INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

701 West Georgia Street | Suite 1500
Vancouver, BC | V7Y 1C6
604.637.1677 | www.iiac.ca

www.iiac.ca

Susan Copland, LLB, BComm
Managing Director
scopland@iiac.ca

The Secretary
Ontario Securities Commission
20 Queen St West
Toronto, ON
M5H-3S8
comments@osc.gov.on.ca

Me Anne Marie Beaudoin
Corporate Secretary
Autorite des marches financiers
800 rue du Square Victoria, 22 etage
Montreal, QC H4Z 1G3
Consultation-en-cours@lautorite.qc.ca

September 27, 2017

Dear Sir/Madam:

Re: CSA Request for Comment – NI 45-102 *Resale of Securities* (Foreign Issuer Exemption)

The Investment Industry Association of Canada (the "IIAC" or the "Association") appreciates the opportunity to comment on the proposed amendments to the prospectus exemption relating to foreign issuers (the "Proposed Exemption").

The IIAC supports the CSA's effort to simplify the criteria and process relating to financings undertaken by foreign issuers. We concur with the concerns expressed about the existing provisions in NI 45-102, relating to the practical problems of imposing ownership conditions in the exemption. The Proposed Exemption would make it much simpler and add predictability to the process of financing foreign issuers. The similarities to US legislation provides useful consistency.

In determining the effectiveness of the proposed exemption, it is important to understand the objective of the regulation. Members questioned whether the objective of the exemption is only to protect investors in Canada, or to also encourage firms to list in Canada.

1. We have proposed a definition of "foreign issuer" for the purposes of the proposed exemption.

a. Are the proposed elements of the definition of foreign issuer appropriate for purposes of establishing that an issuer has a minimal connection to Canada? If not, please explain which elements of the proposed definition of foreign issuer are not appropriate and why.

The proposed definition provides simplicity and predictability, which in turn makes the process more efficient, and does not discourage issuers from conducting these transactions. The removal of the 10% threshold is helpful, as this has been a practical impediment to such transactions. The exemption appropriately targets non Canadian issuers, and does not incent Canadian issuers to list on foreign marketplaces and bypass Canadian markets.

b. Are there other elements we should incorporate into the proposed definition of foreign issuer that would be a more appropriate indicator of whether an issuer has a minimal connection to Canada? If so, which ones and why.

As noted above, the definition provides clarity and simplicity. Although there may be circumstances where the definition may capture issuers without a significant connection to Canada, such as where the head office may be the only nexus to Canada, these situations would not occur frequently, and would be better managed through the issuer obtaining an exemption order rather than by attempting to accommodate such situations in the regulation.

c. Would investors be able to easily determine whether the majority of the consolidated assets of the issuer are located in Canada for purposes of the new foreign issuer definition? Please explain the reasons for your views.

It would be helpful if guidance clarified how this would be evidenced. Is the issuer required to have the assets segregated on its financial statements?

d. Are there other aspects of the proposed definition of foreign issuer that would be difficult to determine and should be removed? Please explain which aspects and why.

The definition of "ordinarily reside" as it applies to the executive directors and officers of the issuers should be clarified. Is this intended to be consistent with the criteria used for tax purposes?

e. In practice, will investors be able to obtain sufficient information from the issuer at the date of distribution to enable them to determine whether the issuer meets the definition of foreign issuer? If not, could investors easily make this determination on their own without assistance from the issuer? Please explain the reasons for your views.

It should be relatively easy to determine whether the issuer meets the definition of foreign issuer, unless there is a geographical distribution of assets that is not clear by examining the disclosure record of the issuer.

2. Under the proposed exemption, the determination of whether an issuer is a foreign issuer is made at the distribution date. We are proposing that the determination be made at this date because, in our view, it provides certainty to the investor at the time of the initial purchase as to whether the proposed exemption will be available for the subsequent resale of the securities. Also, it enables the investor to ask the issuer to make representations as to its foreign issuer status at the time of distribution.

a. Do you agree with our analysis? If not, please explain why.

We agree with this analysis.

b. Do you believe that the date of trade is a more appropriate time to determine foreign issuer status? If so, please explain why.

Using the date of trade to determine foreign issuer status would add complexity and unpredictability to the process. It would result in unfairness in that the resale implications could change after the purchase is made. The resale conditions are a significant factor in the investment decision, and certainty in respect of this factor is critical in arranging financing. Using the date of trade would create an obligation on the investor to continually monitor the status of the issuer subsequent to the initial transaction to ensure that it still remains a foreign issuer. This is not practical.

c. Do you believe we should allow a choice as to whether the determination of the foreign issuer status is made at either the distribution date or the date of trade? Please explain the reasons for your views.

There should not be a choice, and the determination should be set on the distribution date. See b. above.

3. Under the proposed exemption, the determination of the non-reporting issuer status is made at either the distribution date or the date of trade.

a. Do you agree with this approach?

The IIAC strongly disagrees with this approach, and advocates limiting the determination of status to the distribution date. As stated above, allowing status to be determined on the trade date will create unpredictability and will provide a disincentive to investors, as the resale conditions of their investment will be subject to change.

b. Do you believe that determination should be made at only one of these dates? If so, which date? Please explain the reasons for your views.

See a. above

4. We have stipulated as a condition to the proposed exemption that if the selling security holder is an insider of the issuer, then no unusual efforts can be made by the selling security holder to prepare the market or to create a demand in Canada for the security that is the subject of the trade.

a. Do you think that such a condition is appropriate? Please explain why or why not?

This condition creates practical difficulties, as the definition of "insider" varies in different jurisdictions. It is unclear whether the intended definition would be the Canadian version, or that of the applicable foreign market.

b. Would a different condition be more appropriate to address potential concerns about selling security holders that are insiders preparing the market or creating a demand in Canada for the foreign issuer's securities? Please explain and provide examples.

The Proposal should provide guidance on what activities would constitute "preparing the market".

c. Do you think we should be concerned that security holders that are insiders may prepare the market or create a demand in Canada for the foreign issuer's securities? Please explain the reasons for your views.

See c. above

5. Under the proposed amendments, we are proposing to repeal the existing 2.14 exemption. The existing 2.14 exemption applies to the securities of non-reporting issuers that satisfy the ownership conditions whereas the proposed exemption applies to the securities of non-reporting issuers that are foreign issuers.

a. Are you aware of non-reporting issuers that use the existing 2.14 exemption and would not qualify as foreign issuers under the proposed exemption? Please provide examples.

Although such circumstances may exist, they would be extremely rare, and could, if appropriate, be dealt with using a specific exemption order. We do not recommend amending the proposed exemption in order to accommodate potentially remote scenarios.

b. Are there other circumstances where an issuer would be able to use the existing 2.14 exemption but not the proposed exemption? Please provide examples.

See 5(a) above

c. Do you foresee any other issues if we repeal the existing 2.14 exemption? Please provide examples.

If the 2.14 exemption is repealed, there should be provisions that would grandfather the previous transactions that were undertaken and benefited from the exemption.

6. The proposed exemption would not be available for the resale outside of Canada of securities of an issuer incorporated or organized in Canada because such issuers do not fall within the definition of foreign issuer.

a. In your view, should we consider a similar exemption for the resale outside of Canada of securities of a Canadian issuer distributed under a prospectus exemption if the securities of the Canadian issuer are only listed on an exchange, or market, outside of Canada? Please explain the reasons for your views.

Such an exemption may be problematic, in that it may encourage issuers to list outside of Canada, and offer securities to Canadian investors without a hold period or prospectus. This could provide an incentive to issuers to circumvent Canadian securities law and sell securities to Canadians outside of the Canadian regulatory ecosystem as the securities would be privately placed to Canadians could avoiding the prospectus process and resale provisions.

b. What conditions, if any, would you suggest we include in a similar exemption? Please explain the reasons for your suggestions.

We do not recommend implementing a similar exemption for the reasons articulated in 6(a).

Thank you for considering our comments. If you have any questions, please don't hesitate to contact me.

Yours sincerely,

Susan Copland