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By Email

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority (Saskatchewan)
The 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
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon
Superintendent of Securities, Nunavut

Re: Request for Comments on the Proposed Amendments to National Instrument 45-106 – *Prospectus and Registration Exemptions* ("NI 45-106") relating to the Accredited Investor and Minimum Amount Investment Prospectus Exemptions

Blakes appreciates the opportunity to comment on the proposed amendments to NI 45-106 and welcomes the goal of the proposed changes to enhance investor protection. The focus of our comments is on how to best achieve that goal, while at the same time minimizing the regulatory burden on private placement issuers in order to ensure a healthy market for private placement offerings.

In our work with private placement issuers and distributors, we have found that even seemingly minor compliance obstacles can lead to increased regulatory burden and associated costs, which may result in fewer private placement offerings available to investors.

In addition, foreign issuers who are considering whether to offer securities in Canada may choose not to do so, if the perceived cost and burden of compliance with Canadian rules is disproportionately high or burdensome, with the result of excluding Canadian investors from opportunities available internationally.

The Request for Comments stated the impact on investors was that the amendments to the report of exempt distribution would provide the Canadian Securities Administrators ("CSA") with more information about this market, enabling the CSA to better regulate by developing more targeted compliance and investor education programs. We have identified several proposed amendments, listed below, for which we believe the regulatory requirements proposed would impose additional costs or

burdens to issuers with little to no related enhancement of investor protection, while potentially having an adverse impact on investors. Additional information should only be collected pursuant to a legal disclosure requirement where there is a compelling information need.

For each of the identified proposals, we have included our recommendation for an amendment that would achieve investor protection while also maintaining a healthy private placement market.

A. Requirement to identify all applicable paragraphs of the accredited investor exemption

The proposed Schedule 1 to Form 45-106F1 would require identification of all paragraphs of the accredited investor exemption applicable to each purchaser.

This proposed disclosure requirement exceeds the substance of the requirement placed on issuers or underwriters, which is only to be able to identify that each purchaser for which reliance is placed on the accredited investor exemption falls under at least one applicable paragraph. Identification of all paragraphs that could apply, but on which the issuer and underwriters are not relying, does not further investor protection goals. Rather, investor protection goals are fully satisfied by identifying one applicable paragraph.

In the case of offerings of securities of foreign issuers in which the underwriters selling securities to Canadian investors typically are exempt international dealers, it is not the practice to require potential purchasers to complete a questionnaire in which the purchaser identifies each paragraph of the accredited investor exemption that applies to the purchaser. While most purchasers in such offerings would fall under readily verifiable categories of exemption, such as registrants and pension funds, information as to each and every applicable paragraph related to each purchaser's exempt status may not be readily available to underwriters and may be costly and time-consuming to obtain.

For example,

- an investment fund that has distributed only to accredited investors ((n)(i) and (t)) and is advised by a registered or exempt adviser (u); or
- a pension fund trust (i) with net assets of more than $5 million (m).

Recommendation: We recommend that, where reliance is placed on the accredited investor exemption, one applicable paragraph of the exemption be required to be stated in Schedule 1 to Form 45-106F1, rather than all applicable paragraphs.

B. Requirement to identify insiders of the issuer

Information as to whether a person compensated is an insider of the issuer, as would be required by proposed amendment to Item 8 of Form 45-106F1, or whether a purchaser is an insider of the issuer, as would be required by proposed amendment to Schedule I of Form 45-106F1, is unlikely to be readily available to underwriters and may be costly and time-consuming to obtain.

This may be especially true given that there is no definition of "insider" contained in the proposed amendment. Absent a specific definition, issuers and underwriters would be governed by the broad definition of "insider" contained in relevant securities legislation, not the insider reporting rules . This broad definition includes, for example, directors and officer of all companies that are themselves insiders of the issuer, meaning there will be a large group of individuals who may be considered insiders for the purpose of proposed Item 8 and Schedule I.

This broad group would likely be substantially larger than those who are required to file insider trading reports. National Instrument 55-104 *Insider Reporting Requirements and Exemptions* ("NI 55-104") narrowed the scope of the insider reporting requirements to only "reporting insiders", but would not apply to Forms 45-106F1, or 45-106F6, as written.

This requirement would also effectively negate the insider reporting exemptions for insiders of SEC foreign issuers and designated foreign issuers, in sections 4.12 and 5.13 of National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*. So even though insiders were exempt from insider reporting in Canada, their trades in a private placement would nonetheless be reportable as an insider's trade, with the burden of reporting now upon the underwriter, not the insider.

The information gap the CSA seeks to fill here is unclear. For reporting insiders, their purchases would be reported on their insider reports. For non-reporting insiders of reporting issuers, the CSA decided in NI 55-104 any trades were not necessary to be reported by them, so why is it necessary to be reported by the underwriter? If the insider is an insider by virtue of being a director, officer or employee of the issuer or its affiliate, the placement could be made pursuant to the alternate exemptions under section 2.124 of NI 45-106, which has no reporting requirement under section 6.1 of NI 45-106.

Recommendation: We recommend that either the requirement to identify insiders be deleted or the definition of "insider" in proposed Item 8 and Schedule I of Form 45-106F1 be sufficiently narrowed to match reporting insiders, as defined in NI 55-104, only.

C. Requirement for a trust company or registered adviser to give information about the beneficial owner of the fully managed account if they purchase on behalf of a fully managed account under subsections 2.3(2) and (4) of NI 45-106

This proposed Instruction for completing and filing Form 45-106F1 and 45-106F6 would require dealers to provide information they would not typically have gathered as part of their client onboarding process.

We note for instance that registrants are currently exempted from the know-your-client and suitability requirements of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103") if the client is a registered firm (e.g., a registered portfolio manager), pursuant to sections 13.2(5) and 13.3(3).

The proposed Instruction would impose additional information and KYC requirements on dealers simply because the investment offered is a private placement.

For the advisers, if they are making an investment on behalf of a number of clients, this new requirement would force the portfolio managers to identify the individual allocations.

Recommendation: We recommend removing the requirement for advisers acting as portfolio managers to report information related to the underlying beneficial owner(s) of fully managed accounts.

D. Concerns related to offerings by foreign issuers

Given the relatively small number of Canadian investors, in proportion to foreign investors, interested in private placements by foreign issuers, those foreign issuers and underwriters are particularly sensitive to costs, complexity and administrative burden. Even a small increase in cost or burden, in comparison to international standards, could contribute to a foreign issuer's or underwriter's decision not to issue securities in Canada.

Recommendation: The proposed amendments should take into account their potential effect on foreign issuers in order to ensure Canadian investors are not excluded from international opportunities.

Thank you for your attention to these comments.

Yours very truly,

Ross McKee

Pamela Hughes