

September 6, 2017

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)
Nova Scotia Securities Commission
Superintendent of Securities, Department of Justice
and Public Safety, Prince Edward Island Securities
Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

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Dear Sirs and Mesdames:

CSA Multilateral Notice and Request for Comment re: National Instrument 45-106 *Prospectus Exemptions*

This letter is in response to the request for comment on CSA Multilateral Notice and Request for Comment re: Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* relating to Reports of Exempt Distribution (the “**Notice**”). We appreciate the opportunity to provide comments to the Canadian Securities Administrators (“**CSA**”). As a number of comments in this letter relate specifically to Alberta issuers and Alberta legislation, this letter is also being sent directly to the Alberta Securities Commission (“**ASC**”).

Schedule 1 to Form 45-106F1 Report of Exempt Distribution

The CSA have proposed, among other things, amending Schedule 1 to Form 45-106F1 to allow issuers distributing securities to “non-individual permitted clients” to indicate this without having to specify the applicable paragraph number in the definition of “accredited investor” in section 1.1 of NI 45-106. We support this proposed amendment, but believe it should apply to all permitted clients, not just non-individuals.

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We have found that dealers in the U.S., in complying with know-your-client rules, are typically able to represent to Canadian issuers that they reasonably believe that prospective purchasers are either qualified institutional buyers (**QIBs**) or otherwise meet an exemption in the U.S., but do not collect the level of detailed information from their clients that would allow them to provide the specific paragraph number(s) in the definition of “accredited investor”. Although a QIB would benefit from the proposed amendment to exempt “non-individual permitted clients” from having to specify the category of accredited investor, issues would still arise in respect of other qualified foreign buyers. Given the exemption requirements in the U.S. and the requirements imposed contractually on dealers, a prospective purchaser that is eligible in the U.S. would qualify as an accredited investor in Canada as well. However, our experience has been that dealers are often unable to specify the applicable paragraph number in the definition of “accredited investor” based on the information that they already collect regarding their clients and are unwilling to change their practices to collect additional information because it is not market practice to do so. We have found this to be of particular issue in U.S.-denominated high-yield debt financings.

Beyond the apparent inability of U.S. dealers to readily provide detailed exemption information is the issue of the policy rationale behind such a requirement. Institutional investors and other permitted clients are large and sophisticated entities that do not require the same level of oversight and protection by the CSA.

Alberta issuers are more particularly impacted by the current requirements of Form 45-106F1 than those of some other jurisdictions as a result of ASC Policy 45-601 – *Distributions Outside Alberta*, which results in an issuance of securities by an Alberta issuer to a purchaser outside of Alberta being considered a “distribution” under Alberta securities legislation, requiring either a prospectus or an exemption under Alberta law. Accordingly, if relying on the accredited investor exemption in NI 45-106, an Alberta issuer must also provide the contact information and accredited investor paragraph number for foreign subscribers. Such disclosure requirements make it more difficult for Alberta issuers to access foreign capital markets, with little apparent benefit to the Canadian public. Our firm has recently been advised by a large U.S. broker that it was considering no longer acting as underwriter for Alberta issuers because of the requirement to provide detailed subscriber and exemption information for U.S. subscribers when it was not required to do so for Ontario issuers.

As a result of ASC Policy 45-601, other exemptions may be more attractive to Alberta issuers who are offering securities to subscribers resident outside of Canada. These include ASC Rule 72-501 – *Distributions to Purchasers Outside Alberta (ASC Rule 72-501)* as well as the minimum amount exemption in Section 2.10 of NI 45-106. However, certain specific requirements of those exemptions often render them impractical or undesirable to use.

ASC Rule 72-501 - Distributions to Purchasers Outside Alberta

Although the exemption from the prospectus requirement in ASC Rule 72-501 may be used by issuers distributing securities to purchasers resident outside of Canada, there are barriers to relying on the exemption for certain types of financings. Section 3.1(b) of ASC Rule 72-501 requires the purchaser to certify in the subscription agreement that the purchaser is not a resident of Alberta. Likewise, Section 3.1(c) of the rule requires purchasers to acknowledge certain factual matters in the subscription agreement. However, oftentimes in cross-border financings there is no subscription agreement for a prospective purchaser to complete, and therefore no opportunity for the issuer to obtain such a certification or acknowledgement. This is particularly true in the case of debt offerings, including high-yield debt financings. Instead, the purchaser is deemed to make the representations and warranties contained in the relevant offering memorandum. If the issuer wishes to raise money, it must follow market practice and is typically not in a position to impose additional requirements on a dealer. But the unintended consequence is that the issuer is then unable to avail itself of the exemption in ASC Rule 72-501.

Accordingly, we request that the ASC amend section 3.1(b) of ASC Rule 72-501 as follows:

“the purchaser certifies in the subscription agreement or makes a deemed representation in an offering memorandum that the purchaser is not a resident of Alberta and the issuer does not believe, and has no reasonable grounds to believe, that the certification or deemed representation is false”.

Likewise, we request that the ASC make the following similar amendment to section 3.1(c) of ASC Rule 72-501:

“the purchaser acknowledges in the subscription agreement or makes a deemed representation in an offering memorandum that...”

Alternatively, the exemption from the prospectus requirement in Part 2 of ASC Rule 72-501 for Eurobond offerings, which does not require the representations and acknowledgements described above, could be expanded to apply to high-yield debt securities. Since such securities would not typically be listed or quoted on a “genuine market”, a minimum investment amount requirement or a qualified purchaser requirement could be included to satisfy any policy concerns of the ASC.

We note that BC Instrument 72-503 - *Distribution of Securities outside British Columbia* (“**BC Instrument 72-503**”) is very similar to ASC Rule 72-501 and that as a consequence BC issuers may encounter similar difficulties with utilizing the exemption for cross-border debt financings.

We note further that proposed OSC Rule 72-503 – *Distributions Outside Canada*, in contrast to ASC Rule 72-501 and BC Instrument 72-503, would provide a series of broad and streamlined exemptions for distributions of securities to persons and companies outside Canada. For example, the prospectus requirement would not apply in connection with such a distribution where, quite simply, the issuer has materially complied with the securities law requirements of the jurisdiction outside Canada. We also note proposed OSC Form 72-503F – *Report of Distributions Outside Canada*, which does not require the issuer to disclose any information about the purchasers and therefore would impose far less of an administrative burden on the issuer. The ASC should consider adopting a similar approach in order for Alberta issuers to remain competitive and be able to efficiently access foreign capital markets.

Minimum Amount Exemption in Section 2.10 of NI 45-106

Although the “minimum amount” prospectus exemption set forth in Section 2.10 of NI 45-106 is generally available as an alternative to the accredited investor exemption and the exemption in ASC Rule 72-501 for a trade in a security to a non-individual who invests a minimum of \$150,000 in cash in an issuer, it has become less popular in Alberta since the introduction of ASC Rule 45-511 - *Local Prospectus Exemptions and Related Requirements* (**ASC Rule 45-511**) in June 2010. Due to the application of Section 3.4 of ASC Rule 45-511, any document purporting to describe the business and affairs of the issuer and prepared for review by prospective purchasers to assist in making an investment decision in connection with reliance on Section 2.10 is designated to be an offering memorandum, which has disclosure and liability implications. In particular, the granting of statutory rights of rescission or damages and two-day right of rescission make the exemption less attractive to issuers.

To make this prospectus exemption more attractive to Alberta issuers, while still recognizing the importance of investor protection, we propose either the creation of a new exemption or the modification of the existing exemption and ASC Rule 45-511 to provide for a category of “super investment” that would apply to investments by non-individuals of, for example, greater than \$500,000. We propose that for such large investments, ASC Rule 45-511 would not apply. A non-individual that is able to invest more than \$500,000 is likely a sophisticated investor that does not require the same level of protection by the CSA.

Should you have any questions with respect to the foregoing, please do not hesitate to contact the undersigned.

Yours very truly,

(signed) "*Katherine Prusinkiewicz*"

Katherine Prusinkiewicz
Partner, Senior Knowledge Lawyer

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