

SECURITIES

CSA ANNOUNCES AMENDMENTS TO NATIONAL INSTRUMENT (NI) 45-106

On February 19, 2015, the Canadian Securities Administrators (“CSA”) announced the adoption of changes to the accredited investor and minimum amount investment prospectus exemptions, among other changes. The amendments are expected to come into force on May 5th 2015. It was also announced that Ontario was adopting the “Friends, Family and Business Associates” prospectus exemption.

1. New Risk Acknowledgment Form (RAF)

A new RAF has been introduced, Form NI 45-106 F9. The new RAF must be signed by most individuals seeking to rely upon the “accredited investor exemption”, and the issuer must retain a copy of the signed RAF for a minimum period of 8 years after distribution. The new risk acknowledgment form describes, in plain language, the categories of individual accredited investor and identifies the key risks associated with purchasing individual securities in the exempt market. The RAF is not required for parties that meet the financial criteria as set forth in the new category of accredited investor (see below).

In addition, new guidance has been published emphasizing that it is the issuer which is relying on the applicable prospectus exemption and it is the issuer which is responsible for ascertaining that the exemption applies. Previously sellers often relied only on a subscriber’s representation in the subscription document. The companion policy to National Instrument 45-106 (“NI 45-106”) now specifies that the sellers must take reasonable steps to ensure that the subscriber does in fact qualify as an accredited investor or is entitled to rely upon the “friends, family and business associates” exemption and to probe the basis on which the seller believes he/she qualifies. The sellers must maintain detailed records of the steps taken to ensure that the subscriber qualifies, including information related to (a) how the seller identified or located the potential purchaser, (b) what category of accredited investor or eligible investor the purchaser claims to meet, (c) what type of relationship the purchaser claims to have and with which director, executive officer, founder or control person of the issuer (with respect to the “friends, family and business associates” exemption), (d) how much and what type of background information is known about the purchaser, and (e) whether the person who meets with, or provides information to, the purchaser is registered.

If the seller has any reservations about whether the purchaser qualifies under the exemption, the seller should not sell securities to the purchaser in reliance on that exemption.

2. Amendments to the definition of “Accredited Investor”

The definition of “accredited investor” has been expanded to include:

- an individual who beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$5,000,000 (such an individual would not be required to sign a RAF); and
- a trust established by an accredited investor for the benefit of the accredited investor’s family members of which a majority of the trustees are accredited investors and all of the beneficiaries are the accredited investor’s spouse, a former spouse of the accredited investor or a parent, grandparent, bother, sister, child or grandchild of that accredited investor, of that accredited investor’s spouse or of that accredited investor’s former spouse. (This new category will allow certain family trusts to qualify for a prospectus exemption.)

In addition, Ontario has adopted the same wording for the “fully managed account” exemption which is applicable outside of Ontario, namely:

- a person acting on behalf of a fully managed account managed by that person, if that person is registered or authorized to carry on business as an advisor or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction.”

In Ontario authorized persons on behalf of a managed account will be able to invest in securities on an exempt basis on behalf of their clients even if their clients do not otherwise qualify for a prospectus exemption and even if the security is a security of an investment fund.

3. Amendments to “Minimum Amount Investment” exemption

The minimum amount investment exemption allowed investors to acquire securities on an exempt basis where they purchased a minimum amount (not less than \$150,000). The exemption had raised concerns that individuals may be able to satisfy the investment minimum but otherwise lack sufficient market experience or net worth to understand (or weather) the risks associated with such investment. Under the proposed changes the exemption will be no longer available to individuals, but will continue to be available to non-individual investors.

4. Introduction of Friends, Family and Business Associates exemption in Ontario

NI 45-106 has also been amended to harmonize Ontario with the ‘friends, family and business associates’ exemption available to

investors in other jurisdictions. The exemption is based on investors having a sufficiently close relationship with the principal(s) of the issuer to: "assess the capabilities and trustworthiness of the principals and access information about their investment." In connection with the utilization of this exemption, the Ontario Securities Commission will require that the investor sign a RAF, Form 45-106 F12 (which is not the same as the Sashatchewan form), acknowledging the risks related to the investment and identifying the relationship relied upon. The RAF must also be signed by the issuer and by the director, executive officer, control person or founder of the issuer with which the investor claims the relationship. The issuer must retain a copy for a period of eight years after distribution.

Issuers, advisors and dealers in the exempt market will likely need to update their documentation, policies and procedures to reflect these amendments prior to the May 5th, 2015 introduction date.

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