

July 13, 2020

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

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, ON M5H 3S8
Fax: 416-593-2318
comments@osc.gov.on.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-ours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment on Proposed National Instrument 45-110 Start-up Crowdfunding Registration and Prospectus Exemptions

The Private Capital Markets Association of Canada (“**PCMA**”) is pleased to provide our comments in connection with the *Canadian Securities Administrators’ (“CSA”) Proposed National Instrument 45-110 Crowdfunding Registration and Prospectus Exemptions* (the “**Proposal**”) as set out below.

About the PCMA

The PCMA is a not-for-profit association founded in 2002 as the national voice of the exempt market dealers (“**EMDs**”), issuers and industry professionals in the private capital markets across Canada.

The PCMA plays a critical role in the private markets by:

- assisting hundreds of dealer and issuer member firms and individual dealing representatives to understand and implement their regulatory responsibilities.
- providing high-quality and in depth educational opportunities to the private capital markets professionals;
- encouraging the highest standards of business conduct amongst its membership across Canada;
- increasing public and industry awareness of private capital markets in Canada;
- being the voice of the private capital markets to securities regulators, government agencies and other industry associations and public capital markets;
- providing valuable services and cost-saving opportunities to its member firms and individual dealing representatives; and
- connecting its members across Canada for business and professional networking.

Additional information about the PCMA is available on our website at

www.pcmacanada.com.

The first section of the letter presents our general comments on the Proposal, followed by responses to specific questions asked in the Proposal.

The PCMA would like to thank the CSA for the opportunity to comment on proposed NI 45-110. Consultation with stakeholders is an important step in designing effective public policy.

Our general comment is that the proposed NI 45-110 is a small step forward from the status quo but is insufficient towards developing a robust equity crowdfunding environment in Canada.

At this juncture, ambitious public policy will be required to revitalize the Canadian economy which has suffered its steepest decline in living memory and wherein the prospects for a rapid upsurge and a return to the previous growth path remain questionable. A more ambitious crowdfunding regulatory architecture would contribute to Canada's swifter emergence from the present economic and financial crisis. It would also complement the vibrant public capital markets, notably the CSE and the TMX-V, who continue to play an important role in the small and medium size firm capital raising process.

The PCMA is encouraged by the inter-provincial harmonization of the start-up crowdfunding registration and prospectus exemptions as the existing patchwork of regulations has impeded early-stage firms' ability to access capital via this mechanism. Furthermore, we would recommend that a feedback loop process be instituted that would enable regulators, industry stakeholders and consumers to regularly assess progress in terms of the numbers and volumes of company financings stimulated by the new proposals.

Given the current extraordinary circumstances and the importance of quickly implementing a national instrument for crowdfunding in order to better meet capital raising challenges for issuers utilizing the exemption at this time, Staff should consider waiving the comment request period and implementing the proposed changes

immediately. Follow up with issuers, portals and registered dealers on the effectiveness of the instrument could be collected after 4-6 month period, with adjustments initiated in 2021, wherein applicable.

Start-up crowdfunding prospectus exemption

The start-up crowdfunding prospectus exemption is available to issuers that meet a number of conditions, including:

- the distribution of, and payment for, the security is facilitated through a funding portal that is relying on the start-up crowdfunding registration exemption or operated by an exempt market dealer or investment dealer;

We agree with this item.

- the aggregate gross proceeds raised by the issuer group¹ during the 12-months before the closing of the start-up crowdfunding distribution does not exceed \$1,000,000;

We agree with the direction of this item but believe a cap of \$5,000,000 should be considered. See Comments Section (2), below.

- each purchaser invests no more than \$2,500 or, if the purchaser has obtained advice from a registered dealer that such investment is suitable for the purchaser, \$5,000;

We agree with the direction of this item but believe an increase may be considered if an investor meets certain qualifications. See Comments Section (3), below.

- the issuer prepares an offering document disclosing information about the business and the start-up crowdfunding distribution and makes it available to each purchaser through the funding portal's platform;

We agree with this item.

- the closing of the start-up crowdfunding distribution does not occur unless the issuer raises the minimum offering amount stated in the offering document within

¹ The issuer group means, in respect of an issuer, any of the issuer, an affiliate of the issuer, an issuer that is engaged in a common enterprise with the issuer or with an affiliate of the issuer, and an issuer whose business is founded or organized by a person or company who founded or organized the issuer.

the 90-day period after the date the offering document is made available on the funding portal's platform; and

We agree with this item but believe the period should extend to 120 days in light of the particular challenges of the current economic environment.

- the issuer provides the purchaser with a two-day contractual right to withdraw from an agreement to purchase the security by delivering a notice to the funding portal.

We agree with this item.

- The issuer is not required to provide financial statements to investors in connection with a start-up crowdfunding distribution. No continuous disclosure requirements are tied to the start-up crowdfunding prospectus exemption.

We agree with this item.

- The prospectus exemption is not available if the issuer intends to use the proceeds of the distribution to invest in, merge with, amalgamate with, or acquire an unspecified business. Investors in issuers that propose raising capital for these purposes are better protected in regimes other than start-up crowdfunding, such as the TSX Venture Exchange capital pool company (CPC) program.

We do not agree with this item. CPC and RTO (Reverse Takeover) structures may be better monitored through a registered dealer as it concerns suitability. Without a suitability framework, investors may push capital toward investments which normally would be considered unsuitable.

Start-up crowdfunding registration exemption

The start-up crowdfunding registration exemption is available to funding portals that meet a number of conditions, including:

- at least 30 days prior to the first date the funding portal facilitates a start-up crowdfunding distribution in a jurisdiction, the funding portal delivers to the securities regulatory authority or regulator in each jurisdiction a completed Form 45-110F3 *Funding Portal Information* and, for each principal of the funding portal, a completed Form 45-110F4 *Portal Individual Information*;

We agree with this item.

- the funding portal or any of its principals must not be, or have been, the subject of certain proceedings in the last 10 years as specified in the Instrument, including claims related to fraud, theft, breach of trust, illegal distributions, or allegations of similar conduct;

We agree with this item.

- the funding portal holds each purchaser's assets separate and apart from the funding portal's own property, in trust for the purchaser, and in the case of cash, in a designated trust account at a Canadian financial institution;

We agree with this item.

- the funding portal provides the necessary disclosures (such as the issuer's offering document and any amendments) and obtains the necessary risk acknowledgement from purchasers under the Instrument in connection with a distribution of eligible securities;

We agree with this item.

- the funding portal is not registered under securities legislation; and the funding portal does not:
 - provide advice to a purchaser about the merits of the investment or otherwise recommend or represent that an eligible security is suitable, or
 - receive a commission, fee or other similar payment from a purchaser under a start-up crowdfunding distribution.

We agree with this item.

- A funding portal cannot rely on the start-up crowdfunding registration exemption if it is insolvent. A funding portal relying on the start-up crowdfunding registration exemption must deliver to the securities regulatory authority or regulator in each jurisdiction a completed Form 45 110F5 *Annual Working Capital Certification* within 10 days of each calendar year-end. As part of its obligation to deliver a completed Form 45 110F5 *Annual Working Capital Certification*, the funding portal must certify that it has sufficient working capital to continue its operations for at least the next 12 months. If the funding portal becomes insolvent or discontinues operations, it must promptly notify the securities regulatory authority or the regulator, and any purchasers for which it

holds assets, of the process the funding portal will use to return the assets to these purchasers.

We do not agree fully with this item. In general, margins for crowdfunding can be slim at times and the pressure of maintaining a capital requirement of 12 months would be challenging for most registrants and portals to adhere. This is especially true given the impact of Covid 19 now and in the foreseeable future. We would suggest a requirement of 6 months maximum.

Comments Section

In addition to your comments on all aspects of the Instrument, the Guides and the consequential amendments, the CSA also seek specific feedback on the following questions:

1. We are considering repealing MI 45-108 because there has been no use of this regime. We also note that the adoption of the Instrument may reduce the need for market participants to rely on MI 45-108. Do you think MI 45-108 should be maintained? If so, please explain why.

We agree with this item.

2. We recognize the need to provide a balance in the Instrument between investor protection and streamlined, light-touch requirements for capital raising in the spirit of crowdfunding.

The Instrument contemplates individual investment limits of \$2,500 for each purchaser and \$5,000 for each purchaser, if the purchaser has obtained advice from a registered dealer that such investment is suitable for the purchaser. We recognize there may be need for greater flexibility in capital raising and continue to consider whether to increase the individual investment limit to one or more of the following:

- a. \$5,000 for each purchaser;
- b. \$10,000 for each purchaser, if the purchaser has obtained advice from a registered dealer that such investment is suitable for the purchaser; and
- c. a number in between those currently in the Instrument, and those mentioned above.

What would be an appropriate individual investment limit? Please explain and identify the investor protections you think support that amount.

Canada's approach to individual investor purchase limits should be guided by the stances taken in leading comparator nations, particularly the United States, the United Kingdom and Australia – each of which has a more advanced crowdfunding regime and a more vibrant crowdfunding sector than does Canada.

3. Additionally, the Instrument contemplates a limit on aggregate proceeds raised by the issuer group during the 12-month period of \$1,000,000. We recognize there may be need for greater flexibility in capital raising and continue to consider whether to increase the offering limit to one of the following:
 - a. \$1,500,000; or
 - b. a number in between \$1,000,000 and \$1,500,000.

What would be an appropriate offering limit? Please explain and identify the investor protections you think support that amount.

The offering limit should be raised to \$5,000,000 and essentially be brought roughly in line with the regulations put forth by the Securities and Exchange Commission (SEC) in the United States. There is emerging evidence that COVID-19 has resulted in declining early-stage company financings with institutional risk capital providers, focusing on later-stage financings and in Canada a relatively smaller 'angel' investor cohort. Canada risks losing some of its most promising start-ups to the US and other jurisdictions where more needed capital can be raised more expeditiously than domestically.

Annex A

Key differences between the registration and prospectus exemptions under Proposed National Instrument 45-110 *Start-up Crowdfunding Registration and Prospectus Exemptions* and the Start-up Crowdfunding Blanket Orders

| Key theme | Start-up crowdfunding blanket orders | Instrument |
|---|---|---|
| Maximum aggregate proceeds that can be raised by the issuer group under the prospectus exemption | \$250,000 per distribution, up to two times in a calendar year. | \$1,000,000 during the 12 months before the closing of the offering. |
| Maximum investment amount per person per distribution under the prospectus exemption | <ul style="list-style-type: none"> • \$1,500; or • in British Columbia, Alberta and Saskatchewan, \$5,000, provided that the purchaser has obtained advice from a registered dealer that such investment is suitable for the purchaser | <ul style="list-style-type: none"> • \$2,500; or • \$5,000, provided that the purchaser has obtained advice from a registered dealer that such investment is suitable for the purchaser |
| Confirmation by the regulator before a funding portal starts to facilitate distributions | <p>The funding portal cannot facilitate distributions until the regulator confirms in writing receipt of:</p> <ul style="list-style-type: none"> • a duly completed funding portal information form; • a duly completed individual information form for each principal of the funding portal; and • such other documents and information as may be requested by the regulator. | <p>The funding portal must deliver the required forms at least 30 days before facilitating distributions. There is no requirement for the regulator’s written confirmation. However, a funding portal may not rely on the start-up crowdfunding registration exemption if, within 30 days of receiving the funding portal information form, the regulator has notified the funding portal, it or any of its principals has been notified by the regulator that its process and procedure for handling of purchasers’ funds does not satisfy the conditions of the Instrument.</p> |

| Key theme | Start-up crowdfunding blanket orders | Instrument |
|---|---|---|
| Bad actor disqualification | Not applicable. | A funding portal cannot rely on the start-up crowdfunding registration exemption if it or any of its principals is or has been the subject of certain proceedings in the last 10 years related to a claim based in whole or in part on various conduct such fraud, theft, breach of trust, or allegations of similar conduct. |
| Funding portals financial resources certification | Not applicable. | On an annual basis, the funding portal must certify that it has sufficient working capital to continue its operations for at least the next 12 months by delivering a completed funding portal information form or Form 45-110F5 <i>Annual Working Capital Certification</i> . |
| Liability in the event the offering document contains misrepresentations | There is no statutory liability under securities law. The blanket orders do not require the issuer to provide contractual rights to purchasers. Purchasers may have rights under common law or civil law. | The issuer is subject to statutory liability similar to the offering memorandum exemption under section 2.9 of NI 45-106. |
| Investment in an unspecified business | No restrictions. | The start-up crowdfunding prospectus exemption is not available to issuers who intend to use the proceeds of the distribution to invest in, merge with or acquire an unspecified business. |
| Report of exempt distribution form | Except in British Columbia, issuers must use Form 5 – <i>Start-up Crowdfunding – Report of distribution</i> . In British Columbia, issuers must use Form 45-106F1 <i>Report of Exempt Distribution</i> . | Issuers must use Form 45-106F1 <i>Report of Exempt Distribution</i> . |
| Expiry date | The orders were initially set to expire on May 13, 2020. The startup crowdfunding blanket orders will be extended to remain available until the Instrument is available, if adopted. | The Instrument has no expiry date. |

Annex B

Local Matters

British Columbia Securities Commission

BC Instrument 45-535

Effective February 27, 2020, the BCSC has varied BCI 45-535 *Start-up Crowdfunding Registration and Prospectus Exemptions* (BCI 45-535) to extend the expiry date of BCI 45-535 from May 13, 2020 to the date that is 90-days after the effective date of a rule that provides for

- (a) a prospectus exemption for a distribution through a funding portal of an eligible security; and
- (b) a registration exemption exempting certain funding portals for such distributions under the prospectus exemption referred to in paragraph (a), above.

This variation of BCI 45-535 will permit market participants to have continued access to start-up crowdfunding until a harmonized rule is available, if adopted.

Closing Remarks

The PCMA would like to thank to the CSA for their efforts in drafting the Proposal and for soliciting feedback from various stakeholders.

* * * *

We thank you for considering our submissions and we would be pleased to respond to any questions or meet with you to discuss our comments.

Yours truly,

PCMA COMMENT LETTER COMMITTEE MEMBERS

“Philip A. du Heaume”

Co-Chair of PCMA Advisory Committee

“Peter-Paul Van Hoeken”

Member, PCMA Advisory Committee

“Richard Remillard”

Member, Comment Letter Committee

“Richard Carleton”

Director, PCMA

“Tommy Baltzis”

Chair, PCMA

“Georgina Blanas”

Executive Director, PCMA

416 301-2677