

NATIONAL INSTRUMENT 45-106 – PROSPECTUS AND REGISTRATION EXEMPTIONS -
A CONSOLIDATION OF CANADIAN PRIVATE PLACEMENT RULES

On September 14, 2005, the Canadian Securities Administrators (the "CSA") implemented National Instrument 45-106 ("NI 45-106") with the goal of providing market participants engaging in multi-jurisdictional distributions with a more efficient distribution regime based on harmonized offering rules.

Under the previous regime, most jurisdictions had similar, but not identical, sets of exemptions. This meant that market participants wishing to effect a multi-jurisdictional exempt distribution in Canada were required to comply with each of the exempt prospectus and registrations distribution regimes of the various provinces and territories. NI 45-106, however, provides certain exemptions that are identical across the country.

Until November 3, 2005, transactions that would have been exempt from the dealer registration and/or prospectus requirements under the old rules can continue to be completed on an exempt basis.

PROSPECTUS AND REGISTRATION EXEMPTIONS

Accredited Investor Exemption

NI 45-106 provides an exemption from the registration and prospectus requirements of the securities legislation to an investor who qualifies as an accredited investor and purchases the securities as principal. The definition of accredited investor found in NI 45-106 is a combination of the definitions contained in the earlier regulatory instruments from the various jurisdictions. The definition includes both institutional and individual categories. As with prior definitions of accredited investor, there continues to be no minimum level of investment in order to rely on the exemption.

Family, friends and business associates

This exemption is available in all jurisdictions except Ontario and applies to purchases of securities of an issuer by (i) directors, executive officers and control persons of the issuer or an affiliate of the issuer; (ii) founders of the issuer who are currently actively involved in the business; and (iii) certain family members, close personal friends and close business associates of persons listed in (i) and (ii). In Saskatchewan, close friends and business associates must sign a risk acknowledgement prior to the purchase of the securities. There is a similar, although slightly different, exemption available to purchasers in Ontario who are (i) founders of the issuer who are currently actively involved in the business (and their affiliates); (ii) certain relatives of executive officers, directors and founders of the issuer; and (iii) control persons of the issuer.

Minimum amount investment

The CSA reinstated, in the case of Ontario, and preserved in the case of other provinces, the minimum investment exemption. Securities of an issuer can be sold on an exempt basis to any purchaser purchasing as principal, if the securities have an acquisition cost of at least \$150,000, paid in cash at closing. This amount is equal to the former "private placement" level in Ontario and Quebec and represents an increase from the \$97,000 level which was previously in force in certain other provinces. Additional investments may be made on an exempt basis provided that they also have an acquisition cost of at least \$150,000.

Private issuer

Private issuers can sell on an exempt basis securities of its own issue of any value to a list of specified investors (including directors, executives and certain of their relatives; existing securityholders; accredited investors; and persons who are not members of the public) who purchase the securities as principal. This exemption will replace the "closely held issuer exemption" in Ontario and the "closed company" exemption in Quebec. Under NI 45-106, an issuer is a "private issuer" if (i) it is not a reporting issuer or an investment fund; (ii) its constating documents or securityholders' agreement contains restrictions on the transfer of its securities (other than non-convertible debt securities); (iii) its securities are owned by not more than 50 persons, excluding employees and former employees of the issuer or its affiliates; and (iv) it has distributed securities only to a prescribed class of persons.

Investment Funds Exemption

NI 45-106 consolidates a number of registration and prospectus exemptions previously relied upon by investment funds.

NI 45-106 provides for an exemption for all forms of dividends and distributions used for reinvestment in additional securities of the same class or series under a plan (voluntary or mandatory) provided that the plan is available to all investors in the investment fund and no sales commissions or charges are payable in connection with the reinvestment. There are also certain disclosure requirements in connection with the prospectus of the investment fund relating to redemption fees and the ability to elect to receive cash payments. If the securities of an investment fund are listed on a stock exchange or other market, the investment fund will be permitted to issue, on an exempt basis, additional securities of the same class or series to existing securityholders through voluntary purchase plans subject to a limit of 2% of the investment fund's outstanding securities at the beginning of its fiscal year.

Subsequent investments in investment funds are exempt if the purchaser, at the time of the subsequent investment, holds securities having an acquisition cost of at least \$150,000, paid in cash, or if the net asset value of those securities is at least \$150,000 at the time of the trade.

Employee, Executive Officer, Director and Consultant Exemptions

An issuer may issue, or a control person may sell, securities to employees, executive officers, directors or consultants of the issuer and related entities of the issuer provided that the individual's participation in the trade is voluntary. These individuals may also trade among themselves on an exempt basis. These exemptions are similar to those previously available in Multilateral Instrument

45-105 - *Trades to Employees, Senior Officers, Directors and Consultants*. The introduction of this exemption is most significant in Quebec where such trades previously required an application for approval.

Offering Memorandum Exemption

Except in Ontario, issuers are permitted to sell securities on an exempt basis if an offering memorandum is prepared in the required form and purchasers sign a risk acknowledgement statement. Should an offering memorandum contain a misrepresentation, purchasers will have a right of action for damages or rescission. There are two versions of the offering memorandum exemption, one applicable in British Columbia, New Brunswick, Nova Scotia and Newfoundland and Labrador, and a second applicable in Alberta, Manitoba, Northwest Territories, Nunavut, Prince Edward Island, Quebec and Saskatchewan. The principal difference between the two exemptions is that the latter requires purchasers, either to be "eligible investors" (as defined in MI 45-106) or to purchase securities with an aggregate acquisition cost that is less than \$10,000.

Other Exemptions

NI 45-106 also provides for a number of other exemptions from the prospectus and registration requirements of securities legislation including:

- an exemption for rights offerings provided that the offering is in compliance with National Instrument 45-101 – *Rights Offerings*;
- an exemption for business combinations and reorganizations such as amalgamations, mergers, reorganizations and arrangements under statutory procedures or as described in an information circular and approved by securityholders;
- an exemption for a trade by an issuer that involves securities of its own issue distributed as consideration for assets having a fair market value of at least \$150,000;
- an exemption for a trade by an issuer that involves securities of its own issue distributed as consideration for the acquisition of petroleum, natural gas or mining properties or any interest therein;
- an exemption for securities issued by an issuer to a creditor in settlement of a *bona fide* debt of the issuer;
- an exemption for trades of debt securities that are rated and issued or guaranteed by governments, Canadian financial institutions and Schedule III banks;
- an exemption for trades in non-convertible negotiable promissory notes or commercial paper maturing within one year of issue and with an approved credit rating;
- an exemption for trades in non-syndicated mortgages on real property by a registered or licensed person;
- an exemption for trades that are a conversion, exchange or exercise of securities automatically, at the option of the holder or at the option of the issuer;

- in Ontario only, certain registration exemptions for trades in Ontario by market intermediaries are removed, preserving the province's former universal registration regime.

Certain jurisdictions, including Ontario have retained certain local exemptions which, in the case of Ontario, are set forth in the revised Ontario Securities Commission Rule 45-501. The exemptions set forth in this rule include exemptions for trades of certain government incentive securities, a trade in a commodity futures option or contract, a trade in securities of a credit union to which the *Credit Unions and Caisses Populaires Act, 1994* applies and certain trades in securities to or from a self-directed RESP.

REPORTING REQUIREMENTS

In addition to harmonizing the available exemptions, NI 45-106 has also harmonized the post-trade reporting requirements for private placements. Except in British Columbia, Form 45-106F1 is the prescribed reporting form, and is required to be filed within 10 days of the trade made in reliance upon a number of the exemptions described above. In British Columbia, the form of report will be specified by the British Columbia Securities Commission.

It is noteworthy that Form 45-106F1 requires an issuer to disclose the purchasers of its securities in all jurisdictions including foreign jurisdictions (which was not previously required). The CSA has indicated that this disclosure is necessary to protect the integrity of the capital markets in Canada.

In Ontario, privacy legislation requires the OSC to obtain consent when it indirectly collects personal information. As a result, the OSC is requiring issuers to obtain an authorization from purchasers permitting this indirect collection of their personal information by the OSC.

RESALE REQUIREMENTS

The CSA has also amended Multilateral Instrument 45-102 – Resale of Securities to include Quebec, which previously maintained a separate regime of resale restrictions. This has resulted in MI 45-102 becoming a National Instrument and effectively harmonizing resale restrictions across the country. There are a number of housekeeping and consequential amendments incorporated in this rule.

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This update is intended for general information purposes only and should not be relied upon as legal advice.

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