

REGULATORY RESET FOR REPORTS OF CANADIAN PRIVATE PLACEMENTS LAST REVISED IN JUNE 2016, REGULATORS ARE TAKING ANOTHER KICK AT FORM 45-106F1

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On June 8, 2017, the Canadian Securities Administrators (the “CSA”) [published proposed amendments](#) (the “**Proposed Amendments**”) to National Instrument 45-106 - *Prospectus Exemptions* (“**NI 45-106**”) for a 90-day comment period. The Proposed Amendments are a further attempt by the CSA to refine the information required to be provided by issuers and/or underwriters in Form 45-106F1 - *Report on Exempt Distribution* (the “**Report**”). The form of Report received a significant overhaul only a year ago to include substantially more details regarding private placements and the issuers conducting these transactions and received significant push-back from market participants and other stakeholders.

Last year’s amendments to the form of Report (the “**2016 Amendments**”) sought to:

- reduce the compliance burden for issuers and underwriters by harmonizing the reporting requirements for exempt distributions into one form; and
- provide regulators with additional information concerning exempt distributions thereby facilitating oversight of the exempt market and assisting in future policy analysis and development.

However, both the certification requirements for the Report and the nature and quantity of information required to be included therein resulted in significant pushback from issuers, Canadian institutional investors and foreign dealers (among others). Members of the CSA initially attempted to address these concerns by taking such steps as providing exemptive relief from certain information requirements of the Form and issuing revised guidance on the preparation and filing of the Report.

The Proposed Amendments focus on clarifying the certification requirements and simplifying the information to be provided in the Report. The British Columbia Securities Commission did not publish the Proposed Amendments for comment although staff anticipates doing so after obtaining the necessary approval.

Proposed Changes to Certification Requirements

The Proposed Amendments seek to address concerns raised regarding the certification requirements of the

Report by:

- clarifying that the person who certifies the Report (i.e. a director or officer of an issuer or underwriter, as applicable) is doing so on behalf of the issuer or underwriter and not in their personal capacity;
- stating that the person certifying the Report must affirm that the information contained therein is “true and, to the extent required, complete” and more importantly, includes a knowledge qualifier (to be exercised with a reasonable diligence) with respect to this statement;
- removing the ominous bold ALL CAPS cautionary language previously contained in the Report stating that it is an offence to make a misrepresentation in the Report replacing it with a reminder of the obligation to file the Report; and
- allowing authorized agents of issuer or underwriters to sign the certification.

One of the main areas of concern expressed by market participants in relation to the 2016 Amendments was the requirement that a director or officer of an issuer or underwriter certify that they have read and understood the Report and the possibility that personal liability could attach to such certification.

Proposed Changes to Disclosure Requirements

The Proposed Amendments contain a number of significant changes to the information required to be included in the Report. For example, while the Report currently requires the provision of the names of all exchanges on which the issuer’s securities are listed, the Proposed Amendments will require that only the name of the exchange on which the issuer’s securities primarily trade. This change is intended to streamline the process for issuers with securities listed on multiple exchanges and decrease the amount of time needed to collect the relevant information.

Another substantive change to the Form’s information requirements include a reduction relating to the issuer categories that exempt an issuer from providing the information required by Item 9 of the Report (Directors Officers and Promoters of the Issuer). Currently, issuers or underwriters that prepare the Report are required to consider five exemption categories and select all that apply. The Proposed Amendments will require the filer to indicate only one of the applicable exemption categories.

Perhaps most significantly, the Proposed Amendments would relax the reporting requirements relating to distributions of securities made to non-individuals in reliance on the “accredited investor” prospectus exemption in NI 45-106 (arguably, the most popular prospectus exemption). The CSA is proposing to amend the requirements in Schedule I to the Report to permit issuers to indicate reliance on the accredited investor exemption without having to specify the paragraph in the definition of accredited investor (contained in section 1.1 of NI 45-106) by which the non-individual purchaser qualifies. However, this information will still have

to be provided for all individual purchasers of securities. This change is particularly relevant for foreign dealers relying on the international dealer exemption for distributions of eligible foreign securities to non-individual “permitted clients” (institutional investors) in Canada as it is currently necessary to confirm both the “permitted client” status of a purchaser for the purpose of reliance on the international dealer exemption as well as the “accredited investor” status of the purchaser for the purposes of obtaining all required information for the Report.

Miscellaneous

Finally, the Proposed Amendments include other minor amendments intended to clarify changes to and/or requirements under the Report. In particular, the CSA highlighted changes to:

- reflect changes to how the Bank of Canada publishes foreign exchange rate data given the Bank’s decision to stop publishing daily noon exchange rates and closing exchange rates. This is relevant as the Report requires all private placements in securities of foreign denominations to be converted into Canadian dollars as of the applicable date. Under the Proposed Amendments, the daily exchange rate published by the Bank of Canada will be used for the purposes of currency conversions in the Report.
- Update the contact information of the securities regulatory authority or regulator in each local jurisdiction; and
- clarify the language in certain instructions for completing the Report in a effort to accurately gather the required information (for example, in some instances changing the directive from “select all that apply” to “select the one that applies - if more than one applies, select only one”).

Comments on the Proposed Amendments must be submitted in writing by September 6, 2017.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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