches financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Email: consultation-en-cours@lautorite.qc.ca

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

FAIR Canada is pleased to provide our comments and recommendations on the proposal to introduce a Listed Issuer Financing Exemption (the Proposal or Proposed Exemption).

FAIR Canada is a national, independent charitable organization dedicated to being a catalyst for advancing investor' rights in Canada. As a voice of the Canadian investor and financial consumer, FAIR Canada promotes its mission through outreach and education on public policy issues, policy submissions to governments and regulators, and proactive identification of emerging issues.[1]

FAIR Canada supports efforts to promote vibrant capital markets as a general principle, including facilitating capital raising for reporting issuers. In our view, a system that provides for the efficient allocation of capital towards productive enterprises is an objective all market participants share.

The challenge, as always, is to ensure that efforts to streamline capital raising processes for issuers also appropriately balances the needs of investors, including providing proportionate and reasonable investor protections. As drafted, the Proposed Exemption does not strike the appropriate balance. Moreover, we believe it exposes investors, particularly retail investors, to significant and unacceptable risks.

Is Reliance on Continuous Disclosure Justified?

Like most other prospectus exemptions, the Proposal is designed to relieve issuers, particularly smaller and less resourced issuers in this case, from the burden of complying with needed and well accepted investor protection safeguards when securities are distributed to the public.

However, unlike most other prospectus exemptions, the Proposal does not include the typical conditions that act as guardrails to protect investors in the absence of a prospectus. For example, there is no limit on who can purchase under the Proposed Exemption; no limit on how much they can purchase; there is no requirement that additional information be delivered to the investor; that the investor sign a risk acknowledgment declaration; or any other measure designed to act as a proxy for gauging suitability (or at least the ability to withstand the loss of the entire investment).

Rather, the Proposed Exemption relies chiefly on one, and only one, guardrail – that is the issuer has an up-to-date continuous disclosure (CD) record.

This one guardrail is buttressed by requiring the issuer to certify that its CD record contains all material facts about the issuer and the securities being distributed, and that the record does not contain a misrepresentation. To further buttress this requirement, the Proposed

[1] Visit www.-faircanada.ca for more information.

Exemption adds a watered-down measure of potential accountability by defining the offering document[2] as a "core document" for purposes of secondary market liability.

In our view, the fundamental problem with the Proposed Exemption is it assumes the CD record is indeed comprehensive and robust. But who is reviewing the CD record to ensure this is indeed the case? Are regulators currently reviewing all CD filings, particularly of smaller issuers, to warrant this degree of reliance? Alternatively, is every CSA member undertaking the same level of review to instill confidence that investors in one jurisdiction can rely on the CD record of an issuer reporting in another CSA jurisdiction?

We suspect that very few issuers ever get a full review of their CD record or even a partial review. So how is this degree of reliance justified?

It appears to be justified on the basis that investors could always sue the issuer for a misrepresentation.[3] The threat of a lawsuit then, serves as the ultimate check to protect investors. But even here, the Proposal falls short and exposes investors to significant risks.

As proposed, investors could only sue under the civil liability regime for a misrepresentation in secondary market disclosure. While the regime removes the need to prove reliance, it places significant caps on the amounts that the investors can be awarded in damages. This is because it was designed for a different purpose and with significantly different considerations in mind than the liability standard for prospectuses. In short, unlike other situations where the investor could sue the issuer to have their entire investment returned, the Proposed Exemption provides a significantly reduced opportunity for compensation.

We fail to understand why the CSA believe it is appropriate to limit the exposure of an issuer for a misrepresentation under the Proposed Exemption. By limiting the amount that investors can recover in such situations, the CSA in essence, is transferring part of the risk for a misrepresentation to investors. In other words, the issuer gets the benefit of every dollar received under the exempt distribution, but the investor is limited in the amount they can get back from the issuer.

This strikes us as patently unfair and unreasonable. Given the significant information asymmetry between the issuer and investors, investors already take on significantly more risks when buying securities directly from the issuer. They should not then have to also, in effect, subsidize the issuer for the risk there is a misrepresentation in that issuer's disclosure.

---

[2] Proposed Form 45-106F* Listed Issuer Financing Exemption Offering Document.

[3] There is also the risk that the regulator will take enforcement action against the issuer. However, this avenue is initiated at the discretion of the regulator, not the investor. In addition, very few regulators currently have the power to order compensation to harmed investors, let alone restitution. So, while the threat of enforcement action exists, it does little to compensate the investor that has already been harmed.

In this respect, we note that the Modernization Task Force (Ontario) appreciated the need to attach prospectus level liability to address this concern. We believe the Task Force got it right when it comes to the liability standard.

Other concerns with the Proposal

In addition to what we consider to be undue reliance on an issuer's CD record as the main guardrail, the Proposed Exemption relies on several other rebuttable assumptions. These include, for example:

- A reporting issuer's CD, updated as it may be, addresses all concerns regarding the information asymmetry between what the issuer knows about its business and what the investor can glean from the CD record.
- Subjecting the issuer to less liability exposure still provides sufficient market discipline to ensure comprehensive disclosure (and, parenthetically, less boilerplate disclosure than what is commonly found in CD filings today).
- All investors, including retail investors, will understand the nature of the risk when purchasing under the Proposed Exemption, as well as any constraints put on their ability to pursue compensation when harmed.

The Proposal also assumes that retail investors will review the CD record and become familiar with the issuer's business and operations. We suspect that most will not. This is not just speculation on our part. According to a research report[4] commissioned by Broadridge Investor Communications Corporation on Canadian retail investors, it found that:

- Few investors are aware of SEDAR (32%) or use it (4% use it once a year and 6% use it more than once a year).

The research also found that:

- Lack of awareness is greater among segments of investors with *lower income, lower wealth, less education, or among older investors*.[5]

In addition, as noted by the OSC in Annex E of the Proposal, there are potentially other very significant risks, including:

[4] The report, entitled "Canada Investor Quantitative Report – Research Findings" (July 2021), was shared with the CSA on September 13, 2021.
[5] Ibid, page 5.

> … if prospectus distributions are replaced by distributions under the [Proposed] Exemption, there may be a reduction in the quality of the disclosure and there may be a higher likelihood of a misrepresentation. The potential reduction in the quality of disclosure may also affect the investors purchasing in the secondary market, since the disclosure will be filed publicly.

In our view, the departure from the prevailing approach for crafting prospectus exemptions is significant, and it introduces substantial new risks to market integrity, as well as to investor protection. Unfortunately, we believe these risks may undermine confidence in the integrity of our capital markets and, ultimately, could raise the cost of capital for all issuers.

Conclusion

While we applaud the CSA for considering novel ways to ease the burden on smaller issuers and facilitate their ability to raise capital from investors, the Proposed Exemption introduces significant and unacceptable risks to investors that need to be addressed.

We thank the CSA for the opportunity to provide our comments in this submission. We would be pleased to discuss our submission with the CSA should you have questions or require further explanation of our views on these matters. Please contact me at jp.bureaud@faircanada.ca.

Sincerely,

Jean-Paul Bureaud,
Executive Director

DAVIES

155 Wellington Street West
Toronto, ON M5V 3J7 Canada

dwpv.com

October 26, 2021

BY EMAIL

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

c/o

Me Philippe Lebel
Corporate Secretary and Executive Director,
Legal Affairs
Autorité des marchés financiers
Email: consultation-en-cours@lautorite.qc.ca

Larissa Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
Email: lstreu@bcsc.cbc.ca

Dear Sirs/Mesdames:

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

We are writing in response to CSA Notice and Request for Comment – Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* to introduce the Listed Issuer Financing Exemption (the "**Request for Comment**"). We strongly support capital raising initiatives that increase efficiency, reduce costs and minimize regulatory burden where those initiatives do not come at the expense of investor protection and market confidence. While we applaud the Canadian Securities Administrators (the "**CSA**") for considering a novel approach to facilitate capital raising, we have significant concerns that the listed issuer financing exemption proposed in the Request for Comment (the "**Listed Issuer**

Financing Exemption") fails to achieve an appropriate balance between market efficiency and investor protection.

To facilitate the CSA's review, we have structured this letter to conform to the structure of the Request for Comment, beginning with general comments regarding the Listed Issuer Financing Exemption followed by our responses to some of the specific questions identified in the Request for Comment. For ease of reference, the specific questions on which we have commented are reproduced below in bold and use the same numbering as the Request for Comment.

A. General Comments

In our view, the Listed Issuer Financing Exemption would adversely impact confidence in our capital markets due to a diminished use of prospectuses and a corresponding diminished role for registered investment dealers and Canadian securities regulators. Moreover, it would increase the risk of fraud because the issued securities would be of a listed class and freely-tradeable, and so could be sold immediately, thereby introducing new securities into the public markets without any independent assessment of the currency or quality of the issuer's disclosure. These risks are exacerbated by the likelihood that most issuers that distribute securities in reliance on the Listed Issuer Financing Exemption would be smaller issuers that are not well-known by market participants (i.e., the issuers most in need of the diligence function performed by registered dealers and the review by securities regulators), and that investors that purchase those securities are likely to be retail investors (i.e., the investors most in need of the protections afforded by a prospectus).

The core premise underlying the Listed Issuer Financing Exemption appears to be that comprehensive continuous disclosure coupled with secondary market liability is sufficient to elicit quality disclosure and police and deter bad disclosure. This premise is reasonable in certain limited circumstances. One such circumstance is a well-known seasoned issuer ("**WKSI**") model that would allow specified issuers to qualify unspecified amounts of different types of securities by way of an automatic shelf without prior review by any Canadian securities regulator or any other delay. Critical to the success of a WKSI model, however, is that eligible issuers must be 'well-known' in that they must have a wide market following and associated scrutiny of their disclosure by analysts, institutional investors and the financial community generally. It is the 'well-known' nature of these issuers coupled with their 'seasoning' from having a reporting track record that provides comfort that an automatic shelf option would not meaningfully diminish the investor protection that would otherwise be afforded by the traditional prior regulatory review of their shelf prospectus.

The Listed Issuer Financing Exemption, however, only relies on an issuer's 'seasoning' and disregards any requirement for the issuer to be 'well-known'. In doing so, it presumes that secondary market disclosure is sufficient in all circumstances such that neither a prospectus nor a hold period is necessary in order to protect the integrity of the Canadian capital markets where issued securities will become freely-tradeable upon issuance. In our view, the fundamental flaw with this premise is that the secondary market works only with the prospectus regime supporting it. The prospectus requirement and the role that registered investment dealers and CSA staff play in prospectus offerings are the regulatory cornerstones of capital raising. While the prospectus process is beneficial to direct investors participating in the offering, the benefits derived from the diligence function and regulatory review of the prospectus are just as important to the fabric of our capital markets. If applied regularly for a sufficient number of issuers, the prospectus process benefits the Canadian capital markets as a whole by providing an assurance as to the quality of secondary market disclosure. This assurance is diminished both with respect to individual issuers and reporting issuers generally by providing issuers with a way to sidestep the prospectus process indefinitely but still access the Canadian public markets for capital raising.

Helping smaller issuers raise capital efficiently is an important goal. However, the ends do not justify the means. Facilitating capital raising should not come at the expense of market integrity. It cannot be the case that, at a small enough deal size, it is too expensive to conduct a prospectus offering and therefore that, below that deal size, issuers should be able to avoid the prospectus process. This fails to factor in the cost to the integrity of our markets and the indirect impact on every other market participant that is harmed by bad actors that will take advantage of this exemption. Notwithstanding that the Listed Issuer Financing Exemption contemplates limits on the dollar amount that an issuer may raise during any 12-month period, a market's reputation is not proportionately impacted by fraud on a dollar-for-dollar basis, and multiple public frauds will cast doubt on the efficacy of Canadian securities regulation.

The Listed Issuer Financing Exemption will result in fewer prospectus offerings

Although the Listed Issuer Financing Exemption may not result in a meaningful decrease in the number of prospectus offerings conducted by larger issuers due to the limit on the total dollar amount that an issuer can raise, we believe that it would significantly reduce the number of prospectus offerings conducted by smaller issuers. When given a choice, smaller issuers would invariably rely on the Listed Issuer Financing Exemption because they would obtain the same pricing without the corresponding process, disclosure and other requirements of a prospectus by virtue of the securities being freely-tradable immediately upon issuance. While fewer prospectus filings appears to be the very purpose of the Listed Issuer Financing Exemption, we do not believe that fewer prospectus filings would be a positive development for the Canadian capital markets. The rigorous process and robust disclosure requirements mandated by the prospectus regime are fundamental to eliciting quality disclosure. In turn, this disclosure is critical to the efficient functioning of, and market participants' confidence in, the Canadian capital markets both for the appropriate pricing of primary offerings and for secondary market trading.

The Listed Issuer Financing Exemption will result in a diminished role for gatekeepers

Registered Canadian investment dealers are crucial players in the prospectus process due to their market and industry expertise. Among other things, these qualified underwriters, in collaboration with their legal counsel and other experts, undertake rigorous due diligence in order to certify that, to the best of their knowledge, information and belief, the prospectus contains full, true and plain disclosure of all material facts relating to the offered securities. Because the Listed Issuer Financing Exemption would permit issuers to distribute freely-tradable securities without the involvement of a registrant, we expect that most issuers would choose not to involve a dealer assuming that they can make a credible argument that they do not trip the registration business trigger. While not involving registrants may save issuers money, we believe that there would be significant costs from a market integrity perspective.

A second independent check on the accuracy and completeness of an issuer's disclosure is conducted by CSA staff that are assigned to review a prospectus. Staff frequently identify deficiencies or insist that disclosure be supplemented or clarified for the benefit of both the purchasers under the prospectus and, by extension, secondary market purchasers. By virtue of the fact that a receipt must be issued in order for the offering to proceed, issuers typically have to address staff's comments to staff's satisfaction. In the absence of such a review, we are concerned that some issuers would be more willing to cut corners and obfuscate disclosure on the basis that it is easier to ask for forgiveness than permission.[1]

The Listed Issuer Financing Exemption will increase the risk of indirect distributions and mischief in the market

For the reasons noted above, in the absence of a prospectus, there would be no independent check on the currency or quality of an issuer's continuous disclosure. Further, if investors are permitted to freely resell without any hold period, there would inevitably be more indirect distributions.[2] Each of these results individually would lead to a significantly higher risk of 'pump and dump' schemes and other mischief in the market in connection with capital raisings. Together, that risk increases exponentially.

That risk is exacerbated by the fact that it is smaller issuers that would be most likely to distribute securities in reliance on the Listed Issuer Financing Exemption. All else being equal, smaller issuers are more likely to have deficient disclosure than larger issuers because they have fewer resources to devote to their controls and procedures and few or no analysts or institutional investors that might otherwise police such deficiencies. It is these smaller issuers for which good, current disclosure is most critical because they may be of a speculative investment quality and their market price more susceptible to volatility based on real or perceived developments. Worse still is that purchasers under the Listed Issuer Financing Exemption are likely to be less sophisticated retail investors who are more easily misled, who are generally not in a position to protect themselves and who are in no way an

---

1 A related concern is that the Listed Issuer Financing Exemption would not be available if an issuer intends to use the proceeds for a significant acquisition or restructuring transaction such that additional financial statements would be required under prospectus rules. However, there does not appear to be anything built into the Listed Issuer Financing Exemption that would prevent bad actors from distributing securities and, once the offering is complete, actually using the proceeds for a significant acquisition or a restructuring transaction. Staff could consider taking enforcement action, however we anticipate that it would be challenging for staff to prove that the issuer's intention at the relevant time was to use the proceeds for a significant acquisition or a restructuring transaction.

2 We note that the CSA has attempted to address concerns with indirect distributions in subsection 3.12(8) of Companion Policy 45-106CP *Prospectus Exemptions* by stating that "[t]he distribution under the exemption and the subsequent resale may be considered in substance a single distribution", and that "purchasers that purchase with an intention to immediately resell the securities in the secondary market should consider the definition of underwriter in securities legislation and whether they are required to be registered." Although correct, the guidance does not meaningfully reduce the risk of indirect distributions, as it will be difficult (if not impossible) for the CSA to police this in practice.

effective filter to protect the secondary markets. These factors create a perfect storm that we anticipate will result in exponentially more ‘pump and dump’ schemes and other mischief in the market.

The premise of the Listed Issuer Financing Exemption is flawed

From an initial sale perspective, the Listed Issuer Financing Exemption would allow most issuers to distribute their listed securities to anyone, provided that, among other things, the issuer has filed all timely and periodic disclosure documents and supplements its continuous disclosure with a short offering document. In this way, it affords an issuer an unlimited audience of potential investors without regard to their ability to independently assess the investment, much like a prospectus offering *but without the associated process and protections*.

Whether an initial sale or resale, the rationale for the Listed Issuer Financing Exemption appears to be that investment decisions can be made exclusively in reliance on a reporting issuer’s continuous disclosure record. Implicit in this rationale is that the only value of a short form prospectus is to update an issuer’s disclosure record and disclose the terms of an offering. As noted above, this premise is flawed, as it fails to attribute the value to both the primary and secondary markets derived from prospectus offerings and their associated processes. Again, this is particularly troubling given the nature of the issuers that are most likely to distribute securities in reliance on the Listed Issuer Financing Exemption and the nature of the investors most likely to subscribe for those securities.

If adopted, the availability of the Listed Issuer Financing Exemption should be limited

If the Listed Issuer Financing Exemption is adopted notwithstanding the concerns noted above, we submit that an issuer that has undertaken a reverse takeover (“**RTO**”) and that has not had a receipt issued for a prospectus subsequent to the completion of its RTO should be prohibited from relying on the exemption. Although RTOs are exchange-regulated processes that are common in the Canadian capital markets, they do not attract the same level of regulatory scrutiny as an initial public offering. In this regard, we are concerned by the possibility of a private company going public via an RTO with a listed shell company that has been a reporting issuer for at least 12 months and immediately distributing millions of dollars of freely-tradable securities to retail investors without a CSA member’s blessing. In our view, the ability to rely upon the Listed Issuer Financing Exemption should be restricted to issuers that the CSA has carefully vetted as opposed to those that only a stock exchange has vetted in order to mitigate the associated risks canvassed elsewhere in this letter.

B. ***Responses to Specific Questions***

1. Under the Proposed Amendments, the total dollar amount that an issuer can raise using the Listed Issuer Financing Exemption would be subject to the following thresholds:

(a) the greater of 10% of an issuer's market capitalization and $5,000,000

(b) the maximum total dollar limit of $10,000,000

(c) a 100% dilution limit.

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

We do not believe that the proposed thresholds are inappropriate as they apply to larger issuers, although would reiterate our view that a market's reputation is not proportionately impacted by fraud on a dollar-for-dollar basis. However, we have concerns with the proposed thresholds as they apply to smaller issuers. An issuer that has listed securities with an aggregate market value of $5 million would be permitted to issue $5 million worth of freely-tradable securities without a prospectus in any 12-month period. In our view, an issuer doubling its market capitalization in this manner would be problematic given that such an issuer would have very few resources available to devote to compliance with its disclosure and other public company obligations, particularly where the purchasers are likely retail investors that are unlikely to have the expertise necessary to make investment decisions and the financial means to withstand significant losses. Moreover, an issuer of that size is much more likely to be listed on the TSX Venture Exchange or another junior exchange that may not have rules that protect against highly dilutive placements.[3] Finally, we consider it odd that an issuer that has listed securities with an aggregate market value of $50 million would have the exact same $5 million annual limit despite having considerably more resources to devote to compliance.

We recognize that the purpose of the Listed Issuer Financing Exemption is to facilitate capital raising for smaller issuers. However, the universe of smaller issuers is vast; an issuer at one end of that spectrum has little in common with an issuer at the other end. Accordingly, if the Listed Issuer Financing Exemption is adopted, we would recommend that it only be available to issuers that have listed securities with an aggregate market value above $10 million. While we recognize that this would exclude certain legitimate issuers that take their compliance and disclosure responsibilities seriously, we believe that a cut-off is necessary in the interests of investor protection and market confidence.

Related to the above-noted thresholds, subsection 5A.2(2) provides that "the aggregate market value of an issuer's listed securities is calculated by multiplying the total number of listed securities outstanding, by the closing price of the listed securities on the exchange in Canada on which the class of listed

---

3 The TSX Venture Exchange Corporate Finance Manual contemplates shareholder approval for an issuance that results in the creation of a new control person or that constitutes a non-exempt related party transaction for purposes of Policy 5.9 *Protection of Minority Security Holders in Special Transactions*, however we do not expect that it would be difficult for an issuer to avoid these requirements by distributing securities to a sufficiently large number of arm's length purchasers.

securities is principally traded." We would instead propose a volume-weighted average price (either 5- or 20-day) or, at a minimum, a 20-day simple average (see e.g., section 1.11 of National Instrument 62-104 *Take-Over Bids and Issuer Bids*), either of which would help to smooth out any daily volatility in an issuer's share price. If the CSA decides not to make this change, we believe that the provision should at least be clarified so that aggregate market value is calculated by multiplying the total number of listed securities outstanding by the closing price of the listed securities *on the last trading day on which there was a closing price* on the exchange in Canada on which the class is principally traded.

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

In our view, issuers should not be permitted to distribute convertible debt in reliance on the Listed Issuer Financing Exemption. Most investors are familiar with listed equity securities and warrants. With certain limited exceptions, such as issuers with dual class share structures, the rights that attach to these securities do not typically vary significantly from issuer to issuer. That cannot be said for convertible debt, which has multiple variables including with respect to interest rate, maturity, mandatory and optional conversion features, covenant packages and implications upon a change of control transaction. We do not believe that a significant majority of non-accredited, retail investors would be familiar with convertible debt, nor do we believe that they would take the time to carefully review the indenture or other governing instrument. In light of the fact that there are no restrictions on the universe of people that would be able to acquire securities under the Listed Issuer Financing Exemption, more complex securities such as convertible debt should be excluded.

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

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

We do not believe that the proposed liability regime for the Listed Issuer Financing Exemption provides appropriate incentives for issuers to provide accurate and complete disclosure. We would instead recommend imposing prospectus level liability.

We understand that the rationale for imposing secondary market liability is due to the fact that the Listed Issuer Financing Exemption is premised on the accuracy of an issuer's continuous disclosure and limited to distributions of listed equity securities. However, this is equally true for short form prospectus offerings, which attract prospectus level liability. Leaving aside the absence of the critical procedural protections discussed above, the Listed Issuer Financing Exemption resembles a watered-down version of the short form prospectus process in terms of the qualification criteria and the requisite disclosure in the applicable offering document. Given such similarities, we do not believe that there is a sufficiently good reason to impose a lesser standard in connection with an offering conducted in reliance on the Listed Issuer Financing Exemption.

We also note that the Request for Comment provides that "[s]econdary market civil liability puts purchasers under the Listed Issuer Financing Exemption on the same footing as investors in the secondary market." While true, it is not clear *why* such purchasers should be put on the same footing as secondary market purchasers given that they are not purchasing in the secondary market, but are rather participating in a treasury issuance.

As a practical matter, the existence of proportionate liability and liability limits under the secondary market liability regime are such that it is rarely worthwhile for a security holder to bring an action against a smaller issuer for an alleged misrepresentation. As discussed in the Request for Comment, the Listed Issuer Financing Exemption was designed specifically for smaller issuers that cannot afford the costs of completing a short form prospectus offering. It follows that the imposition of secondary market liability would provide no meaningful protection or recourse for subscribers in the majority of offerings conducted in reliance on the Listed Issuer Financing Exemption. Given the significant investor protection-related concerns with the Listed Issuer Financing Exemption discussed above, these are precisely the types of offerings for which meaningful safeguards are required.

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

We do not believe that imposing prospectus level liability would have a significant adverse impact on the objectives of the Listed Issuer Financing Exemption. Given that the offering document would have to contain disclosure of all material facts about the issuer and the securities being distributed, it is not clear why or how prospectus level liability would necessitate *more* disclosure by an issuer and a longer offering document for investors to read. To the extent that prospectus level liability would have any impact on an issuer's decision making process vis-à-vis its disclosure, we would expect that it would simply result in issuers providing *better* disclosure by being more careful with respect to any potential misrepresentations.

Even if imposing prospectus level liability would make offerings under the Listed Issuer Financing Exemption slightly more expensive for issuers and result in marginally longer disclosure documents for investors, such costs are more than offset by the corresponding benefits from an investor protection perspective. Given the inherent risks of a regime that permits almost any issuer to distribute freely-tradable securities to unsophisticated retail investors without any independent check by registered dealers or securities regulators, enhanced protections are critical in order to mitigate the potential for frauds on the market. While prospectus level liability is not sufficient in this regard, it at least provides a small measure of comfort that investors may have some meaningful recourse when these risks crystallize.

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

In our view, it is the absence of registered dealers and the important gatekeeping role that they play that will lead to lower standards of disclosure rather than the absence of statutory liability for dealers. We do not expect many small issuers that choose to distribute securities in reliance on the Listed Issuer Financing Exemption to retain a dealer in connection with their offerings. Accordingly, absent mandatory dealer involvement for such offerings, we do not believe that the absence of statutory liability for dealers will further lower issuers' disclosure standards.

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

We do not believe that it would be unduly burdensome for issuers to enter into agreements with purchasers. We would expect that such agreements would quickly develop into standard form contracts with little or no variation as between purchasers. As such, the costs to the issuer from a legal perspective should be minimal.

C. ***Conclusion***

In our view, the benefits to be derived from the Listed Issuer Financing Exemption are trivial when compared with the decidedly negative impact that it could have from an investor protection and market confidence perspective. As noted above, the premise of the Listed Issuer Financing Exemption is fundamentally flawed because it fails to attribute adequate value to the prospectus process. As with any capital raising proposal that allows for the sale of freely-tradeable securities without a qualifying prospectus, consideration must always be given as to how significantly it could impair confidence in our capital markets due to a diminished use of the prospectus regime and a diminished role for registered investment dealers and Canadian securities regulators.

We recognize and appreciate that it can be expensive and time-consuming for smaller issuers to raise capital by way of a prospectus. However, the solution should not be to allow issuers to circumvent the prospectus process entirely and jeopardize the efficacy of Canada's closed system. Rather, the solution ought to be to examine how the existing elements of the prospectus regime can be modified to make the process cheaper and more efficient while still maintaining adequate safeguards against poor disclosure and fraud. In our view, the benefits of the Listed Issuer Financing Exemption are far outweighed by its immense costs and we would strongly recommend that the CSA not proceed with its adoption.

If the CSA nevertheless insists on moving forward with the Listed Issuer Financing Exemption, we recommend that the CSA make a number of changes to the exemption in the interests of investor protection. Specifically, the CSA should impose prospectus level liability and should not allow the exemption to be used in connection with offerings of convertible debt, by issuers that have listed securities with an aggregate market value below $10 million or by issuers that have undertaken an RTO and that have not had a receipt issued for a prospectus subsequent to the completion of the RTO.

****

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

Robert S. Murphy	David Wilson	Jordan Lavi
416.863.5537	416.863.5517	416.367.7624
rmurphy@dwpv.com	dwilson@dwpv.com	jlavi@dwpv.com

DuMoulin Black

DuMoulin Black LLP
10th Floor 595 Howe Street
Vancouver BC Canada V6C 2T5
www.dumoulinblack.com

Telephone No. (604) 687-1224
Direct Line (604) 602-6822
Email: jsutherland@dumoulinblack.com

VIA EMAIL

November 18, 2021

British Columbia Securities Commission
701 West Georgia Street
P.O. Box 10142, Pacific Centre
Vancouver, BC V7Y 1L2

Attention: **Larissa M. Streu, Senior Legal Counsel, Corporate Finance**
Leslie Rose, Senior Legal Counsel, Corporate Finance
Michael Moretto, Deputy Director, Corporate Disclosure

Dear Sirs / Mesdames:

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

We are writing in response to your email on October 27, 2021 requesting comments on the Canadian Securities Administrators' notice published on July 28, 2021 proposing to adopt a new prospectus exemption, the Listed Issuer Financing Exemption (the "Notice"). We provide the following comments to the British Columbia Securities Commission (the "**BCSC**").

General Comments

As a general comment we are extremely supportive of the proposal and believe that this new exemption will make it easier for small reporting issuers to access capital in Canada. Allowing smaller reporting issuers to raise capital quickly and without having a hold period on the shares, without the time and cost associated with a prospectus, is a positive addition to the regulatory framework.

Barriers to issuers utilizing the Listed Issuer Financing Exemption Comments

We think the following three conditions to accessing the Listed Issuer Financing Exemption, as proposed, will likely be a barrier to issuers utilizing the Listed Issuer Financing Exemption and should be reconsidered:

1. **The issuer must have sufficient funds to last 12 months after the offering**. Required disclosure: *We will not close this offering unless we reasonably believe we have raised sufficient funds to meet our business objectives and all liquidity requirements for a period of 12 months*.

Comments: The conditions associated with the Listed Issuer Financing Exemption, including maximum total dollar amount, suggest that it is intended for use by junior issuers. Junior issuers typically raise funds not to last a specific time frame, but rather to fund a particular business milestone and associated G&A. In many cases, junior issuers will raise just enough money to fund that milestone, in hopes that by completing the milestone the issuer will be able to raise funds at a higher valuation (and with less dilution to shareholders) after completing the milestone. The condition that sufficient funds be raised to last 12 months would be inconsistent with that approach.

We suggest that this condition be replaced with a requirement to "comply or explain", whereby issuers are permitted to either make the above statement or, if the issuer does not expect to have sufficient funds to last 12 months, disclose the number of months it does expect to last and its expectations as to how additional funds may be obtained.

2. **Restriction on use of proceeds.** Required disclosure: *We will not allocate proceeds from this offering to an acquisition that is a "significant acquisition" or "restructuring transaction" under securities law or to any other transaction that requires security holder approval".*

   Comments: We suggest that, instead of prohibiting use of the Listed Issuer Financing Exemption to raise funds for these purposes, the exemption should require disclosure of the significant acquisition or restructuring transaction in sufficient detail to enable reasonable investors to make an investment decision, including disclosure of risks.

3. **The issuer must have been a reporting issuer for 12 months.**

   Comments: Considering the rigid process for a company to become listed and a reporting issuer we find this requirement to be an unnecessary barrier. It contradicts the objective of this proposal to benefit small issuers as they are often looking to grow and raise more capital within the first 12 months of becoming a reporting issuer.

Question 1 Comments

Questions 1: *Under the Proposed Amendments, the total dollar amount that an issuer can raise using the Listed Issuer Financing Exemption would be subject to the following thresholds:*

(a) the greater of 10% of an issuer's market capitalization and $5,000,000

(b) the maximum total dollar limit of $10,000,000

(c) a 100% dilution limit.

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

Comments: We would be supportive of increasing the limits on how much an issuer can raise pursuant to the exemption as we are unsure of the policy rationale for imposing a $5 million limit.

Question 6 Comments

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

<u>Comments:</u> We agree and believe that rarely-used exemptions should be repealed to reduce the complexity of the market regime.

Please do not hesitate to contact the undersigned should you have any questions relating to any of the foregoing.

Yours truly,

DuMOULIN BLACK LLP

Per:

Jason T. Sutherland*

Per: DMGL.

David Gunasekera*

Per:

Cachelin Hall

* practicing through a law corporation

353 Water Street, Suite 401
Vancouver, BC V6B 1B8

Forooghian+Co

November 5, 2021

BY EMAIL

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

c/o

Larissa Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
lstreu@bcsc.bc.ca

Me Philippe Lebel
Corporate Secretary and Executive Director,
Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar 2460,
boulevard Laurier, bureau 400
Québec, Québec G1V 5C1
consultation-en-cours@lautorite.qc.ca

Dear Mesdames/Sirs:

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

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

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

RESPONSES TO QUESTIONS INCLUDED IN THE PROPOSED AMENDMENTS

1. **Under the Proposed Amendments, the total dollar amount that an issuer can raise using the Listed Issuer Financing Exemption would be subject to the following thresholds:**

   a. **the greater of 10% of an issuer's market capitalization and $5,000,000**

   b. **the maximum total dollar limit of $10,000,000**

   c. **a 100% dilution limit.**

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

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

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

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

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

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

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

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

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

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

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

d. If alternative reporting is provided, what information should issuers be required to disclose, in addition to the following:

i. the number and type of securities distributed,

ii. the price at which securities are distributed,

iii. the date of the distribution, and

iv. the details of any compensation paid by the issuer in connection with the distribution and the identity of the compensated party?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

******

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

Farzad Forooghian
604-260-4888
Farzad@forooghianlaw.com

Tajinder Rathor
604-260-2648
Tajinder@forooghianlaw.com

Yours truly,

FOROOGHIAN + COMPANY LAW CORPORATION

IIACACCVM
INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

701 WEST GEORGIA STREET | SUITE 1500
VANCOUVER, BC | V7Y 1C6

604.637.1676 | www.iiac.ca

Susan Copland, LLB, BComm
Managing Director
scopland@iiac.ca

October 26, 2021

Larissa Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
lstreu@bcsc.bc.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorite des marches financiers
Consultation-en-cours@lautorite@qc.ca

Dear: Ms. Streu/Me Lebel:

RE: CSA Notice and Request for Comment Proposed Amendments to National Instrument 45-106 Prospectus Exemptions to introduce the Listed Issuer Financing Exemption (the "Proposal")

The Investment Industry Association of Canada appreciates the opportunity to comment on the Proposal.

Summary: The IIAC supports CSA efforts to improve the efficiencies of Canadian capital markets. We are concerned, however, that the by removing registrant due diligence, while permitting unsophisticated investors to purchase such securities without a registered dealer, the Proposal lacks sufficient safeguards to ensure adequate investor protection.

Recommendations: The CSA should not proceed with the Proposal. However, it should continue to develop initiatives that will improve the efficiency of the regulatory system for all stakeholders, such as the current amendments to the Continuous Disclosure Obligations, Access Equals Delivery proposals as well as amendments to the Accredited Investor exemption as adopted in Alberta and Saskatchewan.

The IIAC supports the efforts of the CSA to examine and adjust the current regulatory system to facilitate more efficient means for Canadian issuers to raise capital. To that end, initiatives such as the recent Proposed Amendments to National Instrument 51-102 *Continuous Disclosure Obligations,* CSA Consultation Paper 51-405 - *Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers,* and the amendments related to the Business Acquisition Report requirements enacted in 2020 are measures that are consistent with this objective.

The stated objectives underpinning the Proposal are to reduce the cost of accessing public markets, particularly by smaller issuers, and to increase the availability of such investments to a wider universe of retail investors, who may not qualify for existing prospectus exemptions.

While we appreciate the objectives of the proposed Listed Issuer Exemption, we believe that there are inherent flaws in the Proposal that will have unintended consequences which could compromise investor protection, leading to outcomes detrimental to the Canadian capital markets.

We believe the Proposal cannot achieve these objectives without introducing a significant risk to unsophisticated investors who may have limited means, potentially compromising the reputation of the Canadian capital markets.

The following elements of the Proposal raise concerns related to investor protection and the practicality of use of the exemption.

1. No gatekeeper disclosure oversight – The Proposal does not mandate involvement of a registrant with obligations to undertake due diligence to ensure the integrity of the continuous disclosure and offering document upon which the offering is based. This oversight is particularly important in respect of the small issuers for which this exemption is designed. These issuers are less likely to have the resources to ensure their disclosure is sufficiently complete and robust to support a significant offering to retail investors. The lack of a required third-party review introduces risk for those relying on the disclosure for a potentially significant financial investment.

2. No regulatory review – Issuers using the exemption are not subject to any concurrent regulatory review to ensure that there are no material gaps in disclosure. This, combined with the potential absence of registrant due diligence for the disclosure underpinning the offering, introduces significant risk in the process.

3. No gatekeeper investor oversight – Issuers may sell securities under this exemption directly to investors or may potentially use an unregistered "finder" pursuant to exemptions in certain provinces to do so. The Proposal expands the universe of potential investors beyond the usual accredited investors participating in such offerings yet does not require a registered dealer with Know-Your-Client and Know-Your Product obligations to ensure the investment in a small issuer that has not been subject to due diligence is appropriate for such investors.

4. No investor qualification – Unlike other prospectus exemptions, the potential investors are not "qualified" in any manner based on sophistication, ability to withstand loss, or relationship to the issuer. Permitting small issuers to issue free trading securities to such potentially unsophisticated and unqualified investors without the due diligence, advisor regulatory obligations, regulatory review, or purchase limitations introduces significant risk of significant financial loss for those least able to understand the risk and recover from the loss.

5. No hold period – We expect that this exemption would essentially replace a subset of private placements issued to qualified accredited investors with hold periods to allow issuance of free trading securities to non-qualified investors.

6. Appropriate due diligence will reduce cost savings – It has been the observation of our members that financings conducted through issuers without the benefit of registrant due diligence are often non-compliant. Although the Proposal does not preclude the use of registrants to undertake the offering, the cost of conducting appropriate due diligence on the issuer and investor will largely negate the cost savings anticipated by the Proposal.

We support the CSA's efforts to support Canadian capital markets by increasing regulatory efficiencies and decreasing unnecessary regulatory burdens. However, the potential cost savings to a subset of issuers do not present a reasonable balance to the investor protection risks inherent in the Proposal.

As noted above, recent initiatives undertaken by the CSA have been helpful in this regard. We recommend that the CSA continue to work within the existing prospectus framework to improve efficiencies. As an example, we suggest expanding the widely used Accredited Investor prospectus exemption to include factors such as education and investment experience, similar to what has been implemented in Alberta and Saskatchewan.

Thank you for considering our comments.

Sincerely

Susan Copland

mcmillan

Date: October 26, 2021

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

Larissa Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Fax: 604-899-6581
lstreu@bcsc.bc.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: 514-864-8381
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames,

Re: Comments with respect to the proposed amendments to National Instrument 45-106 - *Prospectus Exemptions* ("**NI 45-106**") (together with consequential amendments to National Instrument 13-101 - *System for Electronic Document Analysis and Retrieval* and National Instrument 45-102 - *Resale of Securities* ("**NI 45-102**"), the "**Proposed Amendments**") to introduce a new prospectus exemption available to reporting issuers that are listed on a Canadian stock exchange and fulfill certain other conditions (the "**Listed Issuer Financing Exemption**" or the "**proposed exemption**")

We are writing in response to the request for comments by the Canadian Securities Administrators (the "**CSA**") with respect to the Proposed Amendments as set out in the July 28, 2021 proposal of the CSA (the "**CSA Proposal**").

At the outset, we wish to thank the CSA for their efforts in moving forward with the CSA Proposal in an attempt to assist smaller issuers in improving their ability to effectively and efficiently raise needed funds that, if conducted in a way to protect investors, would be beneficial to our capital markets and economy. This effort builds upon the work of the CSA and others[1] and therefore there has been much debate on key aspects that form the CSA Proposal, which can serve to assist in reaching a solution. We also recognize that in reaching an appropriate solution, counterbalancing factors that have been acknowledged for decades have to be addressed, including:[2]

- the tension between investor protection objectives and the goal of fostering capital formation;
- the political currency enjoyed by small business financing, which may make it difficult to focus on substantive analysis; and
- the universal tendency to adhere to the status quo.

We are hopeful that our comments will assist the CSA in moving forward with a solution that will meet the goals of burden reduction, capital efficiency and fostering capital formation, while ensuring that its key mandate of investor protection is not undermined.

In Part I of this submission, we begin with a review of the Canadian closed system as well as its historic alternative regulatory model, the integrated disclosure system. In light of the possible impact of the Proposed Amendments on the closed system, we believe it is appropriate to consider the objectives and historical policy basis for the closed system and to consider the policy rationale of an integrated disclosure system and the manner in which it should properly function. We then review historical alternatives to prospectus offerings which were proposed and have not been adopted at this time, that appear to be the foundation on which the Proposed Amendments were based; namely the 2000 CSA Concept Proposal for an Integrated Disclosure System (the "**CSA Concept Proposal**") and Proposal 16 of the Final Report (as defined below) of the Ontario Capital Markets Modernization Taskforce (the "**Taskforce Proposal**").

---

[1] *Task Force on Small Business Financing Final Report*, OSC (October 1996) [Small Business Report]; *CSA Notice and Request for Comment 44-401, 51-401 – Concept Proposal for an Integrated Disclosure System*, CSA Notice, (2000) 23 OSCB 633 [CSA Concept Proposal]; Capital Markets Modernization Taskforce, *Consultation Report* (9 July 2020), online (pdf): *Government of Ontario* <files.ontario.ca/books/mof-capital-markets-modernization-taskforce-report-en-2020-07-09.pdf> [Consultation Report]; *New Proposals for Securities Regulation – A new way to regulate*, BCSC (5 June 2002), online (pdf): *British Columbia Securities Commission* <bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/HistPolicies/HistPolicyBCN/BCN200220_New_Proposals.pdf> [CMA Proposal].

[2] Small Business Report, *supra* note 1 at 1 (preface).

In Part II of this submission, we contend that a prospectus exemption similar to the Listed Issuer Financing Exemption would be in the public interest and recommend changes to the Proposed Amendments that we believe may strike a better balance between the goals of market efficiency and fostering capital formation, on one hand, and investor protection, on the other hand. Notwithstanding our support for the proposed exemption, we conclude by asking that the CSA examine holistically the closed system with a view to developing a new regime which better meets the needs of the Canadian capital markets.

In Part III of this submission, we respond directly to the questions set out under "Request for Comments" in the CSA Proposal and to the question set out in "Comments" in Annex E.

The views, opinions and recommendations expressed in this letter are solely those of the lawyers whose names are set out at the conclusion of this letter, and are not made on behalf of McMillan LLP, or its clients.[3] We would be pleased to provide further insight and additional details with respect to our submissions, and would welcome the opportunity to engage further with the CSA.

Part I

A. The Closed System

The closed system model characterizes the distribution and trading of securities in every Canadian jurisdiction today, excluding Manitoba.[4] Under the closed system, all distributions require a prospectus (i.e. the system is "closed" around all distributions), unless an exemption from the prospectus requirement is available.

Under current Canadian securities legislation, there can be no issuance of securities (i.e. no primary market distributions) unless there has been a prospectus filing or the primary market distribution takes place under an exemption from the prospectus requirements.[5] Securities issued in the primary market by way of a prospectus are qualified for distribution, and thereby freely tradeable (outside of the closed system) subject to narrow exceptions.

Where it operates, the closed system functions to restrict the secondary market trading of securities sold initially pursuant to a prospectus exemption.[6] Specifically, the closed system prevents such securities from becoming freely tradeable, unless there is compliance with the specific resale rules imposed by NI 45-102, or a prospectus is filed and receipted to qualify

[3] This letter was prepared with the assistance of the following summer and articling students: Srinidhi Akkur, Kamal Azmy, Kiira Kaarid, Ishita Kashyap, Sam Kelley, Vaughan Rawes, Cole Singleton, Kendra Wilson and David Zhang.
[4] David Johnston, Kathleen Doyle Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (Markham: LexisNexis Canada, 2014) at 299 [Johnston].
[5] *Ibid* at 296.
[6] Borden Ladner Gervais LLP, *Securities Law and Practice*, 3rd ed (Toronto: Thomson Reuters, 1988) (loose-leaf updated 2017, release 6), s 17.8 [BLG].

the distributed securities.[7] Failing to do so will relegate the securities to the closed system where they can only be re-sold under a prospectus exemption listed in NI 45-106,[8] a related instrument such as Multilateral Instrument 45-108 – *Crowdfunding* ("**MI 45-108**") or the recently introduced National Instrument 45-110 – *Start-up Crowdfunding Registration and Prospectus Exemptions* (together with MI 45-108, the "**Crowdfunding Exemptions**"),[9] or a local act (such as, the Ontario *Securities Act* ("**OSA**")).[10]

The key purpose of the closed system is to ensure that, before those outside the closed market are able to purchase securities in the secondary market, there is sufficient publicly accessible information available to investors to make informed investment decisions.[11] The closed system was introduced in part as a response to the previous securities law regulatory landscape in Canada, where, in general, there were no restrictions on the resale of securities originally purchased under a prospectus exemption.[12] There were concerns, as expressed by the authors of the *Merger Report* in 1970,[13] that this aspect of the previous legislation provided loopholes for backdoor underwritings, whereby the exemptions served as mere pipelines for covert distributions of securities to the public.[14] These circumstances also created opportunities for sophisticated investors to take advantage of and resell their prospectus-exempt securities to less sophisticated investors who lacked disclosure about the securities and/or the issuers.[15]

The closed system aims to remedy these problems and to protect investors in the secondary market that are outside of the closed market by providing for, "a high continuing standard of disclosure […] coupled with sufficient delay to permit adequate exposure of facts", before resales can take place.[16] NI 45-102 currently achieves this result through the establishment of restricted (or hold) periods and seasoning periods, the primary purposes of which are to allow time for the disclosure to build up and for investors to evaluate it.[17] The availability and sufficiency of the disclosure is realized by making it a pre-requisite that the issuers of the securities be or become reporting issuers, thus subject to continuous and timely disclosure requirements pursuant to Canadian securities laws, before the clock starts running on these

---

[7] *Resale of Securities,* OSC NI 45-102 (as consolidated 1 November 2018), online (pdf): *Ontario Securities Commission* <osc.ca/sites/default/files/pdfs/irps/ni_20181101_45-102_unofficial-consolidation.pdf> [NI 45-102].
[8] *Prospectus Exemptions,* OSC NI 45-106 (as consolidated 5 October 2018), online (pdf): *Ontario Securities Commission* <osc.ca/sites/default/files/2020-09/ni_20181005_45-106_unofficial-consolidation.pdf> [NI 45-106].
[9] *Crowdfunding*, MI 45-108 (as consolidated 31 October 2016), online (pdf): *Ontario Securities Commission* <osc.ca/sites/default/files/pdfs/irps/ni_20170119_45-108_unofficial-consolidation.pdf>; *Start-up Crowdfunding Registration and Prospectus Exemptions*, OSC NI 45-110, (2021) 44 OSCB 7927.
[10] *Securities Act*, RSO 1990, c S.5 [OSA].
[11] BLG, *supra* note 6, s 17.8.2.
[12] Mark R. Gillen, *Securities Regulation in Canada*, 3rd ed (Toronto: Thomson Carswell, 2007) at 242 [Gillen].
[13] Department of Financial and Commercial Affairs, *Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure raised for investors by Business Combinations and Private Placements* (Ontario: February 1970) [Merger Report].
[14] *Ibid* at para 5.04.
[15] Gillen, *supra* note 12 at 242.
[16] Merger Report, *supra* note 13 at para 5.26.
[17] Gillen, *supra* note 12 at 244.

hold or seasoning periods.[18] A knock-on effect of the resale restrictions imposed by hold or seasoning periods is that they potentially work to incentivize public offerings because securities issued under the prospectus regime will not be subject to the discount that frequently occurs because of the resale restrictions.[19]

NI 45-102 harmonized resale restrictions across the closed system jurisdictions in Canada.[20] Prior to the introduction of NI 45-102, hold periods across Canada ranged from anywhere between six months to a year and a half.[21] The hold period originally suggested by the authors of the *Merger Report* was 28 days.[22] Presently under section 2.5 (the restricted or hold period conditions) of NI 45-102, in addition to satisfying certain other requirements, the issuer must be and have been a reporting issuer in a Canadian jurisdiction for the four months immediately preceding the proposed trade, and at least four months must have elapsed since the original distribution.[23] Under section 2.6 (the seasoning period conditions) of NI 45-102, the requirements are similar to those under section 2.5 (including that the issuer must be and have been a reporting issuer in a Canadian jurisdiction for the four months immediately preceding the proposed trade), but there is no requirement that at least four months must have passed since the original distribution.[24]

Requiring an issuer to be a reporting issuer for the four preceding months under both sections makes certain (assuming the issuer is not in default of its obligations under securities legislation) that there will be at least four months' worth of continuous and timely disclosure materials, pertaining to the issuer, available to a prospective purchaser in the secondary market.[25] These materials would include, for example, interim or audited financial statements, management discussion and analysis ("**MD&A**") and material change reports.[26] The combined disclosure from these documents is considered an alternative to the information that a prospectus would otherwise provide.[27] This reliance on continuous and timely disclosure materials rather than a single prospectus is consistent with the shift in regulatory policy,[28] even though these documents are not subject to the same standard of full, true, and plain disclosure of all material facts, as would be required in a prospectus filing.[29] The additional requirement, under section 2.5 of NI 45-102, that four months must have passed since the

---

[18] Johnston, *supra* note 4 at 330.
[19] Ministry of Finance, Five Year Review Committee Final Report ~ Reviewing the Securities Act (Ontario) (Toronto: Publications Ontario, 21 March 2003) at 138 [Crawford Report].
[20] Johnston, *supra* note 4 at 330.
[21] *Ibid*.
[22] Merger Report, *supra* note 13 at para 5.25.
[23] NI 45-102, *supra* note 7, s 2.5(2).
[24] NI 45-102, *supra* note 7, s 2.6(3).
[25] Gillen, *supra* note 12 at 248.
[26] BLG, *supra* note 6 at para 17.1.5; Gillen, *supra* note 12 at 247.
[27] Johnston, *supra* note 4 at 304.
[28] Capital Markets Modernization Taskforce, *Final Report* (January 2021), online (pdf): *Government of Ontario* <files.ontario.ca/books/mof-capital-markets-modernization-taskforce-final-report-en-2021-01-22-v2.pdf> at 34 [Final Report].
[29] OSA, *supra* note 10, ss 56(1), 75(1).

initial distribution operates to prevent backdoor underwritings.[30] It has been argued that the imposition of a hold period under section 2.5, and not section 2.6, is because the exemptions subject to section 2.5 are more prone to backdoor underwritings, than those exemptions subject to section 2.6.[31] It may also be argued that the prospectus exemptions subject to section 2.6 (which in effect usually allows securities to be immediately freely tradeable after issuance, as in most cases the issuer has been a reporting issuer for more than four months) are intentionally limited and have built-in safeguards:

- where an issuer sells shares to its existing shareholders subject to a cap of no more than a 100% dilution;[32]
- statutory transactions that usually require disclosure and the consent of shareholders – such as take-over bids, arrangements and amalgamations; and
- where shares are issued to employees and officers of the issuer who should be fully informed and knowledgeable about the issuer's business.[33]

As referenced, the investors for whom exemptions are available, in effect, constitute a closed market for restricted secondary market trading, the existence of which is linked to a presumption that they do not require the protections provided by a prospectus.[34] The rationales, however, for why these investors do not require these protections appear to have changed with the growing list of available prospectus exemptions, which have worked to expand the list of investors allowed entry into the closed market. In Ontario, key capital raising exemptions include those for accredited investors, minimum amount investments (other than by individuals), family, friends and business associates, and existing security holders, among others.[35] Many of these exemptions are rationalized on the basis that these investors are of a certain level of sophistication and have the experience necessary to do the required diligence on the issuer,[36] that there exists some close relationship to the issuer, pursuant to which their trustworthiness and capabilities can be appropriately evaluated, or that the transaction under which the distribution will take place provides sufficient protections and/or disclosure.[37]

In recent years, however, we have seen the introduction of new prospectus exemptions, like the offering memorandum exemption and the Crowdfunding Exemptions, which target a much broader base than previous exemptions.[38] The rationale for these new exemptions appears to be less about the class of investor, and more about the class of issuer. Specifically, they

---

[30] Gillen, *supra* note 12 at 248.
[31] Gillen, *supra* note 12 at 248.
[32] NI 45-106, *supra* note 8, s 2.1(6)(a).
[33] NI 45-106, *supra* note 8, s 2.24.
[34] Gillen, *supra* note 12 at 87.
[35] Ontario Securities Commission, *Summary of Key Capital Raising Prospectus Exemptions in Ontario* (28 January 2016), online (pdf): <osc.ca/sites/default/files/pdfs/irps/ni_20160128_45-106_key-capital-prospectus-exemptions.pdf> [Key Prospectus Exemptions].
[36] Johnston, *supra* note 4 at 317.
[37] *Ibid* at 311.
[38] Key Prospectus Exemptions*, supra* note 35.

appear to be responses to the desires of smaller issuers for more cost-effective ways to access capital markets.[39] Another difference between these exemptions and the others is that for an issuer to rely on them, they must provide point of sale disclosure, which is not the case with the majority of the other key exemptions.[40] These newer exemptions thus appear to be the result of a compromise. Instead of restricting the availability of prospectus exemptions to particular investors who are deemed not to require disclosure protections, regulators have opened up the closed market in certain circumstances, but are mandating disclosure in those instances where it is presumed to still be necessary. However, the disclosure standard is less than that required for a prospectus and is not subject to a securities regulator's prior review.

The continued existence of the closed system has not been without critique, as perhaps most notably seen in 2003's *Five Year Review Committee Final Report ~ Reviewing The Securities Act (Ontario)* ("**Crawford Report**"), where the authors claimed that it "ha[d] become increasingly complicated and difficult to administer and comply with."[41] The authors of the Crawford Report questioned the continued need for hold periods for reporting issuers, as discussed in more detail below. For example, the authors felt that backdoor underwriting concerns could be targeted specifically, by deeming those who purchase securities pursuant to an exemption "with a view to distribution" as underwriters,[42] which may have been addressed by the definition of underwriter under the OSA.[43] With respect to the supposed disclosure protections gained through hold periods, the authors of the Crawford Report said that this rationale was not compelling because in their view, "[t]he gap in the quality of disclosure as between the prospectus and continuous disclosure that existed when the closed system was introduced ha[d] narrowed considerably".[44] Moreover, the authors felt that the idea that seasoning periods allow time for disclosure to be disseminated, did not really hold up in a world with "SEDAR and other technological advances [that] permit greater and faster access to information than ever before."[45]

Others have raised similar points. For example, then-Professor Anand questioned whether the closed system lacked "relevance in an era where secondary market disclosures about an issuer are comprehensive and issuers now bear liability for such disclosures."[46] She also suggested that backdoor underwriting was less of an issue now than when "a larger proportion of trading occurred in the primary market and when the monitoring of securities distributions was perhaps less comprehensive and less frequent."[47] Finally, she too raised the point about "technological advances such as SEDAR" perhaps cannibalizing the need for hold periods.[48]

---

[39] Johnston, *supra* note 4 at 322.
[40] Key Prospectus Exemptions*, supra* note 35.
[41] Crawford Report, *supra* note 19 at 134.
[42] *Ibid* at 138.
[43] OSA, *supra* note 10, s 1(1).
[44] Crawford Report, *supra* note 19 at 138.
[45] Crawford Report, *supra* note 19 at 139.
[46] Anita Anand, "Towards Effective Balance Between Investors and Issuers in Securities Regulation" (1 August 2006) at 46, online (pdf): <citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.595.2928&rep=rep1&type=pdf>.
[47] *Ibid*.
[48] *Ibid* at 47.

Prior to these commentators, in 1996, the authors of the Ontario Securities Commission Task Force on Small Business Financing Final Report acknowledged that the closed system was "badly in need of rethinking but does not lend itself to tinkering, i.e. recommending certain changes without addressing its conceptual underpinnings."[49] Twenty-five years later that statement remains true.

In summary, the closed system model presently characterizes the distribution of securities in almost every Canadian jurisdiction. Its key purpose is to ensure that there is sufficient information in the market available to inform the investment decisions of potential purchasers. It seeks to achieve this objective by preventing the issuance of securities in the primary market unless there has been a prospectus filing or the distribution takes place under an exemption from the prospectus requirement, and by placing restrictions on secondary market trading for securities purchased earlier pursuant to an exemption. Hold and seasoning periods, as found in NI 45-102, and the reporting issuer pre-requisite are key restrictions, which work to ensure there is continuous and timely disclosure material available before secondary market resales can take place (assuming no prospectus is filed to qualify the securities, and there is no reliance on a further exemption). Hold periods are also said to prevent backdoor underwriting, and to promote public offerings. The prospectus exemptions, by contrast, at least those that are restricted to particular classes of investors, have been rationalized on the basis that such investors do not need the protections offered by NI 45-102. However, the emergence of new exemptions that can be used by any investor appear to have a different rationale, one which reflects the desires of smaller issuers to have more cost effective ways for access to public investors. Issues like cost of compliance with the closed system regime have led some to seek out and conceptualize new regulatory models, as for example an integrated disclosure system.

B. <u>An "Integrated Disclosure System"</u>

The closed system is one that is found not just in Canada but also in nearly all countries with regulated capital markets regimes. An alternative to the closed system is an "integrated disclosure system", with such a system obviating the need for hold or seasoning periods and a growing list of prospectus exemptions. Such an "integrated disclosure system" was described by H. Garfield Emerson in *Towards an Integrated Disclosure System for Ontario Securities Legislation* as the creation of "open public securities markets [which] requires, in theory, that there be full and honest publicity of important information in order that the competing judgments of buyer and seller as to the fair price of a security reflects as nearly as possible a just price and establishes a true market value for the security".[50] Emerson further elaborated on such an "integrated disclosure system" as a "co-ordinated disclosure system" where "public files contain, at any given time, information substantially equivalent to

---

[49] Small Business Report, *supra* note 1 at 105.
[50] H. Garfield Emerson, "Towards an Integrated Disclosure System for Ontario Securities Legislation" (1972) 10:1 Osgoode Hall LJ 1 at 2–3.

a current prospectus—in quantity, quality, timeliness and accessibility".[51] Under a true integrated disclosure system, "issuers could go to market more quickly with new securities issues" and "could raise capital at a reasonable cost without compromising investor protection."[52] A reporting issuer's continuous and timely disclosure documents would be equivalent to prospectus disclosure, and therefore investors in the secondary and exempt markets would have access to the same enhanced public disclosure thereby obviating the need for a closed system for reporting issuers.

In 2003, the Crawford Report examined whether, and under what conditions, hold periods could be removed to effectively introduce an "integrated disclosure system" in Canada. Although the authors of the Crawford Report did not strive to completely eliminate the closed system, they did wish to simplify it through the elimination of hold periods and seasoning periods for reporting issuers. These changes, according to the Crawford Report, would not undermine investor protection and would contribute to capital market efficiency.[53] While hold periods (i) prevent backdoor underwritings, (ii) protect investors by ensuring accurate and up to date information about an issuer is available in the marketplace, and (iii) provide a financial incentive for issuers to complete a public offering, these functions could be or have been achieved by other means.[54] According to the authors of the Crawford Report, hold periods need not apply to all secondary market security issuances in order to capture backdoor underwriters. The Crawford Report proposed modifying the definition of "distribution" instead in order to capture exempt backdoor trades, and proposed that those who acquire securities with a view to distribution may come within the definition of an "underwriter". This modification would then subject backdoor trades to the appropriate hold periods.[55] The Crawford Report also found that regulatory reforms improving the quality of disclosure in both prospectuses and continuous disclosure documents have limited the need for hold periods. Further, the implementation of civil liability for continuous disclosure, upgrading of continuous disclosure standards and a move towards a more integrated disclosure system would reduce if not eliminate the regulatory arbitrage between private and public means of financing, according to the authors.[56]

Similarly, the Crawford Report found that seasoning periods could also be made obsolete for reporting issuers. While seasoning periods were initially introduced in order to allow time for newly minted reporting issuers to disseminate information into the marketplace, the use of SEDAR and other technological advances has permitted faster access to information. The Crawford Report found the focus on seasoning periods obfuscates a primary concern of the closed system, namely quality of disclosure.[57] Its authors argued that although seasoning

---

[51] *Ibid* at 58.
[52] Crawford Report, *supra* note 19 at 125.
[53] *Ibid* at 139.
[54] *Ibid* at 138.
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid* at 140.

periods are often encouraged in order to allow the quality of an issuer's disclosure record to improve over time, it is unclear whether that is true.[58]

The Crawford Report presented a co-ordinated integrated disclosure system concept, similar to that envisioned by Emerson. The Crawford Report was critical of the complexity of the closed system, especially in relation to the inefficiencies and costs associated with the resale of securities that are subject to hold periods and seasoning periods. To address these issues, its authors recommended the Ontario Securities Commission (the "**OSC**") conduct a review of the closed system, "with a view to implementing meaningful reform".[59] The Crawford Report recommended updating the broader securities regulatory regime to include enhanced continuous disclosure standards across Canada, active continuous disclosure review programs ("**CDR Program**"), statutory liability for continuous disclosure, rigorous enforcement of disclosure standards across the country, as well as appropriate escrow requirements applicable to securities held by management and insiders of the companies that go public.[60] These recommendations in conjunction with the elimination of hold and seasoning periods would bring the Canadian securities market towards a more "integrated disclosure" system as contemplated by Emerson.

We note that the term "integrated disclosure system" has been utilized in a variety of ways in securities law. For instance, the CSA Concept Proposal advocated for an integration of the information reporting issuers are required to provide to investors in both the primary and secondary market. The CSA Concept Proposal, further explored below, is distinct from the concept of an "integrated disclosure system" as it is merely a modified closed system that still requires a form of prospectus for primary distributions. The United States of America (the "**U.S.**") also has an alleged integrated disclosure system in place. Their integrated securities system merged two disclosure regimes contained in the *Securities Act of 1933,*[61] and the *Securities Exchange Act of 1934.*[62][63] This disclosure system is still very much a traditional closed system, as it requires prospectus disclosure for primary distributions and imposes resale restrictions similar to the current Canadian securities regime. As such, the CSA Concept Proposal and the U.S. "integrated disclosure system" are distinct from a true "integrated disclosure system".

A true integrated disclosure system would eliminate the distinction between the primary and secondary markets of securities by requiring a coordinated disclosure system whereby disclosure documents are distributed on a timely basis and contain information equivalent to current prospectuses. This would result in the disclosure record of reporting issuers containing all relevant material information on an ongoing basis, which is likely an unrealistic goal. Securities issued by a reporting issuer in an integrated disclosure system would not be subject

[58] *Ibid*.
[59] *Ibid* at 141.
[60] *Ibid* at 140.
[61] *Securities Act of 1933*, Pub L No 73-22, 48 Stat 74 (codified as amended at 15 USC § 77a – 77mm).
[62] *Securities Exchange Act of 1934*, Pub L No 73-291, 48 Stat 881 (codified as amended at 15 USC § 78a – 78qq).
[63] Milton H. Cohen, "The Integrated Disclosure System – Unfinished Business" (1985) 40:3 Bus Lawyer at 987–88.

to hold periods or seasoning periods, except possibly if their distribution fell within the parameters of a backdoor underwriter transaction or a control block distribution.

C. 2000 CSA Concept Proposal for an Integrated Disclosure System

Background

In 2000, the CSA proposed an alternative offering system referred to as an integrated disclosure system (the "**CSA IDS**").[64] The aim of the CSA IDS was to de-emphasize the traditional focus on primary market prospectus disclosure and focus instead on a reporting issuer's continuous disclosure.[65] Under the CSA IDS, information that reporting issuers must provide to investors in both the primary and secondary markets would have been integrated under a common disclosure base.[66] An issuer's CSA IDS disclosure base would have provided investors in both markets with access to issuer-related information in a comprehensive and timely manner.[67] In addition, the CSA IDS would have allowed issuers to use an abbreviated securities offering document to respond quickly to opportunities in the capital markets.[68] This condensed document would have undergone regulatory screenings and would have incorporated by reference the issuer's CSA IDS disclosure base.[69] The CSA predicted that the CSA IDS and its streamlined offering procedures would have reduced issuers' reliance on prospectus exemptions and the related complexities of the closed system's resale restrictions for privately placed securities.[70]

Proposal

CSA IDS Eligibility

The proposed CSA IDS required an issuer to be a reporting issuer or the equivalent thereof in all thirteen jurisdictions in Canada with no specified minimum period of reporting.[71] This requirement was intended to promote uniformity with respect to Canadian distribution rules and reduce the complexity associated with reselling privately placed securities.[72] The CSA recognized that this condition would impose added costs on CSA IDS issuers in the form of filing fees.[73]

---

[64] CSA Concept Proposal, *supra* note 1.
[65] *Ibid* at 633.
[66] *Ibid*.
[67] *Ibid*.
[68] *Ibid*.
[69] *Ibid*.
[70] *Ibid* at 634.
[71] *Ibid* at 634, 649.
[72] *Ibid* at 634.
[73] *Ibid*.

The other qualifications required of a CSA IDS issuer included:

- being listed on a recognized market, described to include Canadian and foreign exchanges;[74]
- having a current base disclosure document in the form of a CSA IDS Annual Information Form ("**CSA IDS AIF**"), a long form prospectus or a short form prospectus with materials incorporated by reference; and
- being in compliance with its continuous disclosure obligations.[75]

In developing the CSA Concept Proposal, the CSA additionally considered, but ultimately rejected, the imposition of a seasoning requirement (which would have required an issuer to satisfy a minimum period as a reporting issuer) and a quantitative (size) requirement for CSA IDS eligibility.[76] In addition to noting the lack of evidence of sound disclosure by more "seasoned" issuers, the CSA believed that the CSA IDS had sufficiently stringent eligibility criteria, thereby lessening the need for a prior seasoning requirement.[77] The CSA rejected quantitative measures on the basis that there is no significant demonstrable link between an issuer's size and its quality of information. The CSA noted that such a qualification could also produce unpredictability as a result of fluctuating quantitative measures.[78] Finally, the CSA was not convinced with the argument that large issuers command greater analyst following and in turn result in investor education and improved disclosure.[79] The CSA believed that this viewpoint failed to recognize the relative size and scale of the Canadian market as compared to the U.S. market, noting that in Canada, even the investors in large issuers do not typically have access to an array of independent analysis.[80] Further, the CSA felt that with technological developments providing improved public access to disclosure, investors would have the opportunity to make a more informed analysis themselves.[81]

The CSA Concept Proposal also specified categories of issuers that would have been ineligible to participate in the CSA IDS, including (i) issuers organized exclusively for issuing derivative or asset-backed securities and (ii) issuers that have no significant assets, operations or specific business plans capable of implementation in the near future or one that intends only a business combination with unidentified issuers. The restricted list would have also included a blind pool, a capital pool company,[82] and a mutual fund.[83] Issuers would have also become ineligible if there were material unresolved CSA staff comments on their disclosure filings or if there were existing circumstances that would have obligated a regulator to refuse a prospectus receipt, if the issuer were to file a prospectus.[84]

---

[74] *Ibid* at 650.
[75] *Ibid*.
[76] *Ibid* at 635–636.
[77] *Ibid* at 635.
[78] *Ibid* at 651.
[79] *Ibid*.
[80] *Ibid*.
[81] *Ibid*.
[82] As defined in TSXV Policy 2.4 Capital Pool Companies.
[83] CSA Concept Proposal, *supra* note 1 at 650.
[84] *Ibid* at 651.

CSA IDS Continuous Disclosure

The CSA IDS proposed upgrading an issuer's continuous disclosure base to that of the prospectus standard of certified "full, true and plain" disclosure, as well as expediting filing due dates in some cases.[85]

An issuer's CSA IDS disclosure base would have included the CSA IDS AIF, a cornerstone document containing a yearly consolidation of information regarding the issuer's business.[86] Accompanying the CSA IDS AIF would have been a quarterly information form (a "**QIF**"), which would have been filed for an issuer's first, second and third financial quarters, and would have contained an issuer's interim financial statements and MD&A.[87] Further, on the occurrence of a triggering event during the year, such as an acquisition, the CSA IDS would have required issuers to file a supplementary information form (a "**SIF**") similar to a material change report within ten days of the event.[88]

In keeping with its goal of ensuring that an issuer's continuous disclosure base has prospectus-quality disclosure, the CSA IDS would have required CSA IDS AIFs, QIFs and SIFs to be certified by an issuer's senior management and directors attesting that the documents contained full, true and plain disclosure.[89] The CSA hoped that the CSA IDS' faster offering process would lead lawyers, underwriters, auditors and other advisors to having greater involvement in an issuer's continuous disclosure so that issuers could satisfy themselves as to the quality of the disclosure relied on by prospective investors.[90]

CSA IDS Offerings

The proposed CSA IDS required both a preliminary and final form CSA IDS prospectus, but placed greater emphasis on the preliminary prospectus.[91] A preliminary CSA IDS prospectus would have included complete disclosure regarding the offering, the offered securities, the statutory rights of investors, and potential risk factors along with documents in the CSA IDS disclosure base and all written marketing communication incorporated by reference.[92] For the prospectus to be complete, issuers would have also been required to incorporate by reference disclosure of each event which occurred after the latest CSA IDS AIF or more recent QIF, and which triggered the filing of a SIF.[93] In contrast to the preliminary CSA IDS prospectus, the CSA proposed a streamlined "checklist" version of the final CSA IDS prospectus that would have identified and incorporated by reference the preliminary prospectus and all documents

---

[85] *Ibid* at 636.
[86] *Ibid* at 652.
[87] *Ibid*.
[88] *Ibid* at 652, 654.
[89] *Ibid* at 655.
[90] *Ibid* at 658.
[91] *Ibid* at 637.
[92] *Ibid* at 655–656.
[93] *Ibid* at 656.

in the issuer's disclosure base, and contained prospectus certificates.[94] The CSA clarified, however, that the brevity of the final CSA IDS prospectus would not diminish the responsibility of the issuer to ensure that the document offered full, true and plain disclosure of all necessary information.[95] The most important role of the final CSA IDS prospectus was to update the preliminary CSA IDS prospectus and function as the basis of investors' statutory rights concerning withdrawal or misrepresentation.[96]

The CSA IDS retained the existing requirement for underwriter certification of the prospectus, recognising that due diligence by underwriters provides an added layer of scrutiny that can strengthen disclosure.[97]

Regulatory Review of the CSA IDS Disclosure

The proposed CSA IDS would have enabled a streamlined regulatory role in the offering process with the shift in focus from prospectus to continuous disclosure.[98] To ensure enhanced disclosure standards, a well-developed and appropriately staffed system of continuous disclosure review would be necessary.[99] The CSA proposed undertaking measures that would have put in place a system of periodic, selective or targeted regulatory review of the CSA IDS disclosure base to ensure a high quality information base underlying a CSA IDS offering.[100]

The CSA IDS prospectuses would have gone through a regulatory screening but not a detailed review.[101] The screening process would have primarily been aimed towards assessing (i) the eligibility of the issuer, (ii) any matters that could prompt a detailed review or (iii) whether the regulator was obliged pursuant to statutory restrictions to decline to provide a prospectus receipt.[102]

Comparative Analysis of the CSA Proposal and the CSA Concept Proposal

While the purpose of both the Listed Issuer Financing Exemption under the CSA Proposal and the CSA Concept Proposal is to make accessing the public markets more cost-effective for issuers, the two proposals principally differ in their approach on the following grounds:

- *Core Document*: The Listed Issuer Financing Exemption requires continuous disclosure records to be supplemented with a short offering document containing key highlights in question-and-answer format. The proposed CSA IDS on the other hand would have

---

[94] *Ibid*.
[95] *Ibid*.
[96] *Ibid*.
[97] *Ibid* at 658.
[98] *Ibid* at 660.
[99] *Ibid*.
[100] *Ibid*.
[101] *Ibid*.
[102] *Ibid*.

required the CSA IDS disclosure base to be supplemented by both a preliminary and final CSA IDS prospectus. The CSA IDS preliminary prospectus would have had comparatively wider disclosure obligations.

- *Offering Document Review*: The Listed Issuer Financing Exemption under the CSA Proposal eliminates review of the offering document by CSA staff. In contrast, the CSA IDS would have retained regulatory screening (however, not a traditional detailed review) of the prospectus.
- *Certification and Standard of Disclosure*: The CSA Proposal requires issuers to certify disclosure of all material facts in the offering document (and continuous disclosure for the past 12 months) and recommends a misrepresentation standard. The proposed CSA IDS, however, would have required the prospectus to be certified by the issuer and underwriters, and to contain "full, true and plain disclosure of all material facts". The CSA Concept Proposal also recommended upgrading issuers' continuous disclosure base to the prospectus standard of certified "full, true and plain" disclosure.
- *Cap on amount that may be raised*: The Listed Issuer Financing Exemption limits the dollar amount that an issuer can raise during any 12-month period. In contrast, the CSA Concept Proposal did not impose a cap.
- *Seasoning*: The Listed Issuer Financing Exemption requires an issuer to be a reporting issuer for 12 months to be eligible (imposing an indirect seasoning period), while the CSA Concept Proposal did not impose any minimum period.

Comments to the CSA Concept Proposal

Six of the 23 commenters offered general support for the CSA Concept Proposal, subject to individual concerns.[103] Those in favour of the proposal supported the CSA's efforts to shift the focus of Canadian securities regulation away from transactional offering disclosure to continuous disclosure. These commenters believed the proposal would help improve Canada's competitiveness in capital markets by enhancing investors' access to information while also assisting issuers to raise capital.

Despite support for the proposal, the CSA IDS also received criticism. Those opposed to the CSA IDS criticized the cost and administrative burden of compliance resulting from enhanced disclosure requirements.[104] They also claimed that many issuers would have likely preferred the short form prospectus and shelf distribution procedures to the CSA IDS because the CSA IDS would have introduced additional disclosure requirements without adding significant benefits.

---

[103] *Notice and Request for Comment – Proposed Repeal and Replacement of National Instrument 44-101 Short Form Prospectus Distributions, Form 44-101F3 Short Form Prospectus and Companion Policy 44-101CP Short Form Prospectus Distributions,* CSA Notice, (2005) 28 OSCB 117 at 153 [Summary Comment Letters].
[104] *Ibid* at 132.

CSA IDS Eligibility

The eligibility requirements were some of the most criticized aspects of the CSA IDS proposal. None of the commenters supported the condition that would have required issuers to obtain reporting issuer status in all Canadian jurisdictions.[105] They opposed the requirement because of the increased costs, complexity and administrative burden that would be associated with obtaining and maintaining reporting issuer status in all CSA jurisdictions.[106] The requirement would have been especially onerous for smaller issuers and could have deterred them from participating in the CSA IDS.[107] Finally, certain commenters questioned the need for universal reporting issuer status when SEDAR has enabled ready access to public documents.[108]

In response to a question regarding whether a seasoning period or quantitative requirements should be imposed, no commenters supported the inclusion of eligibility requirements related to seasoning or size.

None of the commenters believed that a seasoning requirement would have added any benefit to the proposal given advances in technology and the high disclosure standard under the proposed CSA IDS. Two commenters mentioned that a seasoning period provides no certainty that the issuer will become better known in the market or develop an analyst following,[109] which one of them believed is a complex process and involves factors beyond the size and length of time an issuer has been a reporting issuer.[110]

No commenters were in favour of imposing quantitative eligibility criteria. While some commenters stated that larger issuers do generally have higher quality disclosure, they believed quality of disclosure may be enhanced by imposing higher standards. In contrast, one commenter argued that the disclosure of smaller issuers may in fact be superior because relevant details are much easier to provide.[111] This commenter mentioned that a review of recent disclosure could in fact reveal far lesser transparency from larger issuers.[112]

Full, true, plain disclosure

There were differing opinions and concerns raised by commenters in relation to the certification requirement. Six commenters questioned how certification requirements would

[105] *Ibid*.
[106] *Ibid*.
[107] *Ibid*.
[108] *Ibid*.
[109] *Ibid* at 134.
[110] Letter from the Canadian Advocacy Council of the Association for Investment Management and Research to the CSA (19 May 2000) at 2.
[111] Letter from Peter McCarter to the CSA (17 July 2000) at 2.
[112] *Ibid* at 3.

have interacted with the civil remedies proposal[113] and two of these commenters suggested deferring this requirement until finalization of such proposal.[114]

Many commenters did not believe it was feasible to impose "full, true and plain" disclosure standards on all continuous disclosure documents. They expressed difficulty in understanding how the public record could at all times measure up to a "full, true and plain" disclosure standard, believing it was unrealistic to force issuers to consider whether the standard had been met on a day-to-day basis.[115]

The commenters felt the standard would have been particularly onerous for SIFs and QIFs. They claimed that imposing "full, true and plain" disclosure requirements would not be appropriate for these forms since neither form contained prospectus level disclosure.[116] Instead, the commenters believed that implementing a "no misrepresentation" standard (or a variation of this standard) would have been a more suitable alternative.[117]

Involvement of Advisors in Continuous Disclosure

According to four commenters, it would be unreasonable to expect that advisors will be significantly involved in continuous disclosure.[118] They either cited perceived deterioration of due diligence under the prompt offering qualification system in support of their contention or suggested that the introduction of civil liability would be needed for increased advisor involvement.[119]

The Corporate Finance Committee of the Investment Dealers' Association of Canada ("**IDA Committee**") suggested that the CSA identify practices to establish competent due diligence, such as receipt of a comfort letter, favourable opinions from counsel, and discussions with management to assist underwriters under the expedited CSA IDS offering timetable.[120] The IDA Committee also proposed an alternate certification (instead of the standard of "full, true and plain" disclosure): "to the best of the underwriter's knowledge, the underwriter is unaware of any misstatement of a material fact relating to the securities offered hereby in the prospectus or disclosure documents incorporated by reference".[121]

---

113 The "Proposal for a Statutory Civil Remedy for Investors in the Secondary Market" developed and published by CSA members on May 29, 1998 was pending at the time and proposed the extension of a civil right of action to secondary market investors for misrepresentations in the continuous disclosure record. This proposal was essentially adopted as Part XXIII.1 of the *Securities Act* (Ontario) in 2002, and was proclaimed into force in 2005.
114 Summary Comment Letters, *supra* note 103 at 142.
115 *Ibid*.
116 *Ibid*.
117 *Ibid* at 142–143.
118 *Ibid* at 143.
119 *Ibid*.
120 Memorandum from the Corporate Finance Committee of the Investment Dealers' Association of Canada to the CSA (22 June 2000) at 6.
121 *Ibid* at 7.

Prospectuses

In response to the CSA's question regarding reliance of investors on a prospectus in making their investment decision, four commenters argued that recipients at best give a prospectus a cursory reading and retail investors usually rely on their brokers for investment decisions.[122] There were no strong objections to any of the disclosure items or contents of the preliminary prospectus outlined in the CSA Concept Proposal. Some commenters did suggest including supplementary documents such as the addition of a "recent developments" category where the issuer would be required to provide any information necessary to update documents incorporated by reference.[123] Another commenter strongly supported allowing issuers to incorporate by reference all of their CSA IDS base filings making it a more readable document.[124]

Reasons Why the CSA IDS Was Not Adopted

Many benefits of the proposed CSA IDS have been implemented through National Instrument 51-102 – *Continuous Disclosure Obligations* ("**NI 51-102**") and National Instrument 81-106 – *Investment Fund Continuous Disclosure* ("**NI 81-106**", together with NI 51-102, the "**CD Rules**"), National Instrument 52-109 – *Certification of Disclosure in Issuers' Annual and Interim Filings* ("**NI 52-109**") and National Instrument 52-110 – *Audit Committees* ("**NI 52-110**"), as well as through the CSA's harmonized CDR Program.

The CSA rejected the requirements for CSA IDS issuers to have reporting issuer status in all Canadian jurisdictions as it felt this was unnecessary given that the CD Rules harmonize continuous disclosure requirements across all thirteen jurisdictions in Canada.[125]

Most of the enhancements to continuous disclosure proposed by the CSA IDS are now required under the CD Rules, NI 52-109, and NI 52-110, which apply to all issuers.[126] In addition, the content requirements for the CSA IDS AIF and MD&A have been set out in the CD Rules.[127] Although the CD Rules do not require QIFs, they impose specific requirements regarding interim reporting.[128] Further, although SIFs are not required under the CD Rules, the CD Rules require issuers to file both a news release and a material change report if a material change occurs.[129] In addition, while the CD Rules do not require the certification of filings, NI 52-109 requires the certification of annual and interim filings, as applicable.[130] The CD Rules do not

[122] Summary Comment Letters, *supra* note 103 at 144.
[123] *Ibid* at 146.
[124] *Ibid*.
[125] *Ibid* at 133.
[126] *Ibid* at 137.
[127] *Ibid*.
[128] *Ibid*.
[129] *Ibid* at 139.
[130] *Ibid* at 142.

prescribe the standard of "full, true and plain disclosure of all material facts" for continuous disclosure documents, as a result of the reasons provided by commenters.[131]

Regarding the increased involvement of lawyers, underwriters, auditors, and other advisors in an issuer's continuous disclosure, the CSA noted that the combined effect of the CD Rules, NI 52-109, and NI 52-110 would persuade issuers to obtain the guidance of advisors when creating their continuous disclosure documents.[132]

Overall, as stated above, the CSA noted that many of the advantages of the proposed CSA IDS had been adopted through the implementation of the CD Rules, NI 52-109, NI 52-110, and other CSA initiatives.

D. <u>The Taskforce Proposal</u>

Following the CSA Concept Proposal, the last review of the capital markets regulatory framework in Ontario occurred in 2003 by the Crawford Report.[133] Almost two decades later, in February 2020, the provincial government created the Capital Markets Modernization Taskforce (the "**Taskforce**") as part of its commitment to modernize Ontario's capital markets. The mandate of the five-member Taskforce was to review the current capital markets regulations and put forward recommendations aimed at amplifying growth and competitiveness in Ontario's capital markets without diminishing investor protection.[134]

The Taskforce first published a report on July 9, 2020 (the "**Consultation Report**"),[135] for which it sought commenter feedback. Throughout the comment period, commenters provided over 130 comment letters, with submissions containing varying degrees of support, pushback, and additional suggestions for consideration. Earlier this year, on January 22, 2021, the Taskforce published its final report (the "**Final Report**")[136] consisting of 74 recommendations covering a broad set of themes. This section focuses on Proposal 7 of the Consultation Report, finalized as Proposal 16 of the Final Report, which deals with an alternative offering model of securities to enable certain issuers to issue freely tradeable securities pursuant to a prospectus exemption.

Proposal 7 of the Consultation Report

To reduce the high costs associated with preparing and filing a prospectus, Proposal 7 of the Consultation Report recommended the creation of an alternative prospectus exemption where reporting issuers would be able to offer freely tradeable securities under the following conditions:

---

[131] *Ibid* at 143.
[132] *Ibid* at 144.
[133] Crawford Report, *supra* note 19.
[134] Final Report, *supra* note 28 at 1–2.
[135] Consultation Report, *supra* note 1.
[136] Final Report, *supra* note 28.

- the issuer must be a reporting issuer for at least 12 months;
- the reporting issuer must have securities listed on an exchange;
- the reporting issuer must have complied with its continuous disclosure obligations and not be in default;
- the securities to be issued under this prospectus exemption must be of a class that is already listed on an exchange;
- the offering must be subject to an annual maximum; and
- the issuer must file a short offering document when issuing securities to update its disclosure record and certify its accuracy.[137]

Under the proposed prospectus exemption, the Taskforce noted that investors would not benefit from the same civil and statutory protections under the short offering document as they would under a prospectus.[138]

The main policy rationale behind this proposal was to facilitate capital raising at a lower cost for smaller issuers.[139] The Taskforce relied on two assumptions in its reasoning. First, it assumed that shifting reliance to the reporting issuer's continuous disclosure record - rather than on the disclosure derived from the filing of a prospectus - would be cost effective for these companies. Moreover, that the difference in cost would be material enough to justify the creation of a new prospectus exemption.

Second, the Taskforce assumed that an annual maximum for offerings would be a sufficient mechanism to ensure that smaller issuers would be the ones benefiting from the prospectus exemption. In addition, the creation of the maximum limit was justified as a way to prevent material offerings from taking place without a prospectus filing, which it believed would further protect investors.

Commenter Feedback: Arguments

Overall, commenters showed little support for Proposal 7, however, those in support of the proposal raised the following arguments. First, the exemption would have allowed small issuers to benefit from frequent infusions of capital[140] and the ability to conduct small financings.[141] Second, the requirement for an annual maximum would have prevented material offerings from taking place under the exemption, which in turn would have

[137] Consultation Report, *supra* note 1 at 12.
[138] *Ibid*.
[139] *Ibid*.
[140] Letter from Canadian Investor Relations Institute to Capital Markets Modernization Taskforce (7 September 2020) at 2.
[141] Letter from Prospectors & Developers Association of Canada to Capital Markets Modernization Taskforce (7 September 2020) at 4, online (pdf): <pdac.ca/docs/default-source/priorities/access-to-capital/securities/default-document-library/pdac-response-to-cmm-taskforce-consulation-september-7-2020.pdf> [PDAC Letter].

preserved the integrity of the prospectus regime[142] and limited the risks for investors. Third, the introduction of the alternative offering model would have presented an opportunity for reporting issuers to increase their liquidity in the secondary markets and "enable non-accredited parties to invest in secondary offerings by issuers that are currently inaccessible."[143]

On the other hand, many commenters were opposed to the implementation of the exemption, bringing forward four main reasons. First, the lack of investor protection was a significant issue for many commenters. Under the exemption, investors would not benefit from the same statutory and civil protections associated with a prospectus. Reporting issuers would have access to an unlimited number of investors without having any mechanism in place to ensure the investors' ability to assess the investment.[144] The commenters believed this was particularly concerning because "the most likely purchasers under this exemption will be much less sophisticated – namely, 'mom and pop' and other retail investors who are more easily misled."[145] Under this exemption, investors who are unable to assess the risk of their investments would have been more vulnerable as they would not have access to the associated process and protections[146] of a prospectus offering.

Second, the alternative offering model – where securities are issued without a prospectus – would decrease accountability, integrity and trust in the marketplace, which would have led to the loss of confidence in our capital markets. The commenters believed that our capital markets would become less competitive and attractive to investors because this exemption would (i) not have adequate investor protection, (ii) diminish the distinction between the primary and secondary markets[147] and (iii) represent a departure from best practices in international capital markets.[148] Moreover, the commenters noted that the Taskforce failed to appreciate and recognize the value provided by the prospectus process to the primary and secondary markets in their reasoning behind the proposal. This lack of acknowledgement, along with the exemption itself, could have led to a decrease in the use of prospectus offerings and a reduced role for registered investment dealers and securities regulators, which would have inevitably led to the loss of confidence in our capital markets.[149]

Third, the commenters were concerned that the alternative offering model would have allowed the issuance of securities without an independent assessment of the quality of the

---

[142] Letter from Canadian Securities Exchange to Capital Markets Modernization Taskforce (7 September 2020) at 2.
[143] *Ibid*.
[144] Letter from Davies Ward Phillips & Vineberg LLP to Capital Markets Modernization Taskforce (7 September 2020) at 16, online (pdf): <dwpv.com/-/media/Files/PDF_EN/2020/Capital-Markets-Modernization-Taskforce-Comment-Letter.ashx> [Davies Letter].
[145] *Ibid* at 17.
[146] *Ibid* at 16.
[147] Letter from Torys LLP to Capital Markets Modernization Taskforce (7 September 2020) at 4, online (pdf): <torys.com/-/media/files/pdfs/letter-to-capital-markets-modernization-taskforce-consultation-report.pdf>.
[148] Letter from Echelon Wealth Partners Inc. to Capital Markets Modernization Taskforce at 3 [Echelon Letter].
[149] Davies Letter, *supra* note 144 at 17.

issuer's disclosure.[150] They believed that the lack of oversight could have increased the risk of fraud. As noted by a commenter, "although the proposed alternative offering model's small annual maximum may limit the risk to the market by dollar amount, a market's reputation is not proportionately impacted by fraud on a dollar-for-dollar basis."[151] Having multiple incidents of fraud, despite the dollar value, would have a detrimental impact on the reputation, reliability and confidence in our capital markets.

Fourth, the commenters believed that the exemption would have created further inconsistency with the regulatory framework in the U.S. These differences may become problematic for Canadian issuers wishing to raise capital in the U.S., as Canadian disclosure would be perceived as insufficient. In addition, this may have caused further issues under the Canada/U.S. Multijurisdictional Disclosure System as the Securities and Exchange Commission "may not regard Canadian continuous disclosure to be a sufficient replacement for equivalent U.S. reporting."[152] A commenter suggested that a more appropriate model to adopt would have been the U.S. Well-Known Seasoned Issuer model, as it would facilitate access to capital while providing greater investor protection and the model would be in line with the U.S. regulatory framework.[153] The commenters worried that the potential inconsistency with the U.S. and other international capital markets would have made it difficult to attract and retain capital.[154]

Taskforce Proposal

Throughout the consultation process, the commenters expressed significant opposition to the recommendation. Despite the criticism, the Taskforce adopted the alternative offering model as Proposal 16 of the Final Report with similar terms and conditions as originally recommended in the Consultation Report, along with two changes.

First, the Taskforce put forward the recommendation that the offerings under the exemption should have the same level of liability as under a prospectus offering. It justified its reasoning by explaining that offerings under this exemption would be considered a primary offering by the issuer. As a result, "investor[s] should have the right to an effective remedy against the issuer if the offering document contains a misrepresentation."[155] This change from the original proposal demonstrated the Taskforce's response to the significant pushback from commenters surrounding the lack of investor protection.

---

[150] *Ibid* at 16.
[151] *Ibid*.
[152] Letter from Investment Industry Association of Canada to Capital Markets Modernization Taskforce (10 September 2020) at 7, online (pdf): <iiac.ca/wp-content/uploads/IIAC-submits-comments-to-the-Ontario-Capital-Markets-Modernization-Taskforce.pdf>.
[153] Letter from Osler, Hoskin & Harcourt LLP to Capital Markets Modernization Taskforce (7 September 2020) at 13, online (pdf): <osler.com/osler/media/Osler/Content/PDFs/Modernization-Taskforce-Osler-Hoskin-Harcourt-LLP-comment-letter-Sept-7-2020-003.pdf>.
[154] Echelon Letter, *supra* note 148 at 3.
[155] Final Report, *supra* note 28 at 38.

Second, the Taskforce provided concrete thresholds to determine the annual maximum for offerings under the exemption. For each annual period, the maximum amount would be set at 10 percent of the reporting issuer's market capitalization.[156] However, for smaller issuers with a market capitalization under $50 million,[157] the maximum limit would be the lesser of $5 million or 100 percent of the issuer's market capitalization.[158]

Comparative Analysis of the CSA Proposal and the Taskforce Proposal

The CSA Proposal and the Taskforce Proposal contain very similar elements, including the same policy rationale and reasoning – to facilitate capital raising at a lower cost for smaller issuers. The CSA Proposal is more developed as it provides more details and conditions in certain areas where the Taskforce Proposal was silent, for example, the restrictions concerning the use of proceeds or the type of disclosure required under the offering document.

There are two notable differences despite the overall similarities between the proposals. First, the CSA Proposal included a maximum dollar amount of $10 million within its thresholds for the annual maximum for offerings allowed under the exemption. However, the Taskforce Proposal did not contain a maximum dollar value associated for issuers with a market capitalization above $50 million – being that the limit should be set at 10% of the reporting issuer's market capitalization for each annual period.

Second, the civil and statutory protections for purchasers differ under each proposal. Under the CSA Proposal, purchasers would have a right of action under secondary market civil liability and a right of rescission against the issuer. On the other hand, the Taskforce Proposal recommended that purchasers should receive the remedies under primary market civil liability – by stating that the offering document should have the same liability as a prospectus in the event of a misrepresentation.

Part II

Despite its derogation from the fundamentals of the closed system and its inconsistency with the traditional rationale for exemptions from the prospectus requirement, in principle we support the CSA moving forward with the Listed Issuer Financing Exemption in order to respond to the financing needs of smaller issuers in a more cost-effective way than the current model allows, which we believe can be done (subject to certain suggested changes) in a way that maintains investor protection.

---

[156] *Ibid* at 37.
[157] All references to dollar figures are in Canadian dollars, unless otherwise specified.
[158] Final Report, *supra* note 28 at 37.

A. Basis for the Exemption from Prospectus Requirements

In Part I, we described how the closed system works and how it came to characterize the distribution of securities in almost every Canadian jurisdiction. We outlined the traditional rationale of prospectus exemptions founded on the idea that certain investors (those to whom exemptions were made available) did not require the protections provided by a prospectus. We also described how, in recent years, new exemptions like the Crowdfunding Exemptions and the offering memorandum exemption, which can be relied upon by any investor to purchase securities, have complicated this idea and have represented a shift in policy.

It is our view that the Listed Issuer Financing Exemption, like the Crowdfunding Exemptions and offering memorandum exemption before it, is inconsistent with the closed system as it deviates from the focus on a class of investors or the protections afforded by certain transactions and instead tries to respond to the needs of a certain class of issuers, while imposing certain protections meant to address risk and investor protection. For example, although most exemptions do not prescribe point of sale disclosure (consistent with the traditional rationale that the investors to whom exemptions are available do not require such protection), both the Crowdfunding Exemptions and offering memorandum exemption do mandate that issuers provide investors with an offering document and the Listed Issuer Financing Exemption proposes to do the same. Further, unlike most other exemptions, both the Crowdfunding Exemptions and the offering memorandum exemption impose limits on how much an issuer can raise or how much investors can invest - and the Listed Issuer Financing Exemption proposes to do the same.

These compromises and the shift away from the bedrock of the closed system that they represent, does not mean, however, that the Listed Issuer Financing Exemption cannot be justified. It is critical to keep in mind that the closed system is not conducive to the raising of capital by smaller issuers. For well over two decades, the CSA, and numerous task forces and stakeholders have been adamant that the closed system simply does not work. The closed system has complexity and expense that weighs disproportionately on smaller issuers. This is particularly significant in the Canadian context, where small issuers comprise the vast majority of the market. For example, it would appear that approximately 11% of reporting issuers in Canada have a market capitalization above $1 billion, while approximately 89% have a market capitalization below $1 billion. For comparison, in the U.S., approximately 51% of issuers on NASDAQ and NYSE have a market capitalization above $1 billion, and approximately 49% have a market cap below $1 billion.[159] If nothing else, this comparison may help show that the continued focus on harmonization with the regulatory regime in the U.S. (with its fundamentally larger market) may be somewhat misguided. It is important to recognize the relative size and scale of the Canadian market as compared to the U.S. market in developing our regulations.[160] To foster fair, efficient and vibrant capital markets and grow

[159] Based on data obtained through S&P Capital IQ for equities traded on the major exchanges in Canada and the US, using screening conditions to exclude ETFs and Closed End Funds, as of September 23, 2021.
[160] CSA Concept Proposal, *supra* note 1 at 651.

our economy, our governments and the CSA are compelled to consider the financing needs of small issuers. This reality creates an inherent tension between the objectives of investor protection and the goals of market efficiency and fostering capital formation, but it is one that cannot be ignored.

We acknowledge, as others have, that the closed system is not amenable to change without a full rethinking of the system as a whole, which further exacerbates this policy tension.[161] To further compound the issue, there does not appear to be a clear alternative to the closed system, as a true "integrated disclosure system" as described in Part I, appears to be unworkable, given that any such system would require immediate disclosure of material facts. Moreover, we do not hold out any hope that the closed system will be re-examined at a macro level any time soon to address the unique features of the Canadian market and ameliorate the tension between investor protection, on one hand, and market efficiency and fostering capital formation, on the other hand.

Therefore, given the above factors, we accept that there may well be reasons why the tenets of the closed system, including the traditional rationale for prospectus exemptions, may have to be compromised in order to increase market efficiency and foster capital formation and having regard to the need to ensure that regulatory costs and restrictions imposed on issuers are "proportionate to the significance of the regulatory objectives sought to be realized".[162] We believe that the financing needs of small issuers constitute such a reason, and it is on this basis that we support the Listed Issuer Financing Exemption.

Nevertheless, as recognized by the CSA, it is particularly important to ensure that investor protection remains a key guiding principle. To achieve that goal, any new exemption must have, as a core principle, the provision of protections that simulate those afforded by the prospectus regime. As discussed below, we believe that, with some modifications, the Listed Issuer Financing Exemption can provide appropriate levels of investor protection, while also facilitating smaller issuers' access to capital.

B. <u>Investor Protection</u>

Hold Periods

Before reviewing some of the key conditions put forward under the CSA Proposal mostly to address investor protection, we address the decision to add the Listed Issuer Financing Exemption to Appendix E of NI 45-102, which would mean securities issued under the proposed exemption would be freely tradeable – and therefore not subject to a hold period. For the reasons that follow, we believe that the decision to not impose a hold period on

---

[161] Small Business Report, *supra* note 1 at 105.
[162] OSA, *supra* note 10, s 2.1.

securities issued in reliance on the proposed exemption would not diminish investor protection.

It would appear that there are at least two commonly provided reasons for mandating a hold period. First, to prevent backdoor underwritings. Second, to ensure dissemination of information about an issuer.

The draft companion policy in the CSA Proposal addresses the backdoor underwriting issue directly by noting that the definition of underwriter may apply to persons that purchase securities under the Listed Issuer Financing Exemption with an intention to immediately resell the securities in the secondary market. The policy notes that if there is not a *bona fide* intention to invest in the issuer, the distribution under the exemption and the subsequent resale may be considered in substance a single distribution.

The CSA Proposal also imposes several conditions, which appear to address the need for issuers to have sufficient disclosure of information. For example, the condition that issuers must have been reporting issuers for a minimum of 12 months and are in compliance with their continuous and timely disclosure obligations. In addition, the issuer will be required to disclose all material facts at the time of the offering, and certify under a "core" document filed on SEDAR that it is subject to statutory liability. We note that 12 months' disclosure in the public markets is more than that required for securities issued under any other exemption to become freely tradeable.

Notwithstanding that the reasons for the imposition of hold periods have been addressed under the CSA Proposal, we expect that there will be significant unease with this reasoning. In effect, issuers will be allowed to engage in broad distributions without the required involvement of dealers or regulators, which may raise concerns with respect to systemic risk, particularly where investors may be unsophisticated and are not existing shareholders of the issuer. We also note that the rationale for why a hold period is not required could be extended to other types of financings.

Objections to Proposal 7 of the Consultation Report

In reviewing whether the Listed Issuer Financing Exemption adequately addresses investor protection, we first review the objections made in the comment letters to Proposal 7 of the Consultation Report, which is substantially similar to the Listed Issuer Financing Exemption.

<u>Investors would not benefit from the same statutory and civil protections associated with a prospectus</u>. This argument focuses on the fact that the proposed exemption would allow for the issuance of freely tradeable shares without being subject to the prospectus regime. We note, however, that other prospectus exemptions are subject to Appendix E of NI 45-102, which in effect results in shares issued thereunder being freely tradeable. We expect that the real concern is whether the proposed exemption provides sufficient protection to investors.

Under the proposed exemption, investors who are unable to assess the risk of their investments would be more vulnerable as they would not have access to the associated process and protections of a prospectus offering. Certain commenters believed this was particularly concerning because the most likely purchasers under this exemption would be unsophisticated retail investors. However, numerous restrictions and limitations are built into the CSA Proposal. We discuss below certain suggested changes to these restrictions, and limitations to address the investor protection concerns.

It is also important to note that retail investors participate in the much larger secondary market and, under the proposed exemption, they would have the benefit of having the issuer certify that there are no undisclosed material facts. In effect, investors would have available to them a truly integrated disclosure system, where an issuer is certifying that its disclosure record is substantially similar to prospectus level disclosure. We also note that the associated process and protections provided by a prospectus offering appear increasingly less relevant as more companies become reporting issuers through capital pool companies, special purpose acquisition companies and reverse takeovers than through initial public offerings.[163]

Statutory liability would also apply for misrepresentations; however, we do believe that more should be done regarding this condition. See our response to question 8 in Part III.

The Listed Issuer Financing Exemption – where securities are issued without a prospectus – would decrease accountability, integrity and trust in the marketplace, which would lead to the loss of confidence in our capital markets. It is argued that the proposed exemption could lead to a decrease in the use of prospectus offerings and a reduced role for registered investment dealers and securities regulators, which would inevitably lead to the loss of confidence in our capital markets. We believe that for small issuers, the use of prospectuses is already on the decline. Also, we expect that dealers could still play a role in financings under the proposed exemption. No one can deny that the use of a prospectus generally provides better disclosure and can better detect fraud and abuses, even if it is true that few investors actually read a prospectus before making an investment.[164] This argument, however, fails to address the key concerns that are the genesis of the proposed exemption, namely, the fact that the closed system is likely having a significant negative impact on capital formation for small issuers.

It has also been correctly suggested, as noted above, that the limits on dollar amounts proposed under the exemption cannot address the fact that "a market's reputation is not proportionately impacted by fraud on a dollar-for-dollar basis." Having multiple incidents of fraud, despite the dollar value, would have a detrimental impact on the reputation, reliability and confidence in our capital markets. Nevertheless, no evidence is put forward to show that

---

[163] Of 518 new listings (excluding ETFs & Closed-End Funds) on the TSX, TSXV, CSE, and NEO from January 2020-July 2021, our calculations show that approximately 47% involved the filing of a prospectus, while approximately 53% of new listings over this period did not.
[164] CMA Proposal, *supra* note 1 at 10.

incidences of fraud would increase as a result of the proposed exemption, especially if certain conditions are strengthened as we propose below.

The truth is that statements made regarding loss of confidence in our capital markets are not entirely persuasive and hard to disprove. Nevertheless, we would suggest that the CSA consider whether the proposed exemption should be reviewed within 12 or 18 months.

The proposed exemption would create further inconsistency with the regulatory framework in the U.S. It was suggested that these differences may become problematic for Canadian issuers wishing to raise capital in the U.S. as Canadian disclosure would be perceived as insufficient. We would note that the Listed Issuer Financing Exemption would be optional. Also, as noted above, there are significant differences between the U.S. and the Canadian markets and we need to consider that carefully if we are to continue to improve market efficiency and foster capital formation.

Are the Conditions to the Listed Issuer Financing Exemption Sufficient?

In reviewing the conditions to the Listed Issuer Financing Exemption we start with the proposition, as previously articulated, that the proposed exemption is a fundamental aberration from the closed system, but from a policy and economic basis may be very important. The fact that the closed system has been subject to criticism for over 25 years and has been undermined for a similar period of time may suggest that in this case the policy and economic issues are more important; however, nothing should be more important than investor protection if the CSA is to remain focused on systemic risk.

The following conditions, already imposed in the proposed exemption, appear to go a long way to addressing investor protection and creating a framework similar to a prospectus regime:

- *The issuer is and has been a reporting issuer in at least one jurisdiction of Canada for the past 12 months*: The imposition of an indirect 12 month seasoning period could be viewed as excessive in light of the fact that the seasoning period under NI 45-102 is 4 months; however, in the circumstances we believe this may be appropriate to ensure that a reporting issuer using this exemption has a full year of disclosure which would include audited financial statements and a management information circular. This may be increasingly important as we expect more companies to become reporting issuers outside of the prospectus process.
- *Certification of disclosure record for period covering the earlier of 12 months before the date of the offering and the date that the issuer's most recent audited annual financial statements were filed*: This condition provides investors with the assurance that all material facts have been disclosed and it addresses one of the goals of a true integrated disclosure system.

- *Imposition of statutory liability*: Statutory liability serves as a deterrent and also as a means to compensate investors if there are misrepresentations.
- *Address the risk of backdoor underwriting*: We believe the comments in the draft companion policy regarding the intention to apply the underwriter definition to prevent backdoor underwritings by someone claiming to purchase with investment intent are particularly helpful.
- *Listed on a stock exchange*: This requirement ensures oversight over the issuance of listed shares and additional regulation.
- *Restriction on use of proceeds*: The restriction ensures that the offering document is straightforward and that additional complications brought about by complex transactions or a change of business would not be part of the financing.

Nevertheless, we believe that certain changes would better balance the tension between fostering fair, efficient, and vibrant capital markets and investor protection, without diminishing the benefits to be derived from the Listed Issuer Financing Exemption, including:

- *Limit the proposed exemption to small issuers*: It is acknowledged by the CSA that the Listed Issuer Financing Exemption will be of most benefit to small issuers. It is not clear why it should be available to large capitalization issuers, especially since it may be viewed as undermining the closed system. This would further limit the risk of the proposed exemption.
- *Impose prospectus liability*: Please see our response to question 8 in Part III.
- *Limit the proposed exemption to listed equity securities or a unit consisting of a listed equity security and a warrant to acquire such listed equity security*: Please see our response to question 4 in Part III.
- *Remove need for 12 months of liquidity*: It appears entirely counterintuitive to provide the proposed exemption to small issuers to improve liquidity and then prescribe that the proposed exemption cannot be used unless the financing will be sufficient to meet liquidity for 12 months. We would strongly encourage that this condition be dropped and instead require bold face disclosure of current and post-liquidity position, assuming the financing closes. See for example, the disclosure required in respect of the rights offering prospectus exemption in Form 45-106F14 and Form 45-106F15. We would suggest that the concerns that this condition seeks to address could easily be satisfied with appropriate mandated disclosure.
- *Remove need for report of exempt distribution*: Please see our response to question 2 in Part III.

C. Summary

In summary, we support the CSA moving forward with the Listed Issuer Financing Exemption, subject to the recommended changes set out directly above.

Although the proposed exemption is not consistent with the traditional rationale of the closed system, that does not mean it cannot be justified. Other exemptions, including the Crowdfunding Exemptions and offering memorandum exemption, which can be relied upon by any investor and prescribe point-of-sale disclosure, are also not consistent with the tenets of the closed system and yet were introduced in recent years as responses to the capital raising needs of issuers. For decades, the closed system has been criticized as being too costly, especially for small issuers. In a market like ours, which is largely comprised of small issuers, it is imperative that the financing needs of small issuers are addressed if the CSA is to foster fair, efficient and vibrant capital markets. The Listed Issuer Financing Exemption is a real response to the needs of smaller issuers, after years of proposals that have not gotten us any closer to a workable alternative to the closed system. If the concern of some is that the Listed Issuer Financing Exemption does not contain adequate protection for investors, we believe that with our suggested modifications, and potentially other reasonable modifications, these concerns will be alleviated. We are also not opposed to a review of the proposed exemption after 12 to 18 months to ensure that the goals and objectives of the Listed Issuer Financing Exemption are being met.

Ultimately, we believe that the CSA should examine holistically the costs and benefits of changing the closed system with a view to developing a new regime which better meets the needs of the Canadian capital markets. The current piecemeal approach whereby new exemptions are constantly proposed by regulators is intellectually lazy and risks creating confusion and market inefficiency. Regulators need to review the regulatory system as a whole to determine what systemic changes are most effective. The better approach may be a modified integrated disclosure system combined with a more robust CDR Program. The Listed Issuer Financing Exemption could actually serve as a basis for such a model. In any event, we recognize that a rethinking of the closed system would be a monumental task and, although we have significant doubts as to whether this will ever be undertaken, we would be pleased to assist with any such effort.

Part III

Response to CSA Request for Comments:

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

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

We believe these thresholds are reasonable in the circumstances, but we would suggest that the CSA revisit these thresholds within the next 12-18 months and assess whether they are appropriate in light of the objectives of the proposed exemption. In addition, the CSA may wish to consider limiting the use of the proposed exemption to small-cap issuers, which could be achieved by allowing only venture issuers or issuers of a certain size (from a balance sheet perspective, or a certain market capitalization measured over an appropriate period of time) to use the proposed exemption.

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

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

It seems unclear why the exempt trade report in Form 45-106F1 ("**Exempt Trade Report**") is being contemplated. Much of the information that is collected under the Exempt Trade Report appears not to be particularly relevant with respect to the Listed Issuer Financing Exemption. For example:

- as companies that will seek to rely on the proposed exemption will be a reporting issuer in at least one jurisdiction of Canada, certain issuer information in the Exempt Trade Report will not be relevant - particularly, Items 5 d) to h) and the director and officer information in Item 9;
- as an offering document is required to be completed, certified and filed on SEDAR, much of the information in Item 7 appears unnecessary; and
- the notice regarding the collection of personal information is not relevant as no purchaser information will be required to be collected for reporting purposes.

As securities regulators continue to focus on burden reduction, we believe that to the extent information needs to be gathered, this can be done in a different and more efficient manner.

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

Yes. If the purpose of a report[165] would be "to obtain structured data on the offering including type and amount of securities issued",[166] we believe this could be achieved in a simpler and more cost effective manner, as outlined below.

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

Given the goals of reducing regulatory burden and having efficient reporting systems, we suggest that to the extent that information in addition to that set out in the offering document is required that the following alternatives be considered:

- our first preference is that additional information be required to be inserted into a reporting issuer's annual MD&A;
- our second preference is that the CSA require a press release to be issued on the closing or abandonment of a financing under the proposed exemption with mandated disclosure; and
- finally, a simplified report could be required that contains limited information as set out in question 2(d) below.

d. If alternative reporting is provided, what information should issuers be required to disclose, in addition to the following:

- **the number and type of securities distributed,**
- **the price at which securities are distributed,**
- **the date of the distribution, and**
- **the details of any compensation paid by the issuer in connection with the distribution and the identity of the compensated party?**

We believe the information noted above should be sufficient.

---

[165] The purpose of the original Form 20 (predecessor to Form 45-501F1 which is the predecessor to the existing Exempt Trade Report) has been described as being used primarily to allow regulators to monitor compliance on a distribution by distribution basis with statutory "hold periods". McCarthy Tétrault LLP, "One Form, More Information: Significant Changes to Canadian Report of Exempt Distribution Coming in June" (24 April 2016), online: <mccarthy.ca/en/insights/articles/one-form-more-information-significant-changes-canadian-report-exempt-distribution-coming-june>.

[166] *CSA Notice and Request for Comment – Proposed Amendments to National Instrument 45-106 Prospectus Exemptions to introduce the Listed Issuer Financing Exemption*, CSA Notice, (2021) 44 OSCB 6625.

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

Irrespective of how the reporting is required, it should be as minimal as reasonably possible. Other than the offering document disclosure, we would propose either (i) if disclosure is to be set out in the MD&A, disclosure be made in the annual MD&A, or (ii) if disclosure is to be set out in a press release, within one business day of the closing or abandonment of a financing with specified mandated disclosure, or (iii) if disclosure is to be set out in a simplified report, within 45 days of the end of each calendar year.

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

We would strongly encourage the CSA not to impose additional fees or to impose relatively nominal fees if it determines to require a formal report for the Listed Issuer Financing Exemption.

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

We believe that convertible debt should be excluded from the Listed Issuer Financing Exemption because it may run contrary to the goal and rationale of limiting the exemption to securities that most investors would be familiar with and which are easier for investors to understand. Convertible debt instruments can and do often contain features that may not be easily understood by an average investor (such as make whole payments), or other unusual terms which are not frequently seen. Additionally, the disclosure typically required in connection with a convertible debt offering, such as comprehensive risk factors, may not be adequately covered by the short offering document proposed under the Listed Issuer Financing Exemption or by an issuer's disclosure record, especially if it has not filed an annual information form. To expand the "brief document" to cover such disclosure would be inconsistent with the goal of keeping it simple and easy to understand.

5. We designed the Listed Issuer Financing Exemption contemplating that it would be used, from time to time, for discrete private placements, with a single closing date. Do you expect issuers would want to use the exemption to

provide continuous, non-fixed price offerings as well? If so, what changes would be necessary to permit continuous distributions under the exemption? Do you see any concerns with permitting continuous distributions?

We are not certain that many issuers would wish to use the proposed exemption for continuous non-fixed price offerings. The new concise form of offering document with no regulatory review proposed under the Listed Issuer Financing Exemption already offers similar prompt-market-access advantages as shelf prospectus offerings. Issuers may find the benefit of a Listed Issuer Financing Exemption for continuous, non-fixed offerings to be limited especially with a limited validity period. The proposed maximum dollar amount of $10 million that an issuer can raise during a 12-month period may also not be significant enough to justify the costs associated with preparing supplemental disclosures.

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

We believe that the existing prospectus exemptions do not contribute to the complexity of the exempt market regime. Rather, the introduction of new exemptions – such as the Listed Issuer Financing Exemption – in a piecemeal manner creates a greater degree of confusion. For this reason, we do not believe that the repeal of the existing prospectus exemptions is an effective method of streamlining the exempt market regime if regulators continue to implement new exemptions.

To simplify the exempt market regime, we recommend that the CSA and other regulatory bodies work together to examine "the issue holistically, carefully weighing the costs and benefits of changing the current model."[167] Regulators should review the regulatory system as a whole to determine what systemic changes are most effective to streamline the exempt market regime. In doing so, it would be effective to conduct a thorough study to consider the implications of the current exemptions, the capital raising process and the existence of the closed system. This includes examining the policy rationales behind the closed system and prospectus exemptions to decide whether their removal or change is justifiable. A broader and more holistic examination of the regulatory system would allow regulators to streamline the exempt market regime effectively. This would require a shift away from the current piecemeal approach of the constant introduction of new exemptions by regulators.

---

[167] Letter from TMX Group to Capital Markets Modernization Taskforce (7 September 2020) at 10.

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

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

We expect that while many issuers may not need the assistance of dealers in raising funds, others may involve dealers in their offerings under the Listed Issuer Financing Exemption in order to gain access to investors. In particular, smaller issuers without a wide following may benefit from the involvement of smaller dealers who would be able to assist in locating investors.

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

We expect issuers to conduct offerings through their websites, specialized offering portals and dealers. It is possible that a "ticketing" type sales document may develop in coordination with transfer agents or dealers, but we expect that for the immediate future the proposed exemption will resemble a private placement subscription process using an agreement.

One point of clarification that may require additional guidance is whether there can be a situation where an issuer that makes multiple small distributions over a period of time without the involvement of a dealer (for example, an issuer that conducts ten $0.5 million offerings in 12 months) could be considered to be in the business of trading in securities, and as a consequence be required to register as a dealer. We believe it would be helpful to provide additional guidance to issuers on any maximum thresholds in this regard.

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

As discussed below, we do not agree that secondary market liability, based on the issuer's continuous disclosure record (and the offering document), with its more limited damages, strikes the appropriate balance between investor protection, public confidence in the market and assisting smaller issuers in raising capital.

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

We interpret "prospectus level liability" to refer to: (a) an issuer's certification that its offering documents make "full, true and plain" disclosure of all material facts; and (b) the statutory remedies available to purchasers in the primary market.

In reviewing the liability regime, we start with the proposition that statutory liability does not usually attach to securities issued pursuant to a prospectus exemption under NI 45-106 or other exempted trades. The exceptions are for: (i) rights offerings;[168] (ii) the existing security holder exemption;[169] (iii) control person sales under section 2.8 of NI 45-102;[170] (iv) certain exempt takeover bids and issuer bids;[171] and (v) sales by way of an offering memorandum.[172] Items (i) to (iv) have secondary market liability either because the sales are to existing shareholders or the distribution is in circumstances where a person on the other side of the trade usually does not know that the purchaser or seller is purchasing or selling under a prospectus exemption.[173] Where an investor purchases securities under the offering memorandum exemption, NI 45-106 specifically provides that the offering memorandum must provide for contractual remedies of rescission or damages for misrepresentation, unless similar provisions are provided under applicable provincial securities legislation, thereby creating a liability regime similar to prospectus liability.[174] Similar provisions, such as section 130.1 of the OSA create a liability regime similar to prospectus liability whenever an offering memorandum is used in connection with a distribution.[175]

Investors in the primary market and those purchasing securities in the secondary market have different statutory claims and remedies and there is no compelling reason why purchasers under the Listed Issuer Financing Exemption should be treated differently than

---

[168] NI 45-106, *supra* note 8, ss 2.1(3), 2.1.4.
[169] See for example, *CSA Multilateral Notice 45-313 – Prospectus Exemption for Distributions to Existing Security Holders,* CSA Notice, (13 March 2014) (in jurisdictions other than Ontario and Newfoundland and Labrador) and *Ontario Prospectus and Registration Exemptions,* OSC Rule 45-501 (as consolidated 30 June 2016), s 2.9(6), online (pdf): *Ontario Securities Commission* <osc.ca/sites/default/files/2020-09/rule_20160630_45-501_unofficial-consolidation.pdf> [Ontario Exemptions].
[170] NI 45-102, *supra* note 7, s 2.8.
[171] NI 45-106, *supra* note 8, s 2.15-2.16; NI 45-102, *supra* note 7, s 2.11.
[172] NI 45-106, *supra* note 8, s 2.9.
[173] Issuers relying on the existing security holder exemption must nevertheless give a "no misrepresentation certification" in the subscription agreement. See Ontario Exemptions, *supra* note 169, s 2.9(3).
[174] NI 45-106, *supra* note 8, ss 2.9(7), 2.9(8), 2.9(13), 2.9(16). See also OSA, *supra* note 10, s 130.1. We note as well that similar contractual remedies must be provided to purchasers under an ATM distribution under the shelf prospectus rules in NI 44-102, *even though these purchasers will not receive a copy of the ATM prospectus* and may not even know whether their securities are purchased under the ATM distribution or on the secondary market.
[175] OSA, *supra* note 10, s 130.1.

other purchasers in the primary market. The focus of the Listed Issuer Financing Exemption on assisting issuers with raising capital must be balanced against those issuers' duties to investors. Otherwise, the Listed Issuer Financing Exemption potentially undermines decades of deliberate policy choices in the creation of remedies for investors who purchase securities from issuers and those who purchase on the secondary market and larger concerns with balancing efficiency for issuers against systemic risk.

Existing statutory remedies available to investors for misrepresentation are not simply interchangeable claims for negligent misrepresentation at common law. Rather, the statutory remedies have different foundations in common law and serve different policy objectives. To simply rationalize limiting the remedies for purchasers of securities under the Listed Issuer Financing Exemption to those available to purchasers on the secondary market, because these purchasers are left to rely primarily on the issuer's continuous disclosure record, is problematic. At the least, it must be acknowledged that under the Listed Issuer Financing Exemption investors will be treated differently from nearly all other investors in the primary market who do purchase securities from an issuer of which they are not already a shareholder.

The two statutory remedies have different common law foundations:

- Primary market civil liability:
    - the remedies available to investors in the primary market are based on causes of action for contractual misrepresentation, whether fraudulent or innocent. The remedies for a party who enters into a contract on a misrepresentation include a right to rescind the purchase or damages limited to the purchase price of the securities;
    - liability and compensation are based on the theory that, had the investor known the true state of all material facts about the issuer, the investor would not have purchased the securities. Given the misrepresentation, the investor is entitled to rescission and where rescission is no longer available, damages are available as an alternative remedy; and
    - under either remedy, the issuer is required to return the benefit that it improperly gained through its misrepresentation of material facts – up to the whole of the proceeds of the offering.

- Secondary market civil liability:
    - the remedies for purchasers in the secondary market are based on negligent misrepresentation. The harm to the secondary market purchaser is caused when the misrepresentation is disclosed through public correction and the market's response (which is usually a downward price correction). Damages are calculated based on the difference between the price paid and the trading value of the shares once the misrepresentation is corrected;[176]

[176] See for example, OSA, *supra* note 10, s 138.5.

- the issuer does not directly benefit financially from the misrepresentation of material facts or failing to disclose a material change. Therefore, there is no contract to rescind or proceeds to return;
- the issuer and others who are defendants under the statutory secondary market remedies, however, owe duties to ensure that public disclosure is not misleading in relation to material facts and that all material changes are disclosed;
- the key objective of the statutory cause of action is deterrence and not compensation.[177] Accordingly, investor remedies are potentially (and likely) under-compensatory, because issuer liability is capped (as is the liability for others responsible for the issuer's continuous disclosure record, except in cases where the defendant knew of the misrepresentation)[178] and liability of all defendants is proportionate and not joint and several (except where two or more defendants, other than the issuer, authorized, permitted, or acquiesced in the making of a misrepresentation, in which case such defendants will be jointly and severally liable to a plaintiff);[179] and
- investors do not have standing to bring claims for damages as of right, but must seek leave of the court, which stands as a gatekeeper, to commence the proceeding.[180]

Convenience to issuers, therefore, is not a rational policy reason to deprive investors, who purchase securities under the Listed Issuer Financing Exemption, of access to rescission rights or compensatory damages for the issuer's misrepresentation.

What is the appropriate disclosure standard? In our view, *full* and *true* disclosure of material facts is functionally equivalent to a "no misrepresentation" standard in the civil remedies for secondary market purchasers. This is because "misrepresentation" is defined in relation to "material facts" and consists of either making "an untrue statement of material fact" or "an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it is made".[181] However, the issuer's obligation to ensure that it has made *plain* disclosure of all material facts requires the issuer to present the material facts in an understandable manner, not buried or scattered throughout the disclosure, requiring the investor to piece together the significance of what has been disclosed.

[177] Committee on Corporate Disclosure, Allen Committee, *Final Report — Responsible Corporate Disclosure: A Search for Balance* (Toronto Stock Exchange, 1997) [Allen Committee]; *CSA Notice 53-302 – Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definition of "Material Fact" and "Material Change"*, CSA Notice, (2000) 20 OSCB 7383 at 7385–86.
[178] See for example, OSA, *supra* note 10, s 138.7.
[179] See for example, OSA, *supra* note 10, s 138.6.
[180] See for example, OSA, *supra* note 10, s 138.8.
[181] OSA, *supra* note 10, s 1(1).

We suspect that one of the primary reasons for not imposing prospectus liability under the proposed exemption is the concern that the imposition of "full, true and plain" disclosure would compel issuers to retain underwriters or other third parties to assist with due diligence and provide the directors of the issuer with sufficient comfort, which additional cost is the very thing the proposed exemption is seeking to avoid. Based on comments made with respect to the CSA IDS, we expect that this would be especially challenging if such certification extended to an issuer's disclosure record for the preceding 12 months.[182] Although, we believe the proposed exemption would meet its goals and objectives if "full, true and plain" certification was required – even if expanded to the continuous disclosure record of issuers using the proposed exemption – on balance we believe that a "no misrepresentation" certification is adequate and strikes an appropriate balance. The difference between the two standards is not enough to justify the risk that the imposition of a "full, true and plain" certification may significantly diminish use of the proposed exemption, particularly if primary market statutory lability is imposed on a "no misrepresentation" standard.

What is the proper basis for recovery of damages? If the "no misrepresentation" standard is not met, purchasers should be entitled to a choice of remedies that includes a right of rescission or fully compensatory damages against the issuer and its directors and to do so without first seeking leave of the court. We see no reason why purchasers under the Listed Issuer Financing Exemption should not have the same rights to elect rescission and obtain the return of the purchase price for the securities purchased as other investors who purchase securities directly from an issuer. We note purchasers under the offering memorandum exemption as well as those who, by happenstance, purchase securities under an at-the-market ("**ATM**") distribution have alternative contractual rights to rescission or damages.[183] There is no reason why similar remedies should not be extended to investors who purchase under the Listed Issuer Financing Exemption (especially since these investors will receive an offering document, whereas, for example, purchasers under an ATM distribution will not).

The Listed Issuer Financing Exemption is from our perspective one of the most sweeping prospectus exemptions ever proposed, particularly since its policy rationale is not founded strictly on the principles underlying the closed system. Without prospectus level liability, purchasers under a Listed Issuer Financing Exemption would be placed at a unique disadvantage and will be undercompensated in damages. In balancing market efficiency and fostering capital formation against investor protection, we believe that recovery of damages under prospectus liability is a minimum requirement. Accordingly, we would suggest that "prospectus liability" similar to that in respect of offering memoranda under section 130.1 of the OSA be provided to investors under the proposed exemption, with modifications to ensure that investors purchasing securities would also have recourse for damages when there is a

[182] See Part I-C, *above*, for the discussion on the 2000 CSA Concept Proposal for an Integrated Disclosure System.
[183] NI 45-102, *supra* note 7, s 9.3(h).

misrepresentation against (i) the directors of the issuer, (ii) promoters of the issuer, (iii) influential persons, (iv) experts and (v) every person who signs the offering document.[184]

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

While we do not believe that imposing prospectus-level liability and providing purchasers with rescission rights and compensatory damages will impact the objectives of the Listed Issuer Financing Exemption, we share the concern expressed by other industry participants that "full, true and plain" certification may lead issuers to spend significant funds to follow a process similar to that used for a short form prospectus. We believe that such an expense would not provide additional protection to investors, at least not enough to justify any negative impact on the use of the proposed exemption.

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

Not necessarily. We believe that the primary onus for ensuring adequate disclosure rests with the issuer and its directors and officers.

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

We expect that the requirement to enter into subscription agreements may be cumbersome, and ultimately, would be unnecessary. Statutorily imposed liability would eliminate the need to require issuers to provide a contractual right of rescission in an agreement to purchase the security.

<u>Response to Annex E Request for Comments:</u>

1. If the CSA were to adopt a semi-annual reporting regime should we consider excluding issuers who report semi-annually from using the Exemption?

If the CSA were to adopt an optional semi-annual reporting regime, issuers that choose to report on a semi-annual basis should not be allowed to use the Listed Issuer Financing Exemption. This view aligns with the Taskforce's recommendation in the Final Report.[185]

---

[184] Similar to the changes suggested to section 130.1 of the OSA in the recently proposed *Capital Markets Act*. See Ministry of Finance, *Capital Markets Act - Consultation Draft* (2021), online: *Ontario's Regulatory Registry* <www.ontariocanada.com/registry/showAttachment.do?postingId=38527&attachmentId=51026>.
[185] Final Report, *supra* note 28 at 35.

As described in Part I, Section D of this comment letter, the Taskforce proposed and ultimately recommended the introduction of an alternative offering model to enable reporting issuers to issue freely tradeable securities under an exemption similar to the Listed Issuer Financing Exemption.

The Taskforce also proposed introducing an optional semi-annual reporting regime.[186] In Proposal 6 of the Consultation Report, the Taskforce noted that the significant costs associated with quarterly reporting requirements can be a significant burden, in particular for smaller issuers.[187] The Taskforce suggested that an option for semi-annual reporting could be appropriate for such issuers, as they may not experience significant changes to their operations that would be reflected in their financial statements over three-month intervals.[188]

Only one commenter answered the Taskforce's question on whether to exclude those issuers who choose to report on a semi-annual basis from using the proposed alternative offering model exemption.[189] This commenter noted that the target of both the semi-annual reporting proposal and the alternative offering model proposal was the same, smaller issuers. Thus, it was their view that to ask smaller issuers to choose between whether to report on a semi-annual basis or whether to use the alternative offering model was counterproductive. Instead, it was suggested that if an issuer reporting on a semi-annual basis had not filed financial statements in more than a quarter, then such issuer should be required to supplement their financial disclosure at the time of proposed use if they want to rely on the alternative offering model exemption.

In its Final Report, the Taskforce recommended allowing certain reporting issuers to voluntarily report on a semi-annual basis if the issuer:

- had developed a continuous disclosure record of at least 12 months after filing and obtaining a receipt for a final prospectus or filing a filing statement in the case of a reverse takeover or capital pool company;
- had an annual revenue of less than $10 million, as shown on the audited annual financial statements most recently filed by the reporting issuer; and
- was not currently, and had not recently been, in default of its continuous disclosure obligations.[190]

However, in making this recommendation, the Taskforce said that issuers that adopt semi-annual filing would not be eligible to take advantage of the Taskforce Proposal.[191]

---

186 *Ibid* at 35–36.
187 Consultation Report, *supra* note 1 at 11.
188 *Ibid*.
189 PDAC Letter, *supra* note 141 at 7.
190 Final Report, *supra* note 28 at 35.
191 *Ibid.*

We support this recommendation with respect to the Listed Issuer Financing Exemption as well, given the similarities between it and the Taskforce Proposal. The Listed Issuer Financing Exemption relies heavily on the continuous disclosure record of issuers. Semi-annual reporting inherently cuts in half the amount of disclosure available about an issuer, as compared to an issuer reporting on a quarterly basis. In turn, the persuasiveness of the argument for relying on an issuer's continuous disclosure record is greatly diminished.

If you wish to discuss any aspect of this letter, we would encourage you to contact any one of the following lawyers who would be pleased to speak to you at your convenience:

Charlotte Conlin (charlotte.conlin@mcmillan.ca; 416-865-7239)

Paul Davis (paul.davis@mcmillan.ca; 416-307-4137)

Troy Hilson (troy.hilson@mcmillan.ca; 416-945-8021)

Michelle Ho (michelle.ho@mcmillan.ca; 416-866-7117)

Leila Rafi (leila.rafi@mcmillan.ca; 416-945-8017)

Ouvedi Rama Naiken (ouvedi.ramanaiken@mcmillan.ca; 416-865-7042)

Sandra Zhao (sandra.zhao@mcmillan.ca; 416-865-7808)

PHILIP ANISMAN
Barrister and Solicitor
181 University Avenue, Suite 800
Toronto, Ontario M5H 2X7
Telephone: (416) 363-4200
Telecopier: (416) 363-6200

October 26, 2021

BY EMAIL

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

Attention:

Larissa Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Fax: 604-899-6581
lstreu@bcsc.bc.ca

and

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2460, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: 514-864-8381
Consultation-en-cours@lautorite.qu.ca

Re: Comments on Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* ("NI 45-106") to introduce the Listed Issuer Financing Exemption (the "Proposed Rule")

I am submitting these brief comments on the proposal to amend NI 45-106 to add the listed issuer financing exemption described in the CSA Notice and Request for Comments dated July 28, 2021 (the "CSA Notice"). I write on my own behalf because I believe the proposed new exemption is inconsistent with the protection of investors intended by Canadian securities laws when issuers seek funds from the public and should be withdrawn.

The Proposed Rule

The Proposed Rule would create an exemption from the prospectus requirements that would permit an issuer which has been a reporting issuer for twelve months and has equity securities listed on a Canadian stock exchange to make a public offering of securities of the listed class, or of securities convertible into listed securities, to raise up to $5 million or ten per cent of the aggregate market value of its listed securities to a maximum of $10 million, subject to a dilution limit of 100 per cent, within any twelve month period. Instead of a prospectus, the issuer would have to file, but not deliver to investors who purchase its shares, a short offering document ("financing document") disclosing how it intends to use the funds it raises and any other material facts not previously disclosed in its continuous disclosure filings. If the financing document or the issuer's current continuous disclosure documents contain a misrepresentation, purchasers will be entitled to rescind the purchase agreement and receive back their money or to bring an action for damages under the statutory secondary market civil liability regime. They would also be entitled to sell the purchased shares without the hold period required for securities purchased in other prospectus-exempt capital raising distributions of securities. The issuer would not be required to sell the securities through an underwriter and it would have to file a report of the exempt distribution, but without the list of purchasers required for other exempt distributions.

Market Integrity

The Proposed Rule would create an exemption allowing a public offering of securities without either a prospectus or a hold period. Since 1978,[1] the distribution of securities by issuers under Canadian securities laws has been premised on the closed system proposed by the Ontario Securities Commission ("OSC") in 1970,[2] which, in general terms, requires either a prospectus or a hold period when an issuer raises capital by selling its securities. Securities regulators have over the years considered developing an integrated disclosure system to replace this closed system based on the continuous disclosure required of reporting issuers. However, except for a cursory reference to alternative frameworks proposed for discussion in 2000 and 2002, which were withdrawn, the CSA Notice contains no discussion of the implications of the proposed exemption for the closed system, the regulatory disclosure system in current securities laws, or even whether revision of this system is again under consideration. Before a change like the one proposed is adopted, a full public discussion of the current system and the revisions to it that are implied by the Proposed Rule should be pursued through the notice and comment process.

The purpose of the Proposed Rule is to benefit small issuers by enabling them to raise significant amounts through a public offering, with some limitations on the amount and purpose of an offering. Specified maximum amounts are intended to enable a small issuer to obtain

---

[1] See *Securities Act*, 1978, S.O. 1978, c. 47.
[2] *Report of the Ontario Securities Commission on the Problems of Disclosure Raised for Investors by Business Combinations and Private Placements* (February 1970) (the "Merger Study").

sufficient funds for operations over the succeeding year. Securities sold under the exemption would be freely tradeable because the hold period may deter participation by investors, as it has been said to do in private placements. The hold period, however, was never intended to protect these initial purchasers. Rather, it was intended to protect public investors against an indirect public distribution, a so-called "two-step" distribution or "backdoor" underwriting, in which subsequent purchasers would receive neither prospectus level disclosure nor the withdrawal rights and civil remedies available to them in a prospectus offering.

The proposed amendments to Companion Policy CP 45-106 address the potential for backdoor underwritings by stating that resales in a two-step distribution would be integrated with the distribution and the initial purchaser would be required to register as an underwriter because the initial purchase was made with a view to distribution. This would resurrect the concept of investment intent for purposes of distributions of securities. The concept of investment intent, however, is unclear in application; every purchaser buys with a view to the possibility of reselling the purchased security at some point and intentions concerning timing may change. The closed system was adopted, in part, to do away with uncertainties concerning the application of the investment intent concept to private placements and the opportunities for indirect public distributions.[3] As the proposed additions to CP 45-106 recognize, the Proposed Rule would again provide an avenue for such backdoor underwritings, subject to the regulatory difficulties that existed in 1970.

Because the Proposed Rule would create such opportunities, monitoring by securities regulators of offerings made under the new exemption would be required to ensure against indirect distributions and other potential abuses. For example, the proposed exemption does not specify the nature or number of investors who may purchase securities. An issuer may sell shares to any investor without regard to the investor's knowledge or sophistication; purchasers may include a large number of retail investors or a small group of knowledgeable purchasers. Although the issuer must file a report of the distribution with securities regulators, the list of purchasers required for other exempt offerings need not be included because there are no eligibility requirements for purchasing investors. The reporting form does not otherwise require disclosure of the number of purchasers. Providing a list of purchasers would not impose an onerous obligation on issuers, as a purchase agreement granting a contractual right of rescission to each purchaser is required by the Proposed Rule. Requiring filing of a list of purchasers would facilitate monitoring of the use of this proposed exemption to detect and address abuses.

The CSA Notice, however, contains no information concerning securities regulators' intentions with respect to monitoring its use. If the Proposed Rule is adopted, a monitoring programme should accompany it. Public knowledge that offerings under the exemption will be closely reviewed by CSA members might itself help to deter abuses.

Investor Protection

The proposed exemption omits most of the investor protection provided under a prospectus and in existing prospectus exemptions. Similar capital raising exemptions are limited to persons who can fend for themselves (accredited investors) or have a close personal or business relationship with a director, executive officer or control person of the issuer that is

---

[3] See Merger Study, c. 5.

expected to protect them against abuse. Other exempt private sales are conditioned on the nature of the purchaser, impose minimum or maximum limits on the amount unsophisticated investors may invest and require delivery of an offering memorandum to each purchaser and a risk acknowledgment form to be signed by the purchaser. In addition, some preclude advertising and solicitation.

The proposed exemption would have no similar protections. It would permit sales of securities to anyone, in any amount up to the $5 million or $10 million maximum. The CSA Notice characterizes the ability of unsophisticated retail investors to participate in these exempt distributions as a benefit to them. As the intended beneficiaries of the Proposed Rule are small issuers in need of capital to enable them to continue to carry on their business, the proposed exemption would permit such retail investors to invest in issuers at the riskier end of the issuer spectrum, but without the protections that accompany existing exemptions or a prospectus distribution. For example, they need not be specifically informed of the risks associated with these investments, as the risk acknowledgment under the offering memorandum and crowdfunding exemptions requires. Nor would the Proposed Rule require delivery of the financing document to investors, as must occur under the offering memorandum exemption and with a prospectus. While the financing document must be filed and available electronically, retail investors are not likely to access or read it. Nor is it reasonable to expect unsophisticated retail investors to read the issuer's continuous disclosure file on which the use of a short financing document is premised, even if they are aware of SEDAR, which is itself questionable.

Although a public offering under the proposed exemption would otherwise be similar to a short form prospectus offering,[4] the Proposed Rule would remove the gatekeeper protection that exists with a short form prospectus. It would not require an underwriter or dealer, thus eliminating their due diligence review. It would also not require the issuer's auditor to consent to the current use of the issuer's audited financial statements, thus also eliminating the protection that the auditor's review may provide.[5] In addition, the prior review by securities regulators that is required for a prospectus would not be required for a financing document under the Proposed Rule. As the OSC states in Appendix E to the CSA Notice, the lack of underwriter's due diligence, and auditor's review, as well as prior regulatory review, may reduce the quality of the issuer's disclosure in connection with its offering. Foregoing these protections to reduce costs to small issuers will exacerbate the risks to investors who purchase their securities.

As the crowdfunding exemption permits a form of public offering to retail investors by a listed issuer, a comparison with the conditions for use of that exemption is illuminating. Under the crowdfunding exemption, the maximum amount raised in an offering cannot exceed $1.5 million, a non-accredited investor may not be allowed to purchase securities at a cost more than $2,500 in a single offering or more than $25,000 ($10,000 in Ontario) in any twelve month period, and the issuer cannot advertise or solicit purchases, other than informing investors of the dealer (funding portal) through whom its securities may be purchased. None of these limitations, nor similar ones, are in the Proposed Rule.

[4] CSA Notice, Appendix E, p. 36.
[5] Presumably this is the reason for precluding incorporation by reference of the issuer's continuous disclosure in the financing document, as is required with a short form prospectus.

In addition, under the crowdfunding exemption, securities must be distributed through a single dealer that serves as a funding portal and exercises gatekeeper responsibilities, including reviewing the crowdfunding disclosure document and other issuer documents for accuracy and completeness, providing them to investors, and holding the investors' funds until the conditions of closing the distribution are satisfied.[6] The funding portal dealer is thus obligated to fulfil a subordinate regulatory gatekeeping role in crowdfunding distributions. Again, no similar gatekeeping functions would be required under the Proposed Rule.

A crowdfunding issuer must also provide civil remedies equivalent to those in a prospectus offering. The crowdfunding rule, NI 45-108, gives purchasers a contractual 48-hour right of withdrawal and contractual rights to rescission or damages for a misrepresentation in the issuer's offering document or continuous disclosure documents that it incorporates by reference. The Proposed Rule would require only a contractual right of rescission. It would not allow purchasers a right of withdrawal and it provides only for secondary market liability against the issuer, if the issuer's financing document or continuous disclosure documents contain a misrepresentation.

The CSA Notice explains its rationale for limiting purchasers' damage remedy to secondary market liability. It says that secondary market civil liability would put purchasers "on the same footing" as investors in the secondary market, that is, on a stock exchange, presumably because the proposed exemption is premised on the issuer's continuous disclosure. Purchasers in a listed issuer exempt offering, however, are not like those on a stock exchange. Purchases in an exempt offering would be directly from the issuer under a purchase agreement. Unlike in a stock exchange transaction, the issuer receives the investors' funds.

The CSA Notice recognizes this fact in connection with the requirement for a contractual right of rescission; it explains that this right "ensures that the issuer is not unfairly enriched as a result of its misrepresentation". It does not treat the right of action for damages in the same way because of a concern that doing so, "applying primary liability", as it says, "would increase underwriter due diligence costs and result in a much longer offering document" (even though the Proposed Rule itself would require neither).[7]

The Proposed Rule would thus allow the issuer to be "unfairly enriched" at the expense of the investors who purchase its securities. This unfairness is recognized in the existing statutory secondary market liability regime, which excludes prospectus liability. Purchasers in a prospectus offering have a direct statutory remedy for damages against the issuer for the amount of their purchase because the funds paid by investors are received by the issuer. This amount cannot be recovered under secondary market liability, which imposes a liability limit for issuers of five per cent of the issuer's market capitalization, in part because the issuer does not receive funds from investors who purchase in the secondary market.

The unfairness of the secondary market damage remedy under the Proposed Rule is illustrated by the following example. If an issuer with a market capitalization of $100 million raises the maximum $10 million permitted under the Proposed Rule (assuming the "aggregate

[6] These conditions are specified in NI 45-108, s. 6.
[7] CSA Notice, p. 5.

market value" of the issuer's listed securities under the Proposed Rule is also $100 million[8]), its maximum liability in a class action for damages on behalf of the purchasers would be $5 million. The purchasers would not be able to recover more than half of their investment. In fact, they would recover less, as any recovery would have to be shared with other investors who purchased the issuer's shares in the secondary market (on the stock exchange) during the period of the misrepresentation.

The CSA's rationale for this treatment has not been adopted in other exemptions that, like a short form prospectus, take into account the issuer's continuous disclosure. Canadian securities acts grant purchasers of securities prospectus remedies against an issuer that uses an offering memorandum in an exempt offering. The crowdfunding rule, NI 45-108, requires a crowdfunding issuer to provide equivalent contractual rights to both rescission and damages, as well as a right of withdrawal. The damage liability provisions of the Proposed Rule simply cannot be justified.

If the Proposed Rule is adopted, purchasers should be entitled to a right of withdrawal and prospectus-equivalent rights to rescission and damages in the event of a misrepresentation.[9] Indeed, it would be desirable to extend such liability to the issuer's directors and officers, as was recommended for offering memorandums by Ontario's Capital Markets Modernization Task Force.[10]

<u>Conclusion</u>

The Proposed Rule is intended to make Canadian markets more efficient by assisting small issuers to raise capital. In its desire to further this goal, it would trade off the protection of investors in a manner that is inconsistent with the existing regulatory regime and that creates a new avenue for abuse by persons who seek to exploit gaps for their own ends. It thus may have the effect of undermining the perceived integrity of our securities markets and the confidence of investors who participate in them. For the reasons outlined above, the Proposed Rule should be withdrawn.

Yours respectfully,

Philip Anisman

---

[8] This would likely not occur, as the calculation of an issuer's market capitalization (e.g., Ont. Reg. 1015, s. 249) will likely differ from a determination of the aggregate market value of the issuer's listed equity securities on the date the issuer issues a news release announcing the offering (Proposed Rule, s. 5A.2(1)(f)). The Proposed Rule does not define how this value is to be calculated.

[9] See Capital Markets Modernization Task Force, *Final Report* (January 2021), p. 38.

[10] *Ibid*., p. 55.

PROSPECTORS & DEVELOPERS ASSOCIATION OF CANADA

October 26th, 2021

Larissa Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers

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

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

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

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

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

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

Sincerely,

Lisa McDonald

Executive Director

Prospectors & Developers Association of Canada

October 26th, 2021

APPENDIX A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CFA Societies Canada

Canadian Advocacy Council

120 Adelaide Street West, Suite 2205
Toronto, ON M5H 1T1

+1 (416) 366 3658 tel
www.cfacanada.org

October 26, 2021

VIA EMAIL

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

Larissa Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Email: lstreu@bcsc.bc.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2460, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Email: consultation-en-cours@lautorite.qc.ca

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

The Canadian Advocacy Council of CFA Societies Canada[1] (the "CAC") appreciates the opportunity to provide the following general comments on the Proposed

[1] The CAC is an advocacy council for CFA Societies Canada, representing the 12 CFA Institute Member Societies across Canada and over 19,000 Canadian CFA Charterholders. The council includes investment

CFA Societies Canada

Canadian Advocacy Council
120 Adelaide Street West, Suite 2205
Toronto, ON M5H 1T1
+1 (416) 366 3658 tel
www.cfacanada.org

Amendments and responses to select questions set out below. We are directionally supportive of the CSA's intent to create a new prospectus exemption for reporting issuers already listed on a Canadian stock exchange (the "Listed Issuer Financing Exemption") which is premised on the issuer having an up-to-date continuous disclosure record for investor reliance in connection with a financing/offering. We agree with most of the conditions to the exemption, including the caps, the limit on the use of the exemption to those issuers with an existing business, and the requirement to file a report of exempt distribution while omitting individual purchaser details. However, we believe that some small but material changes to the proposed exemption are required to ensure that investor protection principles are upheld in creation and use of the exemption. The most important of these changes is that we believe distributions under the exemption should be subject to prospectus-level liability for misrepresentation.

We agree that it is important to encourage issuers to raise capital in the public markets, but it is just as important to preserve confidence in the quality of the public markets. Liability for representations made in a prospectus, as well as underwriter involvement in offerings have long been understood as important safeguards against fraud and abuse. Prospectus exemptions should not inadvertently allow potentially bad actors to take advantage of the system and thus shake confidence in our capital markets. In addition, we understand that in the United States, a prospectus remains the cornerstone of most secondary offerings and there could be implications to moving out of step with our most interconnected foreign capital market.

We understand that the Listed Issuer Financing Exemption would provide purchasers under the exemption with two options for recourse if there is a misrepresentation, namely a right of action under the existing secondary market civil liability regime, and a contractual right of action against the issuer for rescission. However, we believe the standard of prospectus liability should also be applied against the issuer's continuous disclosure record at time of offering in order to ensure that the issuer has sufficient incentive to ensure full, true and plain disclosure. We are not convinced that the argument that applying prospectus liability would increase underwriter due diligence costs and result in a longer offering document is compelling. If issuers have robust and complete continuous disclosure records, and the offering document does not in fact disclose any new material facts, it should be possible to still utilize an offering document that is shorter and less expensive to prepare than a short-form prospectus.

---

professionals across Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. Visit www.cfacanada.org to access the advocacy work of the CAC.

CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion of ethical behavior in investment markets and a respected source of knowledge in the global financial community. Our aim is to create an environment where investors' interests come first, markets function at their best, and economies grow. There are more than 178,000 CFA Charterholders worldwide in over 160 markets. CFA Institute has nine offices worldwide and there are 160 local member societies. For more information, visit www.cfainstitute.org.

120 Adelaide Street West, Suite 2205
Toronto, ON M5H 1T1
+1 (416) 366 3658 tel
www.cfacanada.org

There are a number of mitigating factors that should prevent issuers from preparing excessively long disclosure documents for use under the exemption. First, the offering caps in themselves mitigate liability risk arising from any offering under the Listed Issuer Financing Exemption, which should lead issuers to take a proportionate approach when drafting disclosure. Second, regardless of the liability regime that applies, the condensed offering document form requirements should lead to more condensed disclosure as issuers are likely to respond to the disclosure requirements that are placed in front of them. We speculate that the short-form prospectus regime would not otherwise have had the benefits it did.

With respect to the potential added costs, we agree with a number of the statements made by staff of the Ontario Securities Commission in its local published annex to the Proposed Amendments. It was noted that the expectation was that the costs to prepare the offering document used with the Listed Issuer Financing Exemption would be lower than that of a short-form prospectus because, among other reasons, there would be no requirement to prepare new personal information forms or expert consents, and auditors would not have to review any existing continuous disclosure filings as they would not be incorporated by reference into the offering document.

We support the requirement to report sales pursuant to the exemption on Form 45-106F1 *Report of Exempt Distribution* within 10 days of a distribution for consistency with other prospectus exemptions and to ensure that the issuer is required to keep up to date investor records. It will also assist regulators to gather information on the use of the exemption in "real time". We agree that given the nature of the purchasers, it would not be necessary to gather the information otherwise required to be included in Schedule 1 to the Form. It would be useful for a variety of capital markets stakeholders if the information contained in the Form was more easily publicly searchable than existing functionality allows.

We expect that many issuers will utilize the services of a dealer in connection with the Listed Issuer Financing Exemption in order to reach the broadest possible number of investors. Regulators should carefully monitor issuers that engage in direct distribution or marketing efforts without a registrant, to help determine if additional supervision or policy work is required in this area.

Responses to Select Questions

1. Under the Proposed Amendments, the total dollar amount that an issuer can raise using the Listed Issuer Financing Exemption would be subject to the following thresholds:

(a) the greater of 10% of an issuer's market capitalization and $5,000,000
(b) the maximum total dollar limit of $10,000,000
(c) a 100% dilution limit.

120 Adelaide Street West, Suite 2205
Toronto, ON M5H 1T1
+1 (416) 366 3658 tel
www.cfacanada.org

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

While not opining directly on the appropriateness of these thresholds, we believe that close supervision of the use of this exemption and responsive modification of these thresholds to address where problems arise will be critical to the success of the exemption, investor protection, and broadly the maintenance of capital markets integrity. There exists real potential for misuse and investor abuse within these thresholds, particularly in combination with any incomplete or misleading disclosure record – caution and close supervision is warranted.

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

We are not aware of policy reasons to exclude convertible debt from the eligible securities available under the exemption, though would highlight the need for monitoring against the dilution threshold on a fully converted basis.

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

We would caution against the consideration (at least in the near-term) of allowing this exemption to be utilized for continuous non-fixed offerings. We believe the challenges of maintaining an accurate disclosure record and preparing an appropriate offering document in a continuous offering scenario are considerable, and present serious practical challenges. The post-offering reporting of a continuous offering is also potentially unnecessarily onerous. We would recommend a separate follow-on policy project examining this possibility in future, once data is available from use of this exemption, if the issues raised in this question remain a policy question or objective.

6. Over the last several years, the CSA has tried to address various capital raising challenges by introducing a number of streamlined prospectus exemptions targeted to reporting issuers with listed equity securities, including the existing security holder exemption and the investment dealer exemption. The use of these exemptions has been limited. We have heard from market participants that the existence of these rarely used

120 Adelaide Street West, Suite 2205
Toronto, ON M5H 1T1
+1 (416) 366 3658 tel
www.cfacanada.org

prospectus exemptions may contribute to the complexity of the exempt market regime. If we adopt the proposed Listed Issuer Financing Exemption, should we consider repealing any of these other exemptions?

We're sympathetic to concerns that the exempt market regime is complex and believe that both market participants and investors could benefit from broad policy simplification. However, each potential exemption repeal should be subject to study as to the original policy reasons, historical usage (across different financing conditions/regimes), and the effect of similar exemptions on usage before any policy action is taken. We are generally supportive of regulatory efficiency, though encourage thoughtful consideration in its pursuit.

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

(a) If adopted, do you anticipate that issuers would involve a dealer in offerings under the exemption?

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

While we expect many issuers to involve a dealer in offerings under the exemption, we expect that some will opt to conduct their own offerings directly with investors. We would encourage close regulatory supervision of this activity by issuers where it occurs, as we believe dealer involvement acts as an effective secondary check on the integrity of an issuer's continuous disclosure record and the content and form of its offering document. Lacking these controls, we believe investors are left in a potentially more vulnerable situation dealing directly with the issuer, with less expert and liability-concerned eyes trained on the offering.

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

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

Per our prior comments, we're of the strong view that prospectus level liability better ensures or encourages issuers maintain a complete disclosure record and produce appropriate offering documents in connection with an offering under the exemption.

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

We're not of the view that brevity of offering document is necessarily directly correlated to the liability standard attached to the offering. We believe that prevailing legal and market practices in drafting of offering documents have often bent towards verbose and exhaustive disclosure to the detriment of utility. We believe that use of this exemption could be an important step forward in utilizing the benefits of a robust continuous disclosure record in combination with a novel and non-prescriptive form of offering document for more efficient and useful information delivery to investors. We believe that in the early going that 'key elements' guidance from regulators will be useful, and encourage the regulatory community to foster innovation and the promotion of best practices to the extent possible.

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

For the reasons cited above, we believe that the liability a dealer carries relating to an offering acts as an important mechanism in motivating the qualification of an issuer's continuous disclosure record and offering document. We believe this is investor-friendly and in the interest of capital market integrity broadly.

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

While the intent of this condition is laudable, the practical considerations could be challenging. We would encourage examination of alternative avenues to achieve the same policy goal rather than requiring execution of individual purchaser agreements in connection with offerings under this exemption.

Question on Local Matters

CFA Societies Canada
Canadian Advocacy Council
120 Adelaide Street West, Suite 2205
Toronto, ON M5H 1T1
+1 (416) 366 3658 tel
www.cfacanada.org

The Capital Markets Modernization Taskforce Final Report dated January 2021 (the Taskforce Report) included a recommendation to introduce a prospectus exemption similar to what is being proposed by the CSA Proposed Amendments. The Taskforce Report suggested that issuers who adopt semi-annual reporting should not be permitted to use the prospectus exemption recommended in the Taskforce Report. If the CSA were to adopt a semi-annual reporting regime should we consider excluding issuers who report semi-annually from using the Exemption?

As noted in multiple prior comments to the CSA in connection with prior policy projects and to the Ontario CMMTF, we are not in support of the introduction of a semi-annual reporting regime, for reasons relating to the continuity, timeliness and reliability of an electing issuer's continuous disclosure record, concerns that would seem to underlie this question. For these reasons, were a semi-annual reporting regime created in the future, we do not believe that this exemption should be available to those electing issuers, as it would compound the challenge of maintaining a complete continuous disclosure record and increases the risk that investors would make an investment decision on stale or incomplete disclosure.

Concluding Remarks

We support efforts to eliminate unnecessary barriers to capital raising while maintaining investor protection mechanisms. The proposed Listed Issuer Financing Exemption seems to generally strike a balance between introducing a lower-cost prospectus exemption and reasonable conditions that protect investors. We believe that issuers should be held to the higher prospectus-level standard for misrepresentation in connection with the exemption.

We thank you for the opportunity to provide these comments and would be happy to address any questions you may have. Please feel free to contact us at cac@cfacanada.org on this or any other issue in future.

(Signed) *The Canadian Advocacy Council of*
CFA Societies Canada

The Canadian Advocacy Council of
CFA Societies Canada

November 2, 2021

VIA EMAIL

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

Larissa Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
lstreu@bcsc.bc.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2460, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

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

TMX Group Limited ("**TMX Group**" or "**we**") welcomes the opportunity to comment on behalf of its subsidiaries, Toronto Stock Exchange ("**TSX**") and TSX Venture Exchange ("**TSXV**") (each, an "**Exchange**" and collectively, the "**Exchanges**") on the notice and request for comment published on July 28, 2021 by the Canadian Securities Administrators ("**CSA**") entitled "*Proposed Amendments to National Instrument 45-106 Prospectus Exemptions to introduce the Listed Issuer*

Financing Exemption" (the "**Request for Comment**"). We appreciate the efforts taken by the CSA to conduct consultations and research international markets to develop a more efficient method of capital raising for reporting issuers that have securities listed on a Canadian stock exchange and to develop the proposed Listed Issuer Financing Exemption ("**Proposed Exemption**"). Capitalized terms used in this letter and not otherwise defined have the meaning given to them in the Request for Comment.

TMX Group strongly supports the CSA's efforts to provide retail investors with a greater choice of investments available in the primary public markets and allow smaller issuers access to public markets and retail investors through the use of the Proposed Exemption. The Proposed Exemption may also be a catalyst for additional regulatory development in the public markets in furtherance of these goals. For instance, if and when the Proposed Exemption is to be brought into effect, TSXV intends to seek regulatory approval to eliminate the application of its Exchange Hold Period to securities issued under the Proposed Exemption in order to better facilitate the use of this new prospectus exemption by our listed issuers.

In light of the goal to facilitate the raising of capital, and considering the unique nature of the Proposed Exemption as one that is restricted in use to publicly-listed issuers, we also encourage the CSA to fully consider the potential impact of the Proposed Exemption to ensure there will not be any unintended negative consequences. In this regard, we note the following points for consideration:

1. A significant amount of new capital is currently raised through the issuance of securities in reliance upon the exemption from the prospectus requirement outlined in s.2.3(1) of National Instrument 45-106 (the "**Accredited Investor Exemption**") for persons who fall within the definition of "accredited investor" ("**Accredited Investor**"), which securities are subject to a four month hold period. However, securities to be issued in reliance upon the Proposed Exemption will not be subject to any such hold period. There exists the possibility that Accredited Investors will insist upon investing in listed issuers in reliance upon the Proposed Exemption, rather than the Accredited Investor Exemption, in order to receive securities that are not subject to a hold period. This may result in listed issuers quickly raising the maximum permitted under the Proposed Exemption from Accredited Investors, rather than from the other retail investors the Proposed Exemption is stated to be designed to attract. Consequently, the desired effect of expanding the pool of new capital available to listed issuers may not actually be achieved if listed issuers end up using the Proposed Exemption primarily to issue securities to investors that would otherwise qualify to subscribe for securities under a different prospectus exemption. Further, Accredited Investors may prefer to invest in listed issuers that are still eligible to issue freely tradeable securities in reliance upon the Proposed Exemption, potentially impeding the capital raising ability of listed issuers that have already raised the maximum permitted under the Proposed Exemption and are only able to offer securities using the prospectus exemptions, such as the Accredited Investor Exemption, with a hold period. Has the CSA considered or conducted any research into whether the Proposed Exemption could potentially have a negative impact on listed issuers' ability to raise capital as a consequence of Accredited Investors choosing to invest only in listed issuers having the ability to issue securities without a hold period using the Proposed Exemption?

2. Frequently, in order to attract investors, listed issuers needing to raise capital will offer to issue securities at a discount to market price. We have observed that this can cause the issuer's share price to fall accordingly. Nevertheless, such a discount may be considered somewhat justified where such securities are subject to a four month hold period and so the discount is essential in order to attract new capital. However, securities issued in reliance upon the Proposed Exemption will not be subject to any hold period. Given the observed connection between hold periods, pricing discounts and downward pressure on share prices, has the CSA considered attaching any parameters or guidance regarding the issue price in order to rely upon the Proposed Exemption to help alleviate the potential impact on share prices?

We appreciate the opportunity to respond to the Request for Comment. Please do not hesitate to contact us if you have any questions regarding any of the above.

Respectfully submitted,

'***Loui Anastasopoulos***'

Loui Anastasopoulos
President, Capital Formation and Enterprise Marketing Officer
TMX Group Limited