Canadian Securities Administrators | Autorités canadiennes en valeurs mobilières

# CSA Notice of Amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* Relating to the Accredited Investor and Minimum Amount Investment Prospectus Exemptions

February 19, 2015

## Introduction

The Canadian Securities Administrators (**CSA** or **we**) are adopting amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106) relating to the accredited investor and minimum amount investment prospectus exemptions (the Rule Amendments). We are modifying and replacing Companion Policy 45-106CP *Prospectus and Registration Exemptions* with Companion Policy 45-106CP *Prospectus Exemptions* (the modified Companion Policy) to provide more guidance on how to verify whether potential purchasers satisfy the conditions of particular prospectus exemptions and to reflect the repeal of Part 3 of NI 45-106.

We are making consequential amendments to a number of instruments to reflect the repeal of Part 3 of NI 45-106 and the change in the title of NI 45-106 from *Prospectus and Registration Exemptions* to *Prospectus Exemptions* (the Consequential Amendments). We are also making consequential changes (the Consequential Changes) to a number of policies to reflect the change in title.

We refer to the Rule Amendments, Consequential Amendments, modified Companion Policy and Consequential Changes collectively as the Amendments.

Provided all necessary ministerial approvals are obtained, the Amendments will come into force on **May 5, 2015.** In Ontario, the Amendments will come into force on the later of May 5, 2015 and the day on which subsection 12(2) of Schedule 26 of the *Budget Measures Act, 2009* is proclaimed in force.

## Substance and Purpose

The Rule Amendments and modified Companion Policy are intended to address concerns that:

- some individual investors may not understand the risks of investing under the accredited investor prospectus exemption (the AI exemption) or may not in fact qualify as accredited investors
- the threshold of $150,000 in the minimum amount investment prospectus exemption (the MA exemption) may not be a proxy for sophistication or ability to withstand financial loss for individual investors and may encourage over-concentration in one investment for an investor who is an individual.

The Rule Amendments also amend the definition of accredited investor in Ontario to allow fully managed accounts to purchase investment fund securities under the managed account category of the AI exemption, as is already permitted in other Canadian jurisdictions.

**Background**

The AI exemption and the MA exemption have historically been premised on the investor having one or more of

- a certain level of sophistication
- the ability to withstand financial loss
- the financial resources to obtain expert advice
- the incentive to carefully evaluate the investment given its size.

The AI exemption and the MA exemption provide cost-effective objective measures for issuers to distribute securities to raise capital or for other purposes. However, the thresholds for individuals to qualify as accredited investors have not been changed or adjusted for inflation since they were originally set[1].

The CSA conducted a broad review of the AI exemption and the MA exemption because of investor protection concerns highlighted by the financial crisis in 2007-2008. As part of our broad review, CSA staff reviewed and considered the following information:

- 110 comment letters received on CSA Staff Consultation Note 45-401 *Review of Minimum Amount and Accredited Investor Exemptions*
- feedback received during consultation sessions held across Canada
- data relating to the exempt market and the use of the capital raising prospectus exemptions gathered from reports of exempt distribution filed in the participating jurisdictions for distributions in 2011
- data compiled from Statistics Canada on Canadian income levels
- input from compliance and enforcement staff about complaints and investigations involving the use of these exemptions
- decisions resulting from enforcement proceedings of securities regulatory authorities involving the exemptions
- guidance issued by CSA members on establishing accredited investor status.

Following our broad review, on February 27, 2014 the CSA published for comment the following proposed amendments to NI 45-106 (the Proposed Amendments):

- The MA exemption would be available only for distributions to non-individuals,
- The AI exemption would be amended to:
    - require individual accredited investors, except those who meet the permitted client test under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103), to complete and sign a new risk acknowledgement form,

[1] The Securities and Exchange Commission originally set the thresholds for individuals to qualify as accredited investors in 1982; the CSA adopted similar thresholds in the early 2000s. The current threshold of $150,000 for the MA exemption was originally set in 1987.

  - require any salesperson or finder to complete and sign the new risk acknowledgement form,
  - include family trusts established by an accredited investor for his or her family in the definition of accredited investor, and
  - in Ontario, allow fully managed accounts to purchase investment fund securities under the managed account category of the AI exemption, harmonizing with the rest of the CSA.
- The Companion Policy 45-106CP would be modified to provide additional guidance on steps persons relying on the AI exemption should take to verify accredited investor status.
- The report of exempt distribution (Form 45-106F1 and, in BC, Form 45-106F6) would be amended to require additional information from issuers, including identifying the category of accredited investor of each purchaser and providing more information on any person being compensated in connection with the distribution.
- Housekeeping amendments resulting from the removal of the dealer registration exemptions in Part 3 of NI 45-106 effective March 27, 2010.

**Summary of Written Comments Received by the CSA**

During the comment period, we received submissions from 28 commenters. We have considered the comments received and thank all of the commenters for their input. The names of commenters are contained in Annex A of this notice and a summary of their comments, together with our responses, are contained in Annex B of this notice.

**Summary of Changes to the Proposed Amendments**

After considering the comments received, we have made some revisions to the Proposed Amendments that were published for comment. Those revisions are reflected in the Amendments we are publishing concurrently with this notice. As these changes are not material, we are not republishing the Amendments for a further comment period.

The key changes from the Proposed Amendments are as follows:

- We have clarified that the categories of individual accredited investor who must sign the risk acknowledgement form are those individuals set out in paragraphs (j), (k) and (l) of the definition of "accredited investor".
- We have revised Form 45-106F9 *Form for Individual Accredited Investors* to make it easier for persons using the AI exemption to complete and for investors to understand.
- We have removed the requirement for salespersons and finders to sign Form 45-106F9.
- We have clarified and reorganized the guidance in the modified Companion Policy on practices for verifying whether purchasers meet the conditions of certain exemptions, including not only the AI exemption, but also the private issuer prospectus exemption, the family, friends and business associates prospectus exemption and, in some jurisdictions, the eligible investor definition under the offering memorandum prospectus exemption.
- We have provided additional guidance in the modified Companion Policy on the meaning of close personal friend and close business associate.
- We have deferred making amendments to the report of exempt distribution. We will

address changes to the report of exempt distribution as a separate CSA project.

**Consequential Amendments**

**National Amendments**
We are making consequential amendments to the following instruments to reflect the repeal of Part 3 of NI 45-106 on March 27, 2010 and the change in the title of NI 45-106 from *Prospectus and Registration Exemptions* to *Prospectus Exemptions*:

- Multilateral Instrument 11-102 *Passport System*
- Multilateral Instrument 13-102 *System Fees for SEDAR and NRD*
- National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*
- National Instrument 33-105 *Underwriting Conflicts*
- National Instrument 41-101 *General Prospectus Requirements*
- National Instrument 45-102 *Resale of Securities*
- National Instrument 51-102 *Continuous Disclosure Obligations*
- National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*
- National Instrument 62-103 *The Early Warning System and Related Take-Over and Insider Reporting Issues*
- Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*

We are also making consequential changes to the following policies to reflect the change in title of NI 45-106 from *Prospectus and Registration Exemptions* to *Prospectus Exemptions*:

- Companion Policy 11-102CP *Passport System*
- National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions*
- Companion Policy 23-103 *Electronic Trading and Direct Electronic Access to Marketplaces*
- Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations*
- Companion Policy 45-102CP *Resale of Securities*
- Companion Policy 51-105CP *Issuers Quoted in the U.S. Over-the-Counter Markets*

**Local Matters**
An annex is being published in any local jurisdiction that is making related changes to local securities laws, including local notices or other policy instruments in that jurisdiction. It also includes any additional information that is relevant to that jurisdiction only.

The Ontario Securities Commission (OSC) will amend NI 45-106, National Instrument 45-102 Resale of Securities (NI 45-102) and OSC Rule 45-501 Ontario Prospectus and Registration Exemptions (OSC Rule 45-501) to reflect the anticipated coming into force of certain amendments to the Securities Act (Ontario). A more detailed explanation of these proposed local amendments is available on the OSC website (www.osc.gov.on.ca). The OSC's local amendments to NI 45-106 are reflected in the amending instrument of NI 45-106.

**Contents of Annexes**

The following annexes form part of this CSA Notice:

| | |
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| Annex A | List of Commenters |
| Annex B | Summary of Comments and CSA Responses |
| Annex C | Amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* |
| Annex D | Blackline of changes to Companion Policy 45-106CP *Prospectus and Registration Amendments* |
| Annex E | Amendments to National Instrument 51-102 *Continuous Disclosure Obligations* |
| Annex F | Amendments to Specified Instruments |
| Annex G | Changes to Specified Policies |

**Questions**

Please refer your questions to any of the following:

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**Annex A**
**List of Commenters**

Accredited Access
Advocis
Alternative Investment Management Association (AIMA)
Blake, Cassels & Graydon LLP
The Canadian Advocacy Council for Canadian CFA Institutes Societies (CFA)
Canadian Foundation for Advancement of Investor Rights (FAIR)
Cawkell Brodie LLP
Cowan Asset Management
Darrin Hopkins
Davies Ward Phillips & Vineberg LLP
Dentons Canada LLP
Fasken Martineau DuMoulin LLP
Fiore Management & Advisory Corp.
Haywood Securities Inc.
Investment Industry Association of Canada (IIAC)
National Exempt Market Association (NEMA)
Osler, Hoskin & Harcourt LLP
Portfolio Management Association of Canada (PMAC)
Private Capital Markets Association of Canada (PCMA)
Prospectors & Developers Association of Canada (PDAC)
Rae & Lipskie Investment Counsel Inc.
RBC Dominion Securities Inc., RBC Direct Investing Inc., RBC PH&N Investment Counsel Inc. and RBC Global Asset Management Inc.
Reed Pope Law Corporation
The Securities Industry and Financial Markets Association (SIFMA)
Siskinds LLP
Stikeman Elliott LLP
TMX Group
Walton International Group Inc.

**Annex B**

**Summary of comments on CSA Notice and Request for Comment**

**Proposed Amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* relating to the Accredited Investor and Minimum Amount Investment Prospectus Exemptions**

| Item | Topic/Theme | Summarized comment | CSA Response |
|---|---|---|---|
| A. | Comments on proposed amendment to restrict minimum amount investment prospectus exemption (MA exemption) to non-individual purchasers | | |
| 1. | Support for amendment | Many commenters supported the proposal to restrict the MA exemption to non-individuals, for the following reasons:<br>• in many cases, such a high investment amount in one product would be unsuitable for an individual who is not already an accredited investor<br>• alternative exemptions, such as the accredited investor exemption (AI exemption), would be available for individual investors<br>• the reduced risk of investors over-concentrating their investment portfolio is well worth the minor reduction in access to capital raising | The CSA thank the commenters for their support. We have decided to proceed with the proposed amendment as published for comment. |
| 2. | Remove exemption entirely or further restrict it | Some commenters suggested that the CSA should repeal the exemption altogether or that the CSA should replace the current exemption with a test that is not tied to an investment amount.<br><br>One commenter suggested that an investment of $150,000 is a poor proxy for sophistication and ability to withstand financial loss. The commenter therefore recommended further amendments to restrict the use of the MA exemption by small companies or family trusts. | The CSA has determined to proceed with the proposed amendment as published. There are certain transactions between non-individual investors where the MA exemption is useful because of its simplicity. The types of problems we have seen with the MA exemption only arise with individual investors – we have not seen the same problems in circumstances where the investor is not an individual, including where the investor is a small company or family trust. For this reason, we do not propose to add further restrictions at this time. |
| 3. | Maintain for investment funds and lower-risk products | Two commenters suggested that the MA exemption should continue to be available to distribute investment funds and lower-risk products to individuals. | The CSA has determined to proceed with the proposed amendment to the MA exemption as published, to apply to all securities. We do not agree that some products are always lower risk than other products. |

| Item | Topic/Theme | Summarized comment | CSA Response |
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| 4. | Comments against amendment | Some commenters disagreed with the proposal to restrict the MA exemption to non-individual investors for the following reasons:<br>• there is not a demonstrable reason to restrict it<br>• for many investors, $150,000 is a significant amount and, in the commenter's experience, these investors take due care when choosing to invest that amount in a single investment<br>• the amount demonstrates that the investor has sufficient resources to conduct due diligence when making the investment decision<br>• investors are not forced to invest under this exemption | The CSA has seen instances where individuals have invested more than is suitable for them under the MA exemption solely because the investor is required to invest a minimum amount of $150,000 to satisfy the requirements of the exemption. We see less of this concern with other exemptions because the investor may choose the amount they want to invest. Given the relatively small amount of capital raised under this exemption from individuals and the devastating loss suffered by some investors because of this exemption, the CSA has determined to proceed with this amendment. |
| 5. | Holding companies | One commenter asked if the restriction to non-individuals would also apply to holding companies of individuals. The same commenter suggested that the prohibition in section 2.10(2) of NI 45-106 may be unduly restrictive where an investor wants to invest through a holding company. | The proposed amendment will restrict the MA exemption to non-individuals. It will remain available to holding companies, subject to the existing prohibition in subsection 2.10(2). Under subsection 2.10(2), the MA exemption is not available for distributions to an entity if that entity was created or used *solely* to purchase or hold securities under the MA exemption. We do not agree that the provision in subsection 2.10(2) is unduly restrictive. If the investor has created the holding company for tax and estate planning purposes or to ensure limited liability, then the holding company would not generally be considered to have been created solely for the purpose of relying on this exemption. |
| B. | Comments on amendments to definition of accredited investor | | |
| 1. | Support for amendment to add family trusts as a category of accredited investor | Many commenters supported the proposed amendment to include trusts established by accredited investors for their family members as a category of accredited investor. A few commenters suggested we include former spouses and family members of former spouses in the group. | The CSA thanks the commenters for their support. We have revised the family trust category to include former spouses and family members of former spouses. |
| 2. | Support for amendment to allow fully managed accounts to purchase investment funds in | Many commenters supported the proposed amendment in Ontario. | The OSC thanks the commenters for their support. The OSC has determined to proceed with this amendment. |

| Item | Topic/Theme | Summarized comment | CSA Response |
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| | Ontario under the managed account category of the AI exemption | | |
| 3. | Registered individuals | One commenter suggested we revise paragraph (e) of the definition of accredited investor to clarify when a former registrant is excluded from the definition of accredited investor. | We have made the suggested clarification. |
| 4. | Support for no changes to income and asset thresholds for individual accredited investors | Some commenters supported the decision to keep the current income and asset thresholds set out in the definition of accredited investor because of the possible negative impact on capital raising in Canada. | The CSA thanks the commenters for their support. |
| 5. | Review income and asset thresholds periodically | Some commenters suggested that the CSA periodically review the income and asset thresholds for individual investors under the accredited investor definition. | CSA staff will periodically monitor relevant data and developments in other jurisdictions. If circumstances warrant it, the CSA will assess whether to consider changes to the current income and asset thresholds under the AI exemption. |
| 6. | Criticism that income and asset thresholds were not increased | Some commenters stated that the current income and asset thresholds are not a good proxy for an individual investor's capacity to appreciate the risks, costs and potential consequences of a particular investment. One commenter suggested the CSA develop a "sophistication test" similar to that used in the United Kingdom and European Union with requirements for independent verification and educational courses. Another commenter suggested that additional protections should be built into the exemption. | The CSA has determined to retain the current income and asset thresholds for individuals because they provide a cost-effective, objective measure for issuers to distribute securities. During our review of comment letters received on CSA Staff Consultation Note 45-401 *Review of Minimum Amount and Accredited Investor Exemptions,* we considered alternative approaches to the income and asset thresholds. We were not able to identify an appropriate measure that issuers could use to assess an individual's sophistication based on education, work or investment experience. We had concerns that possible alternative approaches were not objective measures and would be difficult to consistently apply.<br><br>The CSA will continue to monitor developments in other jurisdictions and if an alternative measure is introduced elsewhere, the CSA will assess whether to consider a similar test for the Canadian exempt market. |

| Item | Topic/Theme | Summarized comment | CSA Response |
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| C. | Comments on proposed amendment to accredited investor prospectus exemption (AI exemption) to require individual accredited investors who are not permitted clients to sign Form 45-106F9 *Form for Individual Accredited Investors* (Form 45-106F9) | | |
| 1. | Support for amendment to require individual accredited investors to sign Form 45-106F9 | Some commenters supported the proposed amendment to require individual accredited investors to sign Form 45-106F9 because it would add protection for investors with little additional work for issuers. Some of these commenters suggested revisions to clarify which individual accredited investors are required to sign Form 45-106F9. Some commenters also identified procedural difficulties with the proposed Form 45-106F9. | The CSA thanks the commenters for their support. The CSA has determined to proceed with this proposed amendment. We have clarified that the requirement only applies to individuals described in paragraphs (j), (k) and (l) of the definition of accredited investor. We have amended the instructions in Form 45-106F9 to address some of the procedural difficulties identified by commenters. |
| 2. | Comments against amendment | Several commenters were critical of the proposed amendment.<br><br>Some of these commenters thought the proposed amendments were not necessary because they had not seen problems in connection with the AI exemption. These commenters thought the proposed amendments would increase the time and cost of raising capital.<br><br>Others of these commenters thought the addition of a risk acknowledgement form would not address the problems associated with the AI exemption, such as investors buying products that are not suitable for them or that they do not understand. Others questioned whether Form 45-106F9 would have any effect on investor behavior. | The CSA has determined to proceed with the proposed amendment in order to address the problem that some individual accredited investors do not understand the risks of investing under the AI exemption or may not in fact qualify as accredited investors. We think Form 45-106F9 will improve investor protection by itemizing the risks associated with products sold under prospectus exemptions (risk of loss, limited liquidity, lack of information and advice) and requiring individual accredited investors to initial beside each risk, increasing the likelihood that investors are aware of the risks. Form 45-106F9 describes, in plain language, the criteria that must be met for an investor to qualify as an accredited investor and requires the investor to initial beside the criteria that applies to him or her.<br><br>Form 45-106F9 is not intended to replace any existing obligations under securities legislation, including the suitability, know-your-client and know-your-product obligations of registered dealers and advisers when facilitating distributions of securities under prospectus exemptions. |
| 3. | Excluding permitted clients from signing Form 45-106F9 | Some commenters expressed support for the CSA's proposal to exclude individuals that satisfy the permitted client test from the requirement to sign Form 45-106F9 because these individual are able to waive suitability advice under National Instrument | The CSA has determined to proceed with the proposal to exclude individual permitted clients from the requirement to sign the Form 45-106F9. We think this is an appropriate balance because permitted clients are |

| Item | Topic/Theme | Summarized comment | CSA Response |
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| | | 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) and this would lessen the burden on issuers.<br><br>A couple of commenters disagreed with the proposal to exclude permitted clients either because of difficulties in determining who is a permitted client or because permitted clients should be afforded similar protection to other investors. | able to waive suitability advice under NI 31-103. |
| 4. | Information already in subscription agreements | Several commenters expressed the view that Form 45-106F9 was not necessary because most issuers already include a description of the risks and accredited investor categories in their subscription agreements. These commenters thought Form 45-106F9 was redundant and would add unnecessary duplication and burden.<br><br>Other commenters suggested that the CSA require the content of Form 45-106F9 be included in subscription agreements or that Form 45-106F9 itself be a required schedule to subscription agreements. | We do not agree that it is sufficient for this information to be included in a subscription agreement. One of the problems we see with the use of the AI exemption is that information relating to the accredited investor categories is often set out in lengthy subscription agreements and is written using the legal definition rather than in accessible language. We think it is necessary that investors receive Form 45-106F9 as a separate document written using plain language. |
| 5. | Which form is required if an accredited investor AI purchases under the OM exemption? | One commenter questioned whether an investor who satisfied the requirements under both the AI exemption and the offering memorandum exemption would be required to complete and sign both Form 45-106F4 and Form 45-106F6. | The issuer is only required to comply with the conditions of one prospectus exemption. If the issuer is relying on the AI exemption, then it must obtain a signed Form 45-106F9 from every individual investor. If the issuer is relying on a different exemption, then the issuer must comply with the conditions under that exemption. Issuers should take care when preparing their exempt distribution reports that they properly identify which prospectus exemption they are using for the distribution to each investor. |
| D. | Comments on Form 45-106F9 *Form for Individual Accredited Investors* | | |
| 1. | Requiring salespersons/finders to sign Form 45-106F9 | Several commenters identified concerns with the proposed requirement for salespersons and finders to sign Form 45-106F9. Some of these commenters questioned the instruction that anyone "involved in the sale" complete and sign Form 45-106F9. Others identified that this requirement would add | We have revised Form 45-106F9 so that persons who meet with or provide information to the purchaser are no longer required to sign it. We have clarified that Form 45-106F9 must contain the following information about the person who meets with, or provides |

| Item | Topic/Theme | Summarized comment | CSA Response |
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| | | significant burden on issuers when raising capital. Some of these commenters suggested that the requirement only apply when a registered dealer or adviser is not facilitating the distribution. One commenter suggested that only salespersons, not issuers, should be required to complete the Form 45-106F9. | information to, the purchaser in connection with the transaction: their name, telephone number, email address and the name of their firm, if registered. We think this is useful information for investors, especially if they have questions after having made the investment. We disagree that issuers (or selling security holders) should not be required to complete Form 45-106F9 because it is the issuer (or selling security holder) that is required to determine if the prospectus exemption is available for purposes of the distribution. |
| 2. | Form 45-106F9 must be uniform across all Canadian jurisdictions | A few commenters requested that the CSA adopt one harmonized form because otherwise it would be inefficient and confusing for inter-jurisdictional financings. | The CSA is adopting one harmonized form. |
| 3. | Additional information should be required in Form 45-106F9 | Some commenters suggested that Form 45-106F9 include additional information, including:<br>• the specific protections an investor is foregoing because the securities are not being qualified by a prospectus;<br>• whether referral fees were paid<br>• disclosure of any conflicts of interest between issuers and dealers<br>• the percentage that the investment represents of the investor's entire portfolio<br>• disclosure of additional risks if the investor borrowed to make the investment<br>• information about the nature of the issuer, dealer and security | CSA staff carefully considered the content of Form 45-106F9 when revising it to ensure that it plainly describes the risks associated with investing under the AI exemption regardless of the type of security being distributed under the exemption, the nature of the issuer or the type of salesperson involved in the transaction. CSA staff considered whether disclosure of certain information is already required by registered dealers and advisers and attempted not to duplicate this information in the form. |
| 4. | Statements in Form 45-106F9 do not apply to certain securities or issuers, such as investment funds | Some commenters suggested that some of the statements in Form 45-106F9 do not apply to certain securities or issuers, in particular, statements that the investment is risky or that the investor may never be able to sell the securities being purchased. These commenters thought that these statements overstate the risks associated with investment funds. | We have revised Form 45-106F9 to reflect the risks of investing under prospectus exemptions generally, regardless of the product or issuer or whether a dealer is facilitating the distribution. We do not agree that all investment funds are less risky or that their securities are necessarily more easily liquidated. Some investment funds are not redeemable on demand and there have been recent cases where funds have had to suspend redemptions indefinitely. |

| Item | Topic/Theme | Summarized comment | CSA Response |
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| 5. | Timing and method of delivery | A few commenters asked that we clarify when and how Form 45-106F9 must be delivered to purchasers, pointing out that it might be more efficient to have the purchaser sign the form *after* the issuer has accepted the subscription. One commenter noted that, for securities of investment funds sold through FundSERV, there may be no interface between the issuer and the purchaser. | We require the issuer to obtain Form 45-106F9 completed and signed by the investor at the same time or before the individual signs the subscription agreement. We think it is important for investors to know the risks of an investment before making their investment decision and before signing the subscription agreement. In cases where an investor has not completed the documentation properly or at all, then the issuer or dealer should return the entire subscription package to the investor for re-signature.<br><br>We think investment funds can continue to use FundSERV in the same way they do now because they are already required to ensure that investors meet the terms of the exemption, i.e., are accredited investors. |
| 6. | Retaining Form 45-106F9 for 8 years | Several commenters expressed concern about the requirement to retain a signed copy of Form 45-106F9 for 8 years. Some commenters asked for clarification on whether the form could be retained as an electronic copy. | The CSA requires the person relying on the AI exemption to retain the completed and signed Form 45-106F9 for 8 years because this represents the length of the longest limitation period under Canadian securities legislation. The rule does not specify how the form is retained; electronic retention is acceptable. |
| 7. | Accept digital signatures | Several commenters questioned the requirement that the purchaser sign two copies of Form 45-106F9. These commenters suggested that we allow for digital, pdf or electronic signatures. | We have amended Form 45-106F9 to remove the requirement for "original" signatures. The purchaser must sign the form, but how the form is signed and delivered is left to the person relying on the exemption, subject to any legislation that may apply to electronic signatures. |
| 8. | Application to "suitability-exempt" firms? | One commenter asked how Form 45-106F9 would apply to clients who transact through suitability-exempt firms, for example order-execution only. | If a person is distributing securities under the AI exemption through an execution-only dealer or firm, that person still needs to ensure that the purchaser of the security meets the terms and conditions of the AI exemption. The person relying on the AI exemption will need to ensure the dealer or firm obtains a completed and signed Form 45-106F9 from any purchasers in addition to ensuring it has properly verified that the purchaser is an accredited investor and is purchasing as |

| Item | Topic/Theme | Summarized comment | CSA Response |
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| | | | principal. |
| E. | Comments on Companion Policy Guidance on verifying accredited investor status (section 1.9) | | |
| 1. | Concerns about verifying whether purchasers are accredited investors | Several commenters expressed concern about the guidance in the Companion Policy requiring persons relying on the AI exemption to verify whether the purchaser is an accredited investor. Some of these commenters stated that these were new procedural obligations that would increase costs associated with capital raising. A few of these commenters suggested it should be sufficient for the person relying on the exemption to obtain a signed Form 45-106F9 or a subscription agreement – that no further steps should be necessary to verify that the purchaser meets the conditions of the exemption. Some of the commenters stated that it is current industry practice to solely rely on the representations in subscription agreements. | The person relying on the exemption needs to demonstrate that the conditions of the exemption are met. We have clarified that it is up to that person to determine what reasonable steps it should take to verify the purchaser's status, based on the particular facts and circumstances. That person may also be required to explain why he or she determined that certain steps were not necessary in the circumstances.<br><br>Decisions from various Canadian securities regulatory authorities confirm that the person relying on the prospectus exemption has the onus of establishing, and must take reasonable steps to ensure, that the purchaser does in fact meet the terms and conditions of the exemption. The guidance in the Companion Policy reflects these recent decisions. |
| 2. | Investor privacy and personal information | Several commenters expressed concern about the guidance that suggested issuers should gather third party financial information from purchasers to verify that the purchaser is an accredited investor. These commenters stated that this type of financial information is highly sensitive and that purchasers may be reluctant to give it, especially when dealing directly with the issuer, for privacy reasons. Some commenters suggested that asking for third party financial information should only be necessary if the person relying on the exemption questions the truthfulness of the purchaser's responses. | We have revised the guidance to clarify that third party financial information may only be necessary in certain circumstances. |
| 3. | Timing of verification | One commenter suggested that purchasers may want information about the offering before they are willing to confirm they meet the terms of the exemption. This commenter suggested we revise the guidance to require verification "before the distribution". | Issuers or selling security holders offering securities under prospectus exemptions that are based on the purchaser meeting certain conditions must take reasonable steps to ensure the offer is made only to persons that qualify under the exemption. |

| Item | Topic/Theme | Summarized comment | CSA Response |
|---|---|---|---|
| 4. | Do both dealer and issuer have to verify investor status? | Several commenters asked for guidance on whether issuers have to do their own verification if a registered dealer is facilitating the distribution. Some of these commenters suggested that if a dealer, with its higher suitability obligation, has determined the purchaser is qualified, then the seller should not have to do anything further. | The person relying on the prospectus exemption, such as the issuer or selling security holder, is required to ensure the terms and conditions of the exemption are met. We have clarified in the guidance that it is up to the person relying on the exemption to determine what steps are reasonable in the circumstances, having considered such factors as how the purchaser was located, how much background information is known about the purchaser and whether the person who meets with, or provides information to, the purchaser is registered. |
| 5. | Support for requiring documentary due diligence and mandating independent verification services | One commenter suggested that the CSA should always require issuers to obtain documentation to verify the purchaser's eligibility under the exemption. This commenter also suggested that the CSA should require, or at least expressly permit, issuers to use third party verification services to ensure purchasers are eligible. | We disagree. We think we have struck an appropriate balance in the guidance by leaving it to the person relying on the exemption to take reasonable steps to verify purchaser eligibility based on the particular circumstances. |
| 6. | Application of guidance to self-directed brokerages | One commenter asked how the guidance applies if investors invest through a self-directed brokerage. | Issuers accepting subscriptions from self-directed brokerage accounts still need to ensure that the investor meets the conditions of the exemption. |
| F. | Comments on Reports of Exempt Distribution (Form 45-106F1 and Form 45-106F6) | | |
| 1. | Prioritize harmonizing reporting obligations across Canada | Several commenters expressed concern that Canada has two separate forms for reporting exempt distributions: the Form 45-106F6 in BC and the Form 45-106F1 in all other jurisdictions. These commenters expressed frustration that the CSA did not harmonize the forms and that issuers are required to file reports in multiple jurisdictions about the same transaction. These commenters asked the CSA make it a priority to harmonize the forms and the filing requirements. | The CSA has decided to defer the proposed amendments to the forms of exempt distribution reports.<br><br>The CSA will address changes to the report of exempt distribution as a separate CSA project. The CSA recognizes the importance of having harmonized forms. |
| 2. | Additional information requirements | Several commenters questioned whether it was necessary to require additional information in the report of exempt distribution, including:<br>• Naming each person being compensated for the distribution | The CSA has decided to defer the proposed amendments to the forms of exempt distribution reports. The CSA will address changes to the report of exempt distribution as a separate CSA project. We will take these comments into account as part of that |

| Item | Topic/Theme | Summarized comment | CSA Response |
|---|---|---|---|
| | | • Identifying whether the person being compensated is a registrant or an insider of the issuer<br>• identifying all applicable categories of accredited investor that the purchaser qualifies under<br>• Identifying whether the purchaser is a registrant or an insider of the issuer<br>• Naming the beneficial owners of fully managed accounts<br>• Disclosing each Canadian and foreign jurisdiction where purchasers reside<br>These commenters expressed concern that requiring this additional information would increase the costs and time involved in capital raising. Some of these commenters identified that foreign issuers in particular may decide to exclude Canadian purchasers from their offerings because of these additional requirements. Other commenters were concerned that investors may refuse to provide the additional information due to privacy concerns. | project. |
| G. | Other comments | | |
| 1. | Removal of guidance on isolated trade exemption (section 4.6 of CP) | One commenter identified that the Notice did not highlight the proposed removal of the second paragraph of section 4.6 in the Companion Policy, dealing with the isolated trade exemption. This commenter expressed the view that the CSA should not make this change. | The CSA Notice identified that we were making housekeeping changes resulting from the removal of the dealer registration exemptions (formerly Part 3 of NI 45-106) effective March 27, 2010 to reflect the adoption of NI 31-103 and the business trigger for registration. The change to section 4.6 of the CP reflects the repeal of section 3.30 of NI 45-106. |
| H. | General comments | | |
| 1. | Importance of harmonization | Several commenters stated it is important that the CSA harmonize the prospectus exemptions across Canada as much as possible. These commenters expressed disappointment that further steps were not taken to harmonize NI 45-106 at this time. | We recognize the desirability of harmonizing the prospectus exemptions as much as possible. However, this CSA project focused on only two of the prospectus exemptions in NI 45-106: the AI exemption and the MA exemption, both of which are largely harmonized. |
| 2. | Expand remedies available to investors | A couple of commenters suggested that the CSA should expand the remedies available to investors under prospectus exemptions to include secondary market liability. | We thank the commenters for this suggestion. This is outside the scope of the current project. |

| Item | Topic/Theme | Summarized comment | CSA Response |
|---|---|---|---|
| 3. | Impose a fiduciary standard on registrants | A couple of commenters suggested that the CSA should impose a fiduciary standard on registrants. | We thank the commenters for this suggestion. This is outside the scope of the current project. The CSA is considering whether such a standard should be imposed as a separate policy project. |
| 4. | Provide more data and transparency about the exempt market and compliance issues in the exempt market | Two commenters suggested that the CSA should make data about the use of prospectus exemptions available to the public. These commenters also suggested that the CSA should be more transparent about compliance issues in the exempt market. | We thank the commenters for this suggestion. The CSA is considering the need to obtain further information about the exempt market as a separate policy project. |

**Annex C**
**Amendments to**
**National Instrument 45-106 *Prospectus and Registration Exemptions***

1. ***National Instrument 45-106 Prospectus and Registration Exemptions is amended by this Instrument.***

2. ***The title of the Instrument is amended by replacing "***Prospectus and Registration Exemptions***" with "***Prospectus Exemptions***".***

3. ***The definition of "***accredited investor***" in Section 1.1 is amended***

   ***(a) by replacing paragraphs (a) to (i) with the following:***

   (a) except in Ontario, a Canadian financial institution, or a Schedule III bank,

   (b) except in Ontario, the Business Development Bank of Canada incorporated under the *Business Development Bank of Canada Act* (Canada),

   (c) except in Ontario, a subsidiary of any person referred to in paragraphs (a) or (b), if the person owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of that subsidiary,

   (d) except in Ontario, a person registered under the securities legislation of a jurisdiction of Canada as an adviser or dealer,

   (e) an individual registered under the securities legislation of a jurisdiction of Canada as a representative of a person referred to in paragraph (d),

   (e.1) an individual formerly registered under the securities legislation of a jurisdiction of Canada, other than an individual formerly registered solely as a representative of a limited market dealer under one or both of the *Securities Act* (Ontario) or the *Securities Act* (Newfoundland and Labrador),

   (f) except in Ontario, the Government of Canada or a jurisdiction of Canada, or any crown corporation, agency or wholly owned entity of the Government of Canada or a jurisdiction of Canada,

   (g) except in Ontario, a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'île de Montréal or an intermunicipal management board in Québec,

   (h) except in Ontario, any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government,

(i) except in Ontario, a pension fund that is regulated by the Office of the Superintendent of Financial Institutions (Canada), a pension commission or similar regulatory authority of a jurisdiction of Canada**„**

***(b) in paragraph (j), by replacing "***that before taxes,***" with "***that, before taxes***",***

***(c) by adding the following paragraph:***

(j.1) an individual who beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $5 000 000**„**

***(d) by replacing paragraph (q) with the following:***

(q) a person acting on behalf of a fully managed account managed by that person, if that person is registered or authorized to carry on business as an adviser or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction**„** ***and***

***(e) by deleting "***or***" at the end of paragraph (u), by adding "***or***" at the end of paragraph (v) and by adding the following paragraph:***

(w) a trust established by an accredited investor for the benefit of the accredited investor's family members of which a majority of the trustees are accredited investors and all of the beneficiaries are the accredited investor's spouse, a former spouse of the accredited investor or a parent, grandparent, brother, sister, child or grandchild of that accredited investor, of that accredited investor's spouse or of that accredited investor's former spouse;**.**

***4. Section 1.5 is amended***

***(a) in subsection (1), by deleting "***from the dealer registration requirement, or from the prospectus requirement,***"***, ***and***

***(b) by repealing subsection (2).***

***5. Subsection 2.2(5) is amended by replacing "***Subject to section 8.3.1, if***" with "***If***".***

***6. Section 2.3 is amended***

***(a) by adding the following subsection:***

(0.1) In this section, "accredited investor exemption" means

(a) in a jurisdiction other than Ontario, the prospectus exemption under subsection (1), and

(b) in Ontario, the prospectus exemption under subsection 73.3(2) of the *Securities Act* (Ontario).**,**

***(b) in each of subsections (2) and (4), by replacing "***this section***" with "***the accredited investor exemption***",***

***(c) in subsection (5), by replacing "***This section***" with "***The accredited investor exemption***", and***

***(d) by adding the following subsections:***

(6) The accredited investor exemption does not apply to a distribution of a security to an individual described in paragraphs (j), (k) or (l) of the definition of "accredited investor" in section 1.1 [*Definitions*] unless the person distributing the security obtains from the individual a signed risk acknowledgement in the required form at the same time or before that individual signs the agreement to purchase the security.

(7) A person relying on the accredited investor exemption to distribute a security to an individual described in paragraphs (j), (k) or (l) of the definition of "accredited investor" in section 1.1 [*Definitions*] must retain the signed risk acknowledgement required in subsection (6) of this section for 8 years after the distribution.

(8) Subsection (1) does not apply in Ontario**.**

***7. Section 2.4 is amended***

***(a) by inserting the following subsection:***

(2.1) The following persons are prescribed for purposes of subsection 73.4(2) of the *Securities Act* (Ontario):

(a) a director, officer, employee, founder or control person of the issuer,

(b) a director, officer or employee of an affiliate of the issuer,

(c) a spouse, parent, grandparent, brother, sister, child or grandchild of a director, executive officer, founder or control person of the issuer,

(d) a parent, grandparent, brother, sister, child or grandchild of the spouse of a director, executive officer, founder or control person of the issuer,

(e) a close personal friend of a director, executive officer, founder or control person of the issuer,

(f) a close business associate of a director, executive officer, founder or control person of the issuer,

(g) a spouse, parent, grandparent, brother, sister, child or grandchild of the selling security holder or of the selling security holder's spouse,

(h) a security holder of the issuer,

(i) an accredited investor,

(j) a person of which a majority of the voting securities are beneficially owned by, or a majority of the directors are, persons described in paragraphs (a) to (i),

(k) a trust or estate of which all of the beneficiaries or a majority of the trustees or executors are persons described in paragraphs (a) to (i), or

(l) a person that is not the public**.,**

***(b) in subsection (3), by adding "***or, in Ontario, a distribution under subsection 73.4(2) of the *Securities Act* (Ontario)***" after "***a distribution under subsection (2)***", and***

***(c) by adding the following subsection:***

(5) Subsection (2) does not apply in Ontario**..**

***8. Subsection 2.10(1) is replaced with the following:***

**2.10 (1)** The prospectus requirement does not apply to a distribution of a security to a person if all of the following apply:

(a) that person is not an individual;

(b) that person purchases as principal;

(c) the security has an acquisition cost to that person of not less than $150 000 paid in cash at the time of the distribution;

(d) the distribution is of a security of a single issuer**..**

***9. Section 2.22 is amended by deleting "***and in Division 4 of Part 3 of this Instrument***", after "***In this Division***".***

***10. Part 3 is repealed.***

***11. Paragraph 6.1(1)(a) is amended by adding "***or, in Ontario, section 73.3 of the *Securities Act* (Ontario) [*Accredited investor*]***" after "***section 2.3 [*Accredited Investor*]***".***

***12. Subsection 6.2(2) is amended by replacing "***section 2.10 [*Minimum amount*] or section 2.19 [*Additional investment in investment funds*]***" with "***section 2.10 [*Minimum amount investment*] or section 2.19 [*Additional investment in investment funds*], or section 73.3 of the *Securities Act* (Ontario) [*Accredited investor*],***".***

***13. Subsection 6.4(1) is amended by deleting "***or section 3.9***".***

***14. Section 6.5 is amended***

***(a) by adding the following subsection:***

(0.1) The required form of risk acknowledgement under subsection 2.3(6) [*Accredited investor*] is Form 45-106F9***., and***

***(b) in subsection (2), by replacing "***or section 3.6 [*Family, friends and business associates*]***" with "***[*Family, friends and business associates – Saskatchewan*]***".***

***15. The title of section 6.6 is replaced with "***Use of information in Form 45-106F6 Schedule I – British Columbia***".***

***16. Section 8.1.1 is repealed.***

***17. Section 8.3.1 is repealed.***

***18. Section 8.4 is amended by deleting "***or 3.2(5)***".***

***19. Section 8.5 is repealed.***

***20. The title to Appendix A is amended by deleting "****and Registration****".***

***21. The title to Appendix B is amended by deleting "****and Registration****".***

***22. The Instrument is amended by adding the following form after Form 45-106F6:***

**Form 45-106F9**

***Form for Individual Accredited Investors***

**WARNING!**

**This investment is risky. Don't invest unless you can afford to lose all the money you pay for this investment.**

| **SECTION 1 TO BE COMPLETED BY THE ISSUER OR SELLING SECURITY HOLDER** | |
|---|---|
| **1. About your investment** | |
| Type of securities: *[Instruction: Include a short description, e.g., common shares.]* | Issuer: |
| Purchased from: *[Instruction: Indicate whether securities are purchased from the issuer or a selling security holder.]* | |
| **SECTIONS 2 TO 4 TO BE COMPLETED BY THE PURCHASER** | |
| **2. Risk acknowledgement** | |
| This investment is risky. Initial that you understand that: | **Your initials** |
| **Risk of loss –** You could lose your entire investment of $_____ . [*Instruction: Insert the total dollar amount of the investment.]* | |
| **Liquidity risk –** You may not be able to sell your investment quickly – or at all. | |
| **Lack of information –** You may receive little or no information about your investment. | |
| **Lack of advice –** You will not receive advice from the salesperson about whether this investment is suitable for you unless the salesperson is registered. The salesperson is the person who meets with, or provides information to, you about making this investment. To check whether the salesperson is registered, go to www.aretheyregistered.ca. | |
| **3. Accredited investor status** | |
| You must meet at least **one** of the following criteria to be able to make this investment. Initial the statement that applies to you. (You may initial more than one statement.) The person identified in section 6 is responsible for ensuring that you meet the definition of accredited investor. That person, or the salesperson identified in section 5, can help you if you have questions about whether you meet these criteria. | **Your initials** |
| • Your net income before taxes was more than $200,000 in each of the 2 most recent calendar years, and you expect it to be more than $200,000 in the current calendar year. (You can find your net income before taxes on your personal income tax return.) | |
| • Your net income before taxes combined with your spouse's was more than $300,000 in each of the 2 most recent calendar years, and you expect your combined net income before taxes to be more than $300,000 in the current calendar year. | |
| • Either alone or with your spouse, you own more than $1 million in cash and securities, after subtracting any debt related to the cash and securities. | |
| • Either alone or with your spouse, you have net assets worth more than $5 million. (Your net assets are your total assets (including real estate) minus your total debt.) | |
| **4. Your name and signature** | |
| By signing this form, you confirm that you have read this form and you understand the risks of making this investment as identified in this form. | |
| First and last name (please print)**:** | |

| | |
|---|---|
| Signature: | Date: |
| **SECTION 5 TO BE COMPLETED BY THE SALESPERSON** | |
| **5. Salesperson information** | |
| *[Instruction: The salesperson is the person who meets with, or provides information to, the purchaser with respect to making this investment. That could include a representative of the issuer or selling security holder, a registrant or a person who is exempt from the registration requirement.]* | |
| First and last name of salesperson (please print): | |
| Telephone: | Email: |
| Name of firm (if registered): | |
| **SECTION 6 TO BE COMPLETED BY THE ISSUER OR SELLING SECURITY HOLDER** | |
| **6. For more information about this investment** | |
| For investment in a non-investment fund<br>*[Insert name of issuer/selling security holder]*<br>*[Insert address of issuer/selling security holder]*<br>*[Insert contact person name, if applicable]*<br>*[Insert telephone number]*<br>*[Insert email address]*<br>*[Insert website address, if applicable]*<br><br>For investment in an investment fund<br>*[Insert name of investment fund]*<br>*[Insert name of investment fund manager]*<br>*[Insert address of investment fund manager]*<br>*[Insert telephone number of investment fund manager]*<br>*[Insert email address of investment fund manager]*<br>*[If investment is purchased from a selling security holder, also insert name, address, telephone number and email address of selling security holder here]*<br><br>**For more information about prospectus exemptions, contact your local securities regulator. You can find contact information at www.securities-administrators.ca.** | |

***Form instructions**:*

1. *This form does not mandate the use of a specific font size or style but the font must be legible.*

2. *The information in sections 1, 5 and 6 must be completed before the purchaser completes and signs the form.*

3. *The purchaser must sign this form. Each of the purchaser and the issuer or selling security holder must receive a copy of this form signed by the purchaser. The issuer or selling security holder is required to keep a copy of this form for 8 years after the distribution.*

23. Except in Ontario, this Instrument comes into force on May 5, 2015. In Ontario, this Instrument comes into force on the later of the following:

***(a)*** May 5, 2015 and

***(b)*** the day on which subsection 12(2) of Schedule 26 of the *Budget Measures Act, 2009* is proclaimed in force.

**Annex D**
**Blackline of Changes to**
**Companion Policy 45-106CP**
***Prospectus ~~and Registration~~ Exemptions***

## PART 1 – INTRODUCTION

National Instrument 45-106 *Prospectus ~~and Registration~~ Exemptions* (~~"~~NI 45-106~~"~~) provides: (i) exemptions from the prospectus requirement~~;~~ and (ii) ~~exemptions from registration requirements; and (iii)~~ one exemption from the issuer bid requirements. ~~The registration exemptions in Part 3 of NI 45-106 will not apply in any jurisdiction **six months** after~~It does not provide exemptions from the requirement to be registered as a dealer, adviser or investment fund manager. National Instrument 31-103 *Registration Requirements ~~and~~, Exemptions and Ongoing Registrant Obligations* (~~"~~NI 31-103~~") comes into force. A subset of registration exemptions will continue to apply after the six month transition period and will be located in NI 31-103.~~) contains some exemptions from the registration requirement.

### 1.1 Purpose

The purpose of this Companion Policy is to help users understand how the provincial and territorial securities regulatory authorities and regulators interpret or apply certain provisions of NI 45-106. This Companion Policy includes explanations, discussion and examples of the application of various parts of NI 45-106.

### 1.2 All distributions and other trades are subject to securities legislation

The securities legislation of a local jurisdiction applies to any trade in, or distribution of, a security in the local jurisdiction, whether or not the issuer of the security is a reporting issuer in that jurisdiction. Likewise, the definition of "trade" in securities legislation includes any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a trade. A person who engages in these activities, or other trading activities, must comply with the securities legislation of each jurisdiction in which the trade or distribution occurs.

### 1.3 Multi-jurisdictional distributions

A distribution can occur in more than one jurisdiction. If it does, the person conducting the distribution must comply with the securities legislation of each jurisdiction in which the distribution occurs. For example, a distribution from a person in Alberta to a purchaser in British Columbia may be considered a distribution in both jurisdictions.

### 1.4 Other exemptions

In addition to the exemptions in NI 45-106, exemptions may also be available to persons under securities legislation of each local jurisdiction. ~~The CSA has issued CSA Staff Notice 45-304 that lists other exemptions available under securities legislation.~~

### 1.5 Discretionary relief

In addition to the exemptions contained in NI 45-106 and those available under securities legislation of a local jurisdiction, the securities regulatory authority or regulator in each jurisdiction has the discretion to grant exemptions from the prospectus requirement~~ and the registration requirements~~.

### 1.6 ~~Advisers~~ Registration business trigger for trading and advising

Securities legislation requires certain persons to be registered if they are any of the following:

- in the business of trading
- in the business of advising
- ~~Subsection 1.5(2) of NI 45-106 provides that an exemption from the dealer registration requirement in NI 45-106 is deemed to be an exemption from the underwriter registration requirement. However, it is not deemed to be an exemption from the adviser registration requirement. The adviser registration requirement is distinct from the dealer registration requirement. In general terms, persons engaged in the business of, or holding themselves out as being in the business of, providing investment advice are required to be registered, or exempted from registration, under applicable securities legislation. Accordingly, only advisers registered or exempted from registration as advisers may act as advisers in connection with a trade made under NI 45-106.~~holding themselves out as being in the business of trading or advising
- acting as an underwriter
- acting as an investment fund manager

NI 31-103 sets out the requirements for registration as well as certain exemptions from these registration requirements.

Issuers relying on prospectus exemptions to distribute securities, or any selling agents they use, may be required to be registered. Companion Policy 31-103CP gives guidance to issuers on how to apply the registration business trigger.

### 1.7 Underwriters

Underwriters should not sell securities to the public without providing a prospectus. If an underwriter purchases securities with a view to distribution, the underwriter should purchase the securities under the prospectus exemption in section 2.33 of NI 45-106. If the underwriter purchases securities under this exemption, the first trade in the securities will be a distribution. As a result, the underwriter will only be able to resell the securities if it can rely on another exemption from the prospectus requirement, or if a prospectus is delivered to the purchasers of the securities.

There may be legitimate transactions where a dealer purchases securities under a prospectus exemption other than the exemption in section 2.33 of NI 45-106; however, these transactions are only appropriate when the dealer purchases the securities with investment intent and not with a view to distribution.

If a dealer purchases securities through a series of exempt transactions in order to avoid the obligation to deliver a prospectus, the transactions will be viewed as a whole to determine if they constitute a distribution. If a transaction is in effect an indirect distribution, a prospectus will be required to qualify the sale of the securities despite the fact that each interim step in the transaction

could otherwise be completed under a prospectus exemption. Such indirect distributions cannot be legitimately structured under NI 45-106.

**1.8 Persons created to use exemptions ("syndication")**

Sections 2.3(5), ~~3.3(5),~~ 2.4(1), ~~3.4(1),~~ 2.9(3)~~, 3.9(3),~~ and 2.10(2) ~~and 3.10(2)~~ of NI 45-106 specifically prohibit syndications. A distribution ~~or a trade~~ of securities to a person that had no pre-existing purpose and is created or used solely to purchase or hold securities under exemptions (a "syndicate") may be considered a distribution of~~, or trade in,~~ securities to the persons beneficially owning or controlling the syndicate.

For example, a newly formed company with 15 shareholders is set up with the intention of purchasing $150 000 worth of securities under the minimum amount investment exemption. Each shareholder of the newly formed company contributes $10 000. In this situation the shareholders of the newly formed company are indirectly investing $10 000 when the exemption requires that they each invest $150 000. Consequently, both the newly formed company and its shareholders may need to comply with the requirements of the minimum amount investment exemption, or find an alternative exemption to rely on.

Syndication related concerns should not ordinarily arise if the purchaser under the exemption is a corporation, syndicate, partnership or other form of entity that is pre-existing and has a bona fide purpose other than investing in the securities being sold. However, it is an inappropriate use of these exemptions to indirectly distribute ~~or trade~~ securities when the exemption is not available to directly distribute ~~or trade~~ securities to each person in the syndicate.

**1.9 Responsibility for compliance and verifying purchaser status**

(1) Determining whether an exemption is available

The prospectus exemptions in NI 45-106 set out specific terms and conditions that must be satisfied in order for the person relying on the exemption to distribute securities. The person relying on a prospectus exemption is responsible for determining whether the terms and conditions of the prospectus exemption are met. That person should retain all necessary documents to demonstrate that they properly relied on the exemption.

Some of the prospectus exemptions in NI 45-106 are available to both issuers and selling security holders. For purposes of this section, the term "seller" refers to the person relying on a prospectus exemption, whether an issuer or a selling security holder.

(2) Registration related requirements

Registered dealers and representatives have specific obligations under NI 31-103, including the "know your client," "know your product" and suitability obligations. These obligations apply to securities traded on a marketplace, distributed under a prospectus or distributed under a prospectus exemption.

Registered dealers or representatives may be involved in distributions under prospectus exemptions in different ways. The registered dealer or representative may be acting on behalf of a seller in connection with a distribution using a prospectus exemption.

In both cases, the registered dealer or representative must not only establish that a prospectus exemption is available, it must also comply with its registration obligations. For example, even if a registered dealer or representative has determined that a purchaser qualifies as an accredited investor or eligible investor, the registered dealer or representative must still assess whether the investment is suitable for the purchaser.

(3) Exemptions based on purchaser characteristics

Some of the prospectus exemptions in NI 45-106 require the purchaser of the securities to meet certain characteristics or have certain relationships with a director, executive officer, founder or control person of the issuer. These exemptions include:

- Exemptions based on income or asset tests - The accredited investor exemption and the "eligible investor" test in the offering memorandum exemption in some jurisdictions require a purchaser to meet certain income or asset tests in order for securities to be sold in reliance on the exemption.

- Exemptions based on relationships - The private issuer exemption, the family, friends and business associates exemption and the "eligible investor" test in the offering memorandum exemption in some jurisdictions require a relationship between the purchaser and a director, executive officer, founder or control person of the issuer, such as that of a family member, close personal friend, or close business associate.

When distributing securities under these exemptions, the seller will have to obtain information from the purchaser in order to determine whether the purchaser has the requisite income, assets or relationship to meet the terms of the exemption.

It will not be sufficient for the seller to accept standard representations in a subscription agreement or an initial beside a category on Form 45-106F9 *Form for Individual Accredited Investors* unless the seller has taken reasonable steps to verify the representations made by the purchaser.

(4) Reasonable steps

Described below are procedures that a seller could implement in order to reasonably confirm that the purchaser meets the conditions for a particular exemption. Whether the types of steps are reasonable will depend on the particular facts and circumstances of the purchaser, the offering and the exemption being relied on, including:

- how the seller identified or located the potential purchaser
- what category of accredited investor or eligible investor the purchaser claims to meet
- what type of relationship the purchaser claims to have and with which director, executive officer, founder or control person of the issuer
- how much and what type of background information is known about the purchaser
- whether the person who meets with, or provides information to, the purchaser is registered

We expect a seller to be in a position to explain why certain steps were not taken or to be able to explain how alternative steps were reasonable in the circumstances. It is the seller that is relying on

the prospectus exemption and it is the seller that is responsible to ensure the terms of the exemption are met. If the seller has any reservations about whether the purchaser qualifies under the exemption, the seller should not sell securities to the purchaser in reliance on that exemption.

(a) Understand the terms and conditions of the exemption

The seller should fully understand the terms and conditions of the exemption being relied on. "Understanding" includes being able to:

- Explain the terms and conditions – The seller must be able to explain to a purchaser the meaning of the terms and conditions of the particular exemption, including the difference between alternative qualification criteria for the same exemption.

  For example, the accredited investor definition uses the terms "financial assets" and "net assets". In some jurisdictions, the offering memorandum exemption also uses the term "net assets" as part of the eligible investor definition. A seller should be capable of explaining the meaning and differences between the two terms, including describing the specific assets and liabilities that form part of each calculation.

- Apply the specific facts of the purchaser to the terms and conditions – The terms "close personal friend" and "close business associate" used in some exemptions are difficult to define and can mean different things to different people. Sections 2.7 and 2.8 of this Companion Policy provide guidance on the key elements necessary to establish these types of relationships. We have not provided a "bright line" test for these relationships. A seller should understand the key elements of these relationships and be able to evaluate whether the relationship claimed by the purchaser meets those key elements.

(b) Establish appropriate policies and procedures

The seller is also responsible for confirming that all parties acting on behalf of the seller in a distribution understand the conditions that must be satisfied to rely on the exemption. This includes any employee, officer, director, agent, finder or other intermediary (whether registered or not) involved in the transaction.

We expect a seller to have policies and procedures in place to confirm that these other parties understand the exemption being relied on, are able to describe the terms of the exemption to purchasers and know what information and documentation must be obtained from purchasers to confirm the conditions of the exemption have been satisfied.

(c) Verify the purchaser meets the criteria set out in the exemption

Before discussing the details of an investment with a prospective purchaser, we expect the seller to obtain information that confirms the purchaser meets the criteria set out in the exemption. It would not be sufficient for a seller to rely solely on a form of subscription agreement or other document that only states: "I am an accredited investor" or "I am a friend of a director".

~~A person distributing or trading securities is responsible for determining when an exemption is available. In determining whether an exemption is available, a person may rely on factual~~

~~representations by a purchaser, provided that the person has no reasonable grounds to believe that those representations are false. However, the person distributing or trading securities is responsible for determining whether, given the facts available, the exemption is available. Generally, a person distributing or trading securities under an exemption should retain all necessary documents that show the person properly relied upon the exemption.~~

We would also have concerns if a seller only accepted detailed representations or an initial beside a category on the Form 45-106F9 *Form for Individual Accredited Investors* from the purchaser. In both cases, we expect the seller to take additional steps to confirm that the purchaser understood the meaning of what the purchaser was signing or initialing and that the purchaser was truthful in making the representation or initialing the category.

For example~~, an issuer distributing securities to a close personal friend of a director could require that the purchaser provide a signed statement describing the purchaser's relationship with the director. On the basis of that factual information, the issuer could determine whether the purchaser is a close personal friend of the director for the purposes of a family, friends and business associates exemption. The issuer should not rely merely on a representation: "I am a close personal friend of a director". Likewise, under the accredited investor exemptions, the seller must have a reasonable belief that the purchaser understands the meaning of the definition of "accredited investor". Prior to discussing the particulars of the investment with the purchaser, the seller should discuss with the purchaser the various criteria for qualifying as an accredited investor and whether the purchaser meets any of the criteria.~~:

- ~~It is not appropriate for a person to assume an exemption is available. For instance a seller should not accept a form of subscription agreement that only states that the~~Exemptions based on income or asset tests - To assess whether a purchaser is an accredited investor~~. Rather the seller should request that the purchaser provide the details on how they fit within the accredited investor definition.~~ or eligible investor, we expect the seller to ask questions about the purchaser's net income, financial assets or net assets, or to ask other questions designed to elicit details about the purchaser's financial circumstances.

  If the seller has concerns about the purchaser's responses, the seller should make further inquiries about the purchaser's financial circumstances. If the seller still questions the purchaser's eligibility, the seller could ask to see documentation that independently confirms the purchaser's claims.

- Exemptions based on relationships - If an exemption is based on the existence of a specific relationship between the purchaser and a principal of the issuer (such as that of a family member, "close personal friend" or "close business associate"), we expect the seller to ask questions designed to confirm the nature and length of the relationship. The seller should also confirm the nature and length of the relationship with the director, executive officer, founder or control person identified by the purchaser.

  For example, if the purchaser claims to be a close personal friend of a director of an issuer, the seller could ask the purchaser for the name of the director and a description of the nature and length of the purchaser's relationship with the director. The seller could verify with the director that the information is accurate. Based on that factual information, the seller could determine

whether the purchaser is a close personal friend of the director for the purposes of the family, friends and business associates exemption.

(d) Keep relevant and detailed documentation

The seller should consider what documentation it needs to retain or collect from a purchaser to evidence the steps the seller followed to establish the purchaser met the conditions of the exemption.

The seller should consider whether it is necessary to have the purchaser sign that documentation before distributing securities to that purchaser. For example, if the purchaser claims to be a close personal friend of a director of the issuer, the seller could ask the purchaser to sign a statement giving the name of the director and describing the nature and length of the purchaser's relationship with the director. The seller could also ask the director to sign the statement confirming the relationship. In other cases, the seller may determine it is not necessary for the purchaser to sign the documentation, for example, if the seller is using meeting notes and email communications to demonstrate its verification efforts.

The seller should retain this documentation to evidence the steps the seller has taken to verify the availability of the exemption. Certain exemptions require the seller to obtain a signed risk acknowledgement form from the purchaser and to retain that risk acknowledgement for 8 years after the distribution. The 8-year period reflects the longest limitation period under securities legislation in Canada. The seller should consider local legislation concerning limitation periods when deciding how long to retain other documentation it considers necessary to demonstrate that it complied with the exemption.

The seller should also consider and comply with the requirements under provincial or federal legislation concerning the protection of personal information when collecting and retaining purchaser information.

### 1.10 Prohibited activities

Securities legislation in certain jurisdictions prohibits any person from making certain representations to a purchaser of securities, including an undertaking about the future value or price of the securities. In certain jurisdictions, these provisions also prohibit a person from making any statement that the person knows or ought reasonably to know is a misrepresentation. These prohibitions apply whether or not a trade or distribution is made under an exemption.

Misrepresentation is defined in securities legislation. The use of exaggeration, innuendo or ambiguity in an oral or written representation about a material fact, or other deceptive behaviour relating to a material fact, might be a misrepresentation.

## PART 2 – INTERPRETATION

### 2.1 Definitions

Unless defined in NI 45-106, terms used in NI 45-106 have the meaning given to them in local securities legislation or in National Instrument 14-101 *Definitions.*

The term “contract of insurance” in the definition of “financial assets” has the meaning assigned to it in the legislation for the jurisdiction referenced in Appendix A of NI 45-106.

### 2.2 Executive officer (“policy making function”)

The definition of “executive officer” in NI 45-106 is based on the definition of the same term contained in National Instrument 51-102 *Continuous Disclosure Obligations* (~~“~~NI 51-102~~”~~).

Paragraph (c) of the definition "executive officer" includes individuals that are not employed by the issuer or any of its subsidiaries, but who perform a policy-making function in respect of the issuer.

The definition includes someone who “performs a policy-making function” in respect of the issuer. The CSA is of the view that an individual who “performs a policy-making function” in respect of an issuer is someone who is responsible, solely or jointly with others, for setting the direction of the issuer and is sufficiently knowledgeable of the business and affairs of the issuer so as to be able to respond meaningfully to inquiries from investors about the issuer.

### 2.3 Directors, executive officers and officers of non-corporate issuers

The term “director” is defined in NI 45-106 and it includes, for non-corporate issuers, individuals who perform functions similar to those of a director of a company.

When the term “officer” is used in NI 45-106, or any of the NI 45-106 forms, a non-corporate issuer should refer to the definitions in securities legislation. Securities legislation in most jurisdictions defines “officer” to include any individual acting in a capacity similar to that of an officer of a company. Therefore, in most jurisdictions, non-corporate issuers must determine which individuals are acting in capacities similar to that of directors and officers of corporate issuers, for the purposes of complying with NI 45-106 and its forms.

For example, the determination of who is acting in the capacity of a director or executive officer may be important where a person intends to distribute~~ or trade~~ securities of a limited partnership under an exemption that is conditional on a relationship with a director or executive officer. The person must conclude that the purchaser has the necessary relationship with an individual who is acting in a capacity with the limited partnership that is similar to that of a director or executive officer of a company.

### 2.4 Founder

The definition of “founder” includes a requirement that, at the time of the distribution of~~, or trade in,~~ a security the person be actively involved in the business of the issuer. Accordingly, a person who takes the initiative in founding, organizing or substantially reorganizing the business of the issuer within the meaning of the definition but subsequently ceases to be actively engaged in the day to day operations of the business of the issuer would no longer be a “founder” for the purposes of NI 45-106, regardless of the person’s degree of prior involvement with the issuer or the extent of the person’s continued ownership interest in the issuer.

## 2.5 Investment fund

Generally, the definition of "investment fund" would not include a trust or other entity that issues securities that entitle the holder to net cash flows generated by: (i) an underlying business owned by the trust or other entity, or (ii) the income-producing properties owned by the trust or other entity. Examples of trusts or other entities that are not included in the definition are business income trusts, real estate investment trusts and royalty trusts.

## 2.6 Affiliate, control and related entity

(1) Affiliate

Section 1.3 of NI 45-106 contains rules for determining whether persons are affiliates for the purposes of NI 45-106, which may be different than those contained in other securities legislation.

(2) Control

The concept of control has two different interpretations in NI 45-106. For the purposes of Division 4 of Part 2 ~~and Division 4 of Part 3 (trades to employees~~(employee, executive ~~officers, directors and consultants~~officer, director and consultant exemptions), the interpretation of control is contained in section 2.23(1)~~ and section 3.23(1), respectively~~. For the purposes of the rest of NI 45-106, the interpretation of control is found in section 1.4 of NI 45-106. The reason for having two different interpretations of control is that the exemptions for distributions of~~, and trades in,~~ securities to employees, executive officers, directors and consultants require a broader concept of control than is considered necessary for the rest of NI 45-106 to accommodate the issuance of compensation securities in a wide variety of business structures.

## 2.7 Close personal friend

For ~~the~~ purposes of both the private issuer ~~exemptions~~exemption in section 2.4 of NI 45-106 and the family, friends and business associates ~~exemptions,~~exemption in section 2.5 of NI 45-106, a "close personal friend" of a director, executive officer, founder or control person of an issuer is an individual who knows the director, executive officer, founder or control person well enough and has known them for a sufficient period of time to be in a position to assess their capabilities and trustworthiness and to obtain information from them with respect to the investment. The term "close personal friend" can include a family member who is not already specifically identified in the exemptions if the family member satisfies the criteria described above.

We consider the following factors as relevant to this determination:

(a) the length of time the individual has known the director, executive officer, founder or control person,

(b) the nature of the relationship between the individual and the director, executive officer, founder or control person including such matters as the frequency of contacts between them and the level of trust and reliance in the other circumstances, and

(c) the number of "close personal friends" of the director, executive officer, founder or control person to whom securities have been distributed in reliance on the private issuer exemption or the family, friends and business associates exemption.

An individual is not a close personal friend solely because the individual is:

(a) a relative,

(b) a member of the same club, organization, association or religious group,

(c) a co-worker, colleague or associate at the same workplace,

(d) a client, customer, former client or former customer,

(e) a mere acquaintance, or

(f) connected through some form of social media, such as Facebook, Twitter or LinkedIn.

The relationship between the individual and the director, executive officer, founder or control person must be direct. For example, the exemption is not available to a close personal friend of a close personal friend of a director of the issuer.

~~An individual is not a close personal friend solely because the individual is:~~

~~(a) a relative,~~

~~(b) a member of the same organization, association or religious group, or~~

We would not consider a relationship that is primarily founded on participation in an Internet forum to be that of a close personal friend.

~~(c) a client, customer, former client or former customer.~~

The person relying on the exemption is responsible for determining that the purchaser meets the characteristics required under the exemption. See section 1.9 of this Companion Policy for guidance on how to verify and document purchaser status.

**2.8 Close business associate**

For the purposes of both the private issuer ~~exemptions~~exemption in section 2.4 of NI 45-106 and the family, friends and business associates ~~exemptions,~~exemption in section 2.5 of NI 45-106, a "close business associate" is an individual who has had sufficient prior business dealings with a director, executive officer, founder or control person of the issuer to be in a position to assess their capabilities and trustworthiness and to obtain information from them with respect to the investment.

We consider the following factors as relevant to this determination:

(a) the length of time the individual has known the director, executive officer, founder or control person,

(b) the nature of any specific business relationships between the individual and the director, executive officer, founder or control person, including, for each relationship, when it began, the frequency of contact between them and when it terminated if it is not ongoing, and the level of trust and reliance in the other circumstances,

(c) the nature and number of any business dealings between the individual and the director, executive officer, founder or control person, the length of the period during which they occurred, and the nature and date of the most recent business dealing, and

(d) the number of "close business associates" of the director, executive officer, founder or control person to whom securities have been distributed in reliance on the private issuer exemption or the family, friends and business associates exemption.

An individual is not a close business associate solely because the individual is:

(a) a member of the same club, organization, association or religious group, ~~or~~

(b) a co-worker, colleague or associate at the same workplace,

(c) a client, customer, former client or former customer,

(d) a mere acquaintance, or

(e) connected through some form of social media, such as Facebook, Twitter or LinkedIn.

The relationship between the individual and the director, executive officer, founder or control person must be direct. For example, the exemptions are not available for a close business associate of a close business associate of a director of the issuer.

We would not consider a relationship that is primarily founded on participation in an internet forum to be that of a close business associate.

The person relying on the exemption is responsible for determining that the purchaser meets the characteristics required under the exemption. See section 1.9 of this Companion Policy for guidance on how to verify and document purchaser status.

### 2.9 Indirect interest

Under paragraph (t) of the definition of "accredited investor" in section 1.1 of NI 45-106, an "accredited investor" includes a person in respect of which all of the owners of interests in that person, direct, indirect or beneficial, are accredited investors. The interpretive provision in section 1.2 of NI 45-106 is needed to confirm the meaning of indirect interest in British Columbia.

## PART 3 – CAPITAL RAISING EXEMPTIONS

### 3.1 Soliciting purchasers

Part 2, ~~Division 1, and Part 3,~~ Division 1 (capital raising exemptions) in NI 45-106 ~~do~~does not prohibit the use of registrants, finders, or advertising in any form (for example, ~~internet~~Internet, e-mail, direct mail, newspaper or magazine) to solicit purchasers under any of the exemptions. However, use of any of these means to find purchasers under the private issuer ~~exemptions~~exemption in ~~sections~~section 2.4 ~~and 3.4~~ of NI 45-~~106,~~106 or under the family, friends and business associates ~~exemptions~~exemption in ~~sections~~section 2.5 ~~and 3.5~~ of NI 45-106, may give rise to a presumption that the relationship required for use of these exemptions is not present. If, for example, an issuer advertises or pays a commission or finder's fee to a third party to find purchasers under the family, friends and business associates ~~exemptions~~exemption, it suggests that the precondition of a close relationship between the purchaser and the issuer may not exist and therefore the issuer cannot rely on ~~these exemptions~~this exemption.

Use of a finder by a private issuer to find an accredited investor, however, would not preclude the private issuer from relying upon the private issuer ~~exemptions~~exemption, provided that all of the other conditions to ~~those exemptions~~that exemption are met.

Any solicitation activities that aim to identify a particular category of investor should clearly state the kind of investor being sought and the criteria that investors will be required to meet. Any print materials used to find accredited investors, for example, should clearly and prominently state that only accredited investors should respond to the solicitation.

### 3.2 Soliciting purchasers – ~~Newfoundland and Labrador and~~ Ontario

~~In Newfoundland and Labrador and Ontario, the exemptions from the dealer registration requirement identified in section 3.01 of NI 45-106 are not available to a "market intermediary", except as therein provided (or as otherwise provided in local securities legislation – see, for instance, in the case of Ontario, OSC Rule 45-501 *Ontario Prospectus and Registration Exemptions*). Generally, a person is a market intermediary if the person is in the business of trading in securities as principal or agent. In Ontario, the term "market intermediary" is defined in Ontario Securities Commission Rule 14-501 *Definitions*.~~

The Ontario Securities Commission takes the position that if an issuer retains an employee whose primary job function is to actively solicit members of the public for the purposes of selling the issuer's securities, the issuer and its employee are in the business of selling securities. Further, if an issuer and its employees are deemed to be in the business of selling securities, the Ontario Securities Commission considers both the issuer and its employees to be market intermediaries. This applies whether the issuer and its employees are located in Ontario and solicit members of the public outside of Ontario or whether the issuer and its employees are located outside of Ontario and solicit members of the public in Ontario. Accordingly, in order to be in compliance with securities legislation, these issuers and their employees should be registered under the appropriate category of registration in Ontario.

### 3.3 Advertising

NI 45-106 does not restrict the use of advertising to solicit or find purchasers. However, issuers and selling security holders should review other securities legislation and securities directions for

guidelines, limitations and prohibitions on advertising intended to promote interest in an issuer or its securities. For example, any advertising or marketing communications must not contain a misrepresentation and should be consistent with the issuer's public disclosure record.

### 3.4 Restrictions on finder's fees or commissions

The following restrictions apply with respect to certain exemptions under NI 45-106:

(1) no commissions or finder's fees may be paid to directors, officers, founders and control persons in connection with a distribution ~~or a trade~~ made under the private issuer ~~exemptions~~exemption or the family, friends and business associates ~~exemptions~~exemption, except in connection with a distribution of~~, or trade in,~~ a security to an accredited investor under ~~a~~the private issuer exemption; and

(2) in Northwest Territories, Nunavut and Saskatchewan, only a registered dealer may be paid a commission or finder's fee in connection with a distribution of~~, or a trade in,~~ a security to a purchaser in one of those jurisdictions under ~~an~~the offering memorandum exemption.

### 3.4.1 Reinvestment plans

(1) When is a plan administrator acting "for or on behalf of the issuer"?

~~Sections~~Section 2.2 ~~and 3.2~~ of NI 45-106 ~~contain~~contains a prospectus ~~and dealer registration exemptions~~exemption for distributions of~~, and trades in,~~ securities by a trustee, custodian or administrator acting for or on behalf of the issuer. If the trustee, custodian or administrator is engaged by the issuer, the plan administrator acts "for or on behalf of the issuer" and therefore falls within the language contained in ~~sections~~section 2.2(1)~~ and 3.2(1) of NI 45-106.~~. The fact that the plan administrator may act on or in accordance with instructions of a plan participant, under the plan, does not preclude the administrator from relying on the ~~exemptions~~exemption contained in ~~sections~~section 2.2~~ or 3.2~~ of NI 45-106.

(2) Providing a description of material attributes and characteristics of securities

The~~ prospectus and dealer registration~~ reinvestment plan ~~exemptions~~exemption in ~~sections~~section 2.2(5) ~~and 3.2(5)~~ of NI 45-106 ~~add~~includes a requirement, effective September 28, 2009, that if the securities distributed~~ or traded~~ under a reinvestment plan~~, in reliance upon a reinvestment plan exemption,~~ are of a different class or series than the securities to which the dividend or distribution is attributable, the issuer or plan agent must have provided the plan participants with a description of the material attributes and characteristics of the securities being distributed~~ or traded~~. An issuer or plan agent with an existing reinvestment plan can satisfy this requirement in a number of ways. If plan participants have previously signed a plan agreement or received a copy of a reinvestment plan that included this information, the issuer or plan agent does not need to take any further action for current plan participants. (Future participants should receive the same type of information before their first trade of a security under the plan.)

If plan participants have not received this information in the past, the issuer or plan agent can provide the required information or a reference to a website where the information is available with other materials sent to holders of that class of securities, for example with proxy materials.~~ Section 8.3.1 of NI 45-106 provides a transition period, allowing the issuer or plan agent to meet this~~

~~requirement not later than 140 days after the next financial year end of the issuer ending on or after September 28, 2009.~~

(3) Interest payments

The ~~exemptions~~exemption in ~~sections~~section 2.2~~ and 3.2~~ of NI 45-106 may be available where a person invests interest payable on debentures or other similar securities into other securities of the issuer. The words "distributions out of earnings…or other sources" cover interest payable on debentures.

**3.5 Accredited investor**

(1) Individual qualification – financial tests

An individual is an "accredited investor" for the purposes of NI 45-106 if ~~he or she satisfies, either alone or with a spouse, any of the financial asset test in paragraph (j), the net income test in paragraph (k) or the net asset test in paragraph (l) of~~the individual satisfies one of four tests set out in the "accredited investor" definition in section 1.1 of NI 45-~~106.~~106:

- the $1 000 000 financial asset test in paragraph (j)
- the $5 000 000 financial asset test in paragraph (j.1)
- the net income test in paragraph (k)
- the net asset test in paragraph (l)

~~These~~Three branches of the definition (in paragraphs (j), (k) and (l)) are designed to treat spouses as a single investing unit, so that either spouse qualifies as an "accredited investor" if the combined financial assets~~, net income, or net assets~~ of both spouses exceed ~~the~~ $1 000 000, the combined net income of both spouses exceeds $300 000, or ~~$5 000 000 thresholds, respectively.~~the combined net assets of both spouses exceeds $5 000 000.

The fourth branch, the $5 000 000 financial asset test, does not treat spouses as a single investing unit. If an individual meets the $5 000 000 financial asset test, they also meet the test to be a "permitted client" under NI 31-103. Permitted clients are entitled to waive the "know your client" and suitability obligations of registered dealers and advisers under NI 31-103. Under subsection 2.3(7) of NI 45-106, an issuer distributing securities under the accredited investor exemption to an individual who meets the $5 000 000 financial asset test in paragraph (j.1) under the definition of "accredited investor" is not required to obtain a signed risk acknowledgement in Form 45-106F9 *Form for Individual Accredited Investors* from that individual.

For the purposes of the financial asset ~~test~~tests in ~~paragraph~~paragraphs (j) and (j.1), "financial assets" are defined in NI 45-106 to mean cash, securities, or a contract of insurance, a deposit or an evidence of a deposit that is not a security for the purposes of securities legislation. These financial assets are generally liquid or relatively easy to liquidate. The value of a purchaser's personal residence ~~would~~is not ~~be~~ included in a calculation of financial assets.

By comparison, the net asset test under paragraph (l) ~~involves a consideration of~~means all of the purchaser's total assets minus all of the purchaser's total liabilities. Accordingly, for the purposes of the net asset test, the calculation of total assets would include the value of a purchaser's personal

residence and the calculation of total liabilities would include the amount of any liability (such as a mortgage) in respect of the purchaser's personal residence.

If the combined net income of both spouses does not exceed $300 000, but the net income of one of the spouses exceeds $200 000, only the spouse whose net income exceeds $200 000 qualifies as an accredited investor.

(2) Bright-line standards – individuals

The monetary thresholds in the "accredited investor" definition are intended to create "bright-line" standards. Investors who do not satisfy these monetary thresholds do not qualify as accredited investors under the applicable paragraph.

(3) Beneficial ownership of financial assets

~~Paragraph~~Paragraphs (j) and (j.1) of the "accredited investor" definition ~~refers to an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $1 000 000.~~refer to the beneficial ownership of financial assets. As a general matter, it should not be difficult to determine whether financial assets are beneficially owned by an individual, an individual's spouse, or both, in any particular instance. However, in the case where financial assets are held in a trust or in ~~other types~~another type of investment ~~vehicles~~vehicle for the benefit of an individual there may ~~raise~~be questions as to whether the individual beneficially owns the financial assets ~~in the circumstances~~. The following factors are indicative of beneficial ownership of financial assets:

(a) physical or constructive possession of evidence of ownership of the financial asset;

(b) entitlement to receipt of any income generated by the financial asset;

(c) risk of loss of the value of the financial asset; and

(d) the ability to dispose of the financial asset or otherwise deal with it as the individual sees fit.

For example, securities held in a self-directed RRSP, for the sole benefit of an individual, are beneficially owned by that individual. In general, financial assets in a spousal RRSP would also be included for the purposes of the ~~threshold~~$1 000 000 financial asset test ~~because~~in paragraph (j) because it takes into account financial assets owned beneficially by a spouse. However, financial assets in a spousal RRSP would not be included for purposes of the $5 000 000 financial asset test in paragraph (j.1). Financial assets held in a group RRSP under which the individual ~~would~~does not have the ability to acquire the financial assets and deal with them directly would not meet ~~these~~the beneficial ownership requirements in either paragraph (j) or paragraph (j.1).

(4) Calculation of an individual purchaser's net assets

To calculate a purchaser's net assets under the net asset test in paragraph (l) of the "accredited investor" definition, subtract the purchaser's total liabilities from the purchaser's total assets. The value attributed to assets should reasonably reflect their estimated fair value. Income tax should be

considered a liability if the obligation to pay it is outstanding at the time of the distribution of~~, or trade in,~~ the security.

(4.1) Risk acknowledgement from individual investors

Persons relying on the accredited investor exemption in section 2.3 of NI 45-106 and section 73.3 of the *Securities Act* (Ontario) to distribute securities to individual accredited investors described in paragraphs (j), (k) and (l) of the "accredited investor" definition must obtain a completed and signed risk acknowledgement from that individual accredited investor.

"Individual" is defined in the securities legislation of certain jurisdictions to mean a natural person. The definition specifically excludes partnerships, unincorporated associations, unincorporated syndicates, unincorporated organizations and trusts. It also specifically excludes a natural person acting in the capacity of trustee, executor, administrator or personal or other legal representative.

(5) Financial statements

The minimum net asset threshold of $5 000 000 specified in paragraph (m) of the "accredited investor" definition must, in the case of a non-individual entity, be shown on the entity's "most recently prepared financial statements". The financial statements must be prepared in accordance with applicable generally accepted accounting principles.

(6) Time for assessing qualification

The financial tests prescribed in the accredited investor definition are to be applied only at the time of the distribution of~~, or trade in,~~ the security. The person is not required to monitor the purchaser's continuing qualification as an accredited investor after the distribution of~~, or trade in,~~ the security is completed.

(7) Recognition or ~~Designation~~designation as an ~~Accredited Investor~~"accredited investor"

Paragraph (v) of the "accredited investor" definition in NI 45-106 contemplates that a person may apply to be recognized or designated as an accredited investor by the securities regulatory authorities or~~ regulators~~, except in Ontario and Québec, the regulators. The securities regulatory authorities or regulators have not adopted any specific criteria for granting accredited investor recognition or designation to applicants, as the securities regulatory authorities or regulators believe that the "accredited investor" definition generally covers all types of persons that do not require the protection of the prospectus requirement~~ or the dealer registration requirement~~. Accordingly, the securities regulatory authorities or regulators expect that applications for accredited investor recognition or designation will be utilized on a very limited basis. If a securities regulatory authority or regulator considers it appropriate in the circumstances, it may grant accredited investor recognition or designation to a person on terms and conditions, including a requirement that the person apply annually for renewal of accredited investor recognition or designation.

(8) Verifying accredited investor status

Persons relying on the accredited investor exemption are responsible for determining whether a purchaser meets the definition of "accredited investor". See section 1.9 of this Companion Policy for guidance on how to verify and document purchaser status.

**3.6 Private issuer**

(1) Meaning of "the public"

Whether or not a person is a member of the public must be determined on the facts of each particular case. The courts have interpreted "the public" very broadly in the context of securities trading. Whether a person is a part of the public will be determined on the particular facts of each case, based on the tests that have developed under the relevant case law. A person who intends to distribute ~~or trade~~ securities~~,~~ in reliance upon the private issuer prospectus exemption in section 2.4(2) ~~or the private issuer dealer registration exemption in section 3.4(2)~~ of NI 45-~~106,~~106 to a person not listed in paragraphs (a) through (j) of that section will have to satisfy itself that the distribution of~~, or trade in,~~ the security is not to the public.

(2) Meaning of "close personal ~~friends~~friend" and "close business ~~associates~~associate"

See sections 2.7 and 2.8 of this Companion Policy for a discussion of the meaning of "close personal friend" and "close business associate".

(2.1) Meaning of "non-convertible debt securities"

Paragraph (b) of the definition of private issuer has a number of restrictions that apply to the securities, other than non-convertible debt securities, of a private issuer. Non-convertible debt securities are debt securities that do not have a right or obligation to exchange or convert into another security of the issuer.

(3) Business combination of private issuers

A distribution of~~, or trade in,~~ securities in connection with an amalgamation, merger, reorganization, arrangement or other statutory procedure involving two private issuers~~,~~ to holders of securities of those issuers is not a distribution of~~, or trade in,~~ a security to the public, provided that the resulting issuer is a private issuer.

Similarly, a distribution of~~, or trade in,~~ securities by a private issuer in connection with a share exchange take-over bid for another private issuer is not a distribution of~~, or trade in,~~ securities to the public, provided the offeror remains a private issuer after completion of the bid.

(4) Acquisition of a private issuer

Persons relying on a private issuer exemption in NI 45-106 must be satisfied that the purchaser is not a member of the public. Generally, however, if the owner of a private issuer sells the business of the private issuer by way of a sale of securities, rather than assets, to another party who acquires all of the securities, the sale will not be considered to have been to the public.

(5) Ceasing to be a private issuer

The term "private issuer" is defined in section 2.4(1) ~~(with the same definition repeated in section 3.4(1) of NI 45-106).~~106. A private issuer can distribute securities only to the persons listed in section 2.4(2) of NI 45-106. If a private issuer distributes securities to a person not listed in section 2.4(2), even under another exemption, it will no longer be a private issuer and will not be able to continue to use the private issuer prospectus exemption in section 2.4(2) ~~(or the private issuer dealer registration exemption in section 3.4(2))~~. For example, if a private issuer distributes securities under the offering memorandum exemption, it will no longer be a private issuer.

Issuers that cease to be private issuers ~~will~~do not automatically become "reporting issuers". They are simply no longer able to rely on the private issuer exemption in section 2.4(1). Such issuers would still be able to use other exemptions to distribute their securities. For example, such issuers could rely on the family, friends and business associates prospectus exemption (except in Ontario) or the accredited investor prospectus exemption. However, issuers that rely on these prospectus exemptions must file a report of exempt distribution with the securities regulatory authority or regulator in each jurisdiction in which the distribution took place.

An issuer that completes a going private transaction (for example, by way of an amalgamation, squeeze out or a takeover bid with a subsequent statutory compulsory acquisition) can ~~however~~ use the private issuer exemption after a going private transaction.

**3.7 Family, friends and business associates**

(1) Number of purchasers

There is no restriction on the number of persons that the issuer may sell securities to under the family, friends and business associates ~~exemptions~~exemption in ~~sections~~section 2.5 ~~and 3.5~~ of NI 45-106. However, an issuer selling securities to a large number of persons under this exemption may give rise to a presumption that not all of the purchasers are family, close personal friends or close business associates and that the exemption may not be available.

(2) Meaning of "close personal ~~friends~~friend" and "close business ~~associates~~associate"

See sections 2.7 and 2.8 of this Companion Policy for a discussion of the meaning of "close personal friend" and "close business associate".

(3) Risk acknowledgement - Saskatchewan

Under ~~sections~~section 2.6 ~~and 3.6~~ of NI 45-106, the ~~corresponding~~ family, friends and business associates exemption in section 2.5 ~~or 3.5~~ of NI 45-106 cannot be relied upon in Saskatchewan for a distribution of~~, or trade in,~~ securities based on a close personal friendship or close business association unless the person obtains a signed "risk acknowledgement" in the required form from the purchaser and retains the form for eight years after the distribution of~~, or trade in,~~ securities.

**3.8 Offering memorandum**

(1) Eligibility criteria - Alberta, Manitoba, Northwest Territories, Nunavut, Prince Edward Island, Québec and Saskatchewan

Alberta, Manitoba, Northwest Territories, Nunavut, Prince Edward Island, Québec, Saskatchewan, and Yukon impose eligibility criteria on persons investing under the offering memorandum ~~exemptions~~exemption. In these jurisdictions, the purchaser must be an eligible investor if the purchaser's acquisition cost is more than $10 000.

In determining the acquisition cost to a purchaser who is not an eligible investor, include any future payments that the purchaser will be required to make. Proceeds ~~which~~that may be obtained on exercise of warrants or other rights, or on conversion of convertible securities, are not considered to be part of the acquisition cost unless the purchaser is legally obligated to exercise or convert the securities. The $10 000 maximum acquisition cost is calculated per distribution of~~, or trade in,~~ security.

Nevertheless, concurrent and consecutive, closely-timed offerings to the same purchaser will usually constitute one distribution of~~, or trade in,~~ a security. Consequently, when calculating the acquisition cost, all of these offerings by or on behalf of the issuer to the same purchaser who is not an eligible investor would be included. It would be inappropriate for an issuer to try to circumvent the $10 000 threshold by dividing a subscription in excess of $10 000 by one purchaser into a number of smaller subscriptions of $10 000 or less that are made directly or indirectly by the same purchaser.

A purchaser can qualify as an eligible investor under various categories of the definition, including if the purchaser has and has had in prior years either $75 000 pre-tax net income or profit or has $400 000 worth of net assets. In calculating a purchaser's net assets, subtract the purchaser's total liabilities from the purchaser's total assets. The value attributed to assets should reasonably reflect their estimated fair value. Income tax should be considered a liability if the obligation to pay it is outstanding at the time of the distribution of~~, or trade in,~~ a security.

Another way a purchaser can qualify as an eligible investor is to obtain advice from an eligibility adviser. An eligibility adviser is a person registered as an investment dealer (or in an equivalent category of unrestricted dealer in the purchaser's jurisdiction) that is authorized to give advice with respect to the type of security being distributed~~ or traded~~. In Saskatchewan and Manitoba, certain lawyers and public accountants may also act as eligibility advisers.

A registered investment dealer providing advice to a purchaser in these circumstances is expected to comply with the "know your client" and suitability requirements under applicable securities legislation and SRO rules and policies. Some dealers have obtained exemptions from the "know your client" and suitability requirements because they do not provide advice. An assessment of suitability by these dealers is not sufficient to qualify a purchaser as an eligible investor.

(2) Form of offering memorandum

There are two forms of offering memorandum: Form 45-106F3, which may be used by qualifying issuers, and Form 45-106F2, which must be used by all other issuers. Form 45-106F3 requires qualifying issuers to incorporate by reference their annual information form (AIF), management's discussion and analysis (MD&A), annual financial statements and subsequent specified continuous disclosure documents required under NI 51-102.

A qualifying issuer is a reporting issuer that has filed an AIF under NI 51-102 and has met all of its other continuous disclosure obligations, including those in NI 51-102, National Instrument 43-101 *Standards of Disclosure for Mineral Projects*, and National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities*. Under NI 51-102, venture issuers are not required to file AIFs. However, if a venture issuer wants to use Form 45-106F3, the venture issuer must voluntarily file an AIF under NI 51-102 in order to incorporate that AIF into its offering memorandum.

(3) Date of certificate and required signatories

The issuer must ensure that the information provided to the purchaser is current and does not contain a misrepresentation. For example, if a material change occurs in the business of the issuer after delivery of an offering memorandum to a potential purchaser, the issuer must give the potential purchaser an update to the offering memorandum before the issuer accepts the agreement to purchase the securities. The update to the offering memorandum may take the form of an amendment describing the material change, a new offering memorandum containing up-to-date disclosure or a material change report, whichever the issuer decides will most effectively inform purchasers.

Whatever form of update the issuer uses, it must include a newly signed and dated certificate as required in the applicable subsection 2.9(9), ~~(10), (10.1), (10.2), (10.3), (11), (11.1), or (12) or 3.9(9),~~ (10), (10.1), (10.2), (10.3), (11), (11.1), or (12) of NI 45-106.

"Promoter" is defined differently in provincial and territorial securities legislation across CSA jurisdictions. It is generally defined as meaning a person who has taken the initiative in founding, organizing or substantially reorganizing the business of the issuer or who has received consideration over a prescribed amount for services or property or both in connection with founding, organizing or substantially reorganizing the issuer. "Promoter" has not been defined in the *Securities Act* (Québec) and a broad interpretation is taken in Québec in determining who would be considered a promoter.

Under securities legislation, persons who receive consideration solely as underwriting commissions or in consideration of property and who do not otherwise take part in the founding, organizing or substantially reorganizing the issuer are not promoters. Simply selling securities, or in some way facilitating sales in securities, does not make a person a promoter under the offering memorandum ~~exemptions~~exemption.

(4) Consideration to be held in trust

The purchaser has, or must be given, the right to cancel the agreement to purchase the securities until midnight on the 2nd business day after signing the agreement. During this period, the issuer must arrange for the consideration to be held in trust on behalf of the purchaser.

It is up to the issuer to decide what arrangements are necessary to preserve the consideration received from the purchaser. The requirement to hold the consideration in trust may be satisfied if, for example, the issuer keeps the purchaser's cheque, without cashing or depositing it, until the expiration of the two business day cancellation period.

It is also the issuer's responsibility to ensure that whoever is holding the consideration promptly returns it to the purchaser if the purchaser cancels the agreement to purchase the securities.

(5) Filing of offering memorandum

The issuer is required to file the offering memorandum with the securities regulatory authority or regulator in each of the jurisdictions in which the issuer distributes~~ or trades~~ securities under an offering memorandum exemption. The issuer must file the offering memorandum on or before the 10th day after the distribution.

If the issuer is conducting multiple closings, the offering memorandum must be filed on or before the 10th day after the first closing. Once the offering memorandum has been filed, there is no need to file it again after subsequent closings, unless it has been updated.

(6) Purchasers' rights

Unless securities legislation in a purchaser's jurisdiction provides a purchaser with a comparable right of cancellation or revocation, an issuer must give each purchaser under an offering memorandum a contractual right to cancel the agreement to purchase the securities by delivering a notice to the issuer not later than midnight on the 2nd business day after the purchaser signs the agreement.

Unless securities legislation in a purchaser's jurisdiction provides purchasers with comparable statutory rights, the issuer must also give the purchaser a contractual right of action against the issuer in the event the offering memorandum contains a misrepresentation. This contractual right of action must be available to the purchaser regardless of whether the purchaser relied on the misrepresentation when deciding to purchase the securities. This right is similar to that given to a purchaser under a prospectus. The purchaser may claim damages or ask that the agreement be cancelled. If the purchaser wants to cancel the agreement, the purchaser must commence the action within 180 days after signing the agreement to purchase the securities. If the purchaser is seeking damages, the purchaser must commence the action within the earlier of 180 days after learning of the misrepresentation or 3 years after signing the agreement to purchase the securities.

The issuer is required to describe in the offering memorandum any rights available to the purchaser, whether they are provided by the issuer contractually as a condition to the use of the exemption or provided under securities legislation.

**3.9 Minimum amount investment**

(1) Baskets of securities

An issuer may wish to distribute~~ or trade~~ more than one kind of security of its own issue, such as shares and debt, in a single transaction under ~~a~~the minimum investment amount exemption. Provided that the shares and debt are sold in units that have a total acquisition cost of not less than $150 000 paid in cash at the time of the distribution of~~, or trade in,~~ a security, the ~~exemptions~~exemption can, if otherwise available, be used, notwithstanding that the acquisition cost of the shares and the acquisition cost of the debt, taken separately, are both less than $150 000.

(2) Not available for distributions to individuals or syndicates

The minimum amount investment exemption in section 2.10 of NI 45-106 is not available for distributions to individuals. "Individual" is defined in the securities legislation of certain jurisdictions to mean a natural person. The definition specifically excludes partnerships, unincorporated associations, unincorporated syndicates, unincorporated organizations and trusts. It also specifically excludes a natural person acting in the capacity of trustee, executor, administrator or personal or other legal representative.

Subsection 2.10(2) of NI 45-106 specifically prohibits using the minimum amount investment exemption to distribute to persons created or used solely to rely on this exemption. See section 1.8 of this Companion Policy for a discussion of the "anti-syndication" provisions in NI 45-106.

## PART 4 - OTHER EXEMPTIONS

### 4.1 Employee, executive officer, director and consultant exemptions

Trustees, custodians or administrators who engage in activities, contemplated in the prospectus ~~and dealer registration exemptions in sections~~exemption in section 2.27~~ and 3.27~~ of NI 45-106, that bring together purchasers and sellers of securities should have regard to the provisions of National Instrument 21-101 *Marketplace Operation* respecting "marketplaces" and "alternative trading systems".

The employee, executive officer, director and consultant exemptions are based on the alignment of economic interests between an issuer and its employees. They may, where available, be used to provide employees and other similar persons with an opportunity to participate in the growth of the employer's business and to compensate persons for the services they provide to an issuer. The securities regulatory authorities or regulators will generally not grant exemptive relief analogous to these exemptions except in very limited circumstances.

### 4.2 Business combination and reorganization

(1) Statutory procedure

The securities regulatory authorities and regulators interpret the phrase "statutory procedure" broadly and are of the view that the prospectus ~~and dealer registration exemptions~~exemption contained in ~~sections~~section 2.11 ~~and 3.11~~ of NI 45-106 ~~apply~~applies to all distributions of~~, and trades in,~~ securities of an issuer that are both part of the procedure and necessary to complete the transaction, regardless of when the distribution of~~, or trade in,~~ a security occurs.

The prospectus ~~and dealer registration exemptions~~exemption contained in ~~sections~~section 2.11 ~~and 3.11~~ of NI 45-106 ~~exempt~~exempts distributions of~~, and trades in,~~ securities in connection with an amalgamation, merger, reorganization or arrangement if the same is done "under a statutory procedure". The securities regulatory authorities or regulators are of the view that the references to statutory procedure in sections 2.11~~ and 3.11of NI 45-106~~ are to any statute of a jurisdiction or foreign jurisdiction under which the entities involved have been incorporated or created and exist or under which the transaction is taking place. This would include, for example, an arrangement under the *Companies' Creditors Arrangement Act* (Canada).

(2) Three-cornered amalgamations

Certain corporate statutes permit a so-called “three-cornered merger or amalgamation” under which two companies will amalgamate or merge and security holders of the amalgamating or merging entities will receive securities of a third party affiliate of one amalgamating or merging entity. The prospectus ~~and dealer registration exemptions~~exemption contained in ~~sections~~section 2.11 ~~and 3.11~~ of NI 45-106 ~~refer~~refers to these distributions of~~, or trades in,~~ a security when they refer to a distribution of~~, or a trade in,~~ a security made in connection with an amalgamation or merger done under a statutory procedure.

(3) Exchangeable shares

A transaction involving a procedure described in the prospectus ~~and dealer registration exemptions~~exemption contained in ~~sections~~section 2.11~~ and 3.11~~ of NI 45-106 may include an exchangeable share structure to achieve certain tax-planning objectives. For example, where a non-Canadian company seeks to acquire a Canadian company under a plan of arrangement, an exchangeable share structure may be used to allow the Canadian shareholders of the company to be acquired to receive, in substance, shares of the non-Canadian company while avoiding the adverse tax consequences associated with exchanging shares of a Canadian company for shares of a non-Canadian company. Instead of receiving shares of the non-Canadian company directly, the Canadian shareholders receive shares of a Canadian company which, through various contractual arrangements, have economic terms and voting rights that are essentially identical to the shares of the non-Canadian company and permit the holder to exchange such shares, at a time of the holder’s choosing, for shares of the non-Canadian company.

Historically, the use of an exchangeable share structure in connection with a statutory procedure has raised a question as to whether the ~~exemptions~~exemption now contained in ~~sections~~section 2.11 ~~and 3.11~~ of NI 45-106 ~~were~~was available for all distributions~~ or trades~~ necessary to complete the transaction. For example, in the case of the acquisition under a plan of arrangement noted above, the use of an exchangeable share structure may result in a delay of several months or even years between the date of the arrangement and the date the shares of the non-Canadian company are distributed to the former shareholders of the acquired company. As a result of this delay, some filers have questioned whether the distribution of the non-Canadian company’s shares upon the exercise of the exchangeable shares may still be viewed as being “in connection with” the statutory transaction, and have made application for exemptive relief to address this uncertainty.

The securities regulatory authorities or regulators take the position that the statutory procedure ~~exemptions~~exemption contained in section 2.11 ~~and section 3.11~~ of NI 45-106 ~~refer~~refers to all distributions ~~or trades~~ of securities that are necessary to complete an exchangeable share transaction involving a procedure described in section ~~2.11 or section 3.11,~~2.11, even where such distributions~~ or trades~~ occur several months or years after the transaction. In the case of the acquisition noted above, the investment decision of the shareholders of the acquired company at the time of the arrangement represented a decision to, ultimately, exchange their shares for shares of the non-Canadian company. The distribution of such shares upon the exercise of the exchangeable shares does not represent a new investment decision, but merely represents the completion of that original investment decision. Accordingly, additional exemptive relief is not warranted in circumstances where the original transaction was completed in reliance on ~~these exemptions~~this exemption.

### 4.3 Asset acquisition - character of assets to be acquired

When issuing securities, issuers must comply with the requirements under applicable corporate or other governing legislation that the securities be issued for fair value. Where securities are issued for non-cash consideration such as assets or resource properties, it is the responsibility of the issuer and its board of directors to determine the fair market value of the assets or resource properties and to retain records to demonstrate how that fair market value was determined. In some situations, cash assets that make up working capital could also be considered in the total calculation of the fair market value.

### 4.4 Securities for debt - *bona fide debt*

A bona fide debt is one that was incurred for value, on commercially reasonable terms and that on the date the debt was incurred the parties believed would be repaid in cash.

A reporting issuer may distribute~~ or trade~~ securities to settle a debt only after the debt becomes due, as evidenced by the creditor issuing an invoice, demand letter or other written statement to the issuer indicating that the debt is due. The securities for debt ~~exemptions~~exemption may not be relied on for the issuance of securities by an issuer to secure a debt that will remain outstanding after the issuance.

### 4.5 Take-over bid and issuer bid

(1) Exempt bids

The terms "take-over bid" and "issuer bid", for the purposes of ~~sections~~section 2.16~~ and 3.16~~ of NI 45-106, include an exempt take-over bid and exempt issuer bid.

(2) Bids involving exchangeable shares

The take-over bid and issuer bid exemptions refer to all distributions~~ or trades~~ necessary to complete a take-over bid or an issuer bid that involves an exchangeable share structure (as described under section 4.2 of this Companion Policy), even where such distributions ~~or trades~~ may occur several months or even years after the bid is completed.

### 4.6 Isolated distribution ~~or trade~~

The ~~exemptions~~exemption contained in section 2.30 ~~and 3.30~~ of NI 45-106 ~~are~~is limited to ~~distributions of, or trades in,~~a distribution of a security made by an issuer in a security of its own issue. ~~There is also an additional isolated trade dealer registration exemption contained in section 3.29 of NI 45-106. While the latter exemption refers to trades in any security, it does not apply to any trades by an issuer in a security that is issued by the issuer.~~It is intended that ~~these exemptions~~this exemption will only be used rarely and ~~are not available for registrants or others whose business is trading in~~not to distribute securities to multiple purchasers.

### 4.6.1 Short-term securitized products

(1) Types of short-term securitized products

Section 2.35.1 is a prospectus exemption for the distribution of short-term securitized products. Short-term securitized products distributed in Canada are generally asset-backed commercial paper.

(2) Definition of "asset pool"

The term "cash-flow generating assets" in the definition of "asset pool" refers to the bonds, mortgages, leases, loans, receivables, or royalties in which a conduit has a direct or indirect ownership or security interest. It does not refer to a security or other instrument through which a conduit obtains an indirect ownership or security interest in underlying cash-flow generating assets. For example, a conduit may enter into an asset transaction whereby it purchases a note from a trust that owns a pool of mortgages, thereby acquiring an indirect ownership or security interest in that pool of mortgages. In this scenario, the "cash-flow generating assets" are the mortgages, not the note.

(3) Interaction of conditions with credit ratings

In order for the short-term securitized products prospectus exemption to be available, the short-term securitized product must satisfy certain conditions relating to credit ratings as set out in subparagraphs 2.35.2(a)(i) and (ii). The short-term securitized product and issuing conduit must also satisfy other conditions regarding liquidity support, series or class seniority and asset pool composition as set out in subparagraphs 2.35.2(a)(iii) and (iv) and paragraphs 2.35.2(b) and (c).

Short-term securitized products that satisfy the conditions in the prospectus exemption relating to liquidity support, series or class seniority and asset pool composition may not necessarily satisfy the credit-rating conditions; particularly the requirement in subparagraph 2.35.2(a)(i) that one of the two credit ratings must be at the highest rating category. Designated rating organizations each have their own rating methodologies and may require features that go beyond those specified in the prospectus exemption in order for a short-term securitized product to obtain a credit rating in the highest category.

(4) Liquidity provider

Clause 2.35.2(a)(iv)(B) requires a liquidity provider to be a deposit-taking institution regulated or approved to carry on business in Canada by the Office of the Superintendent of Financial Institutions (OSFI) or a Canadian federal or provincial government department or regulatory authority. This provision allows a foreign bank to be a liquidity provider if it is a Schedule II or Schedule III bank that is regulated by OSFI or approved by OSFI to carry on business in Canada.

(5) Exceptions relating to liquidity agreements

The intention of subsection 2.35.3(2) is to permit a liquidity agreement to provide that a liquidity provider need not advance funds in respect of assets that have defaulted and that are not covered by any applicable credit enhancement. For purposes of paragraph 2.35.3(2)(a), we expect that the aggregate value of the non-defaulted assets would be the book value, unless some other method of

determining the value is specified by the provisions of the applicable liquidity agreement, e.g. discounted value or market value.

(6) Disclosure – meaning of "make reasonably available"

Section 2.35.4 requires that each information memorandum and reports on Form 45-106F7 and Form 45-106F8 be made reasonably available both to securities regulators and purchasers of a short-term securitized product.

~~Reliance upon the isolated trade exemption might, for example, be appropriate when a person who is not involved in the business of trading securities wishes to make a single trade of a security that the person owns to another person. The exemption would not be available to a person for any subsequent trades for a period of time adequate to ensure that each transaction was truly isolated and unconnected.~~
This requirement could generally be satisfied by a conduit posting the document on a website maintained by it or on its behalf. If a password is used to limit access to the website, we would expect that the password would be promptly provided upon application. We generally would not object if a prospective purchaser, before being provided access to a website on which the documents are posted, would have to agree to keep the information on the website confidential or that it would not provide others with access to the website or the documents available on it.

### 4.7 Mortgages

In British Columbia, Alberta, Manitoba, Québec and Saskatchewan, NI 45-106 specifically excludes syndicated mortgages from the mortgage prospectus ~~and dealer registration exemptions in sections 2.36 and 3.36.~~exemption in section 2.36. In determining what constitutes a syndicated mortgage, issuers will need to refer to the corresponding definition provided in section 2.36~~(1) or 3.36~~(1) of NI 45-106.

The mortgage ~~exemptions do~~prospectus exemption does not apply to distributions ~~or trades~~ in securities that secure mortgages by bond, debenture, trust deed or similar obligation. The mortgage ~~exemptions~~prospectus exemption also ~~do~~does not apply to a distribution of~~, or a trade in,~~ a security that represents an undivided co-ownership interest in a pool of mortgages, such as a pass-through certificate issued by an issuer of asset-backed securities.

### 4.8 Not for profit issuer

(1) Eligibility to use ~~these exemptions~~this exemption

~~These exemptions apply~~This exemption applies to distributions of~~, and trades in,~~ securities of an issuer that is organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not for profit ("not for profit issuer"). To use ~~these exemptions~~this exemption, an issuer must be organized exclusively for one or more of the listed purposes and use the funds raised for those purposes.

If an issuer is organized exclusively for one of the listed purposes, but its mandate changes so that it is no longer primarily engaged in the purpose it was organized for, the issuer may no longer be able to rely on ~~these exemptions~~this exemption. For example, if an issuer organized exclusively for educational purposes over time devotes more and more of its efforts to lending money, even if it is

only to other educational entities, the lending issuer may be unable to rely on these exemptions. The same would also be true if one of an issuer's mandates was to provide an investment vehicle for its members. An issuer that issues securities that pay dividends would also not be able to use these exemptions, because no part of the issuer's net earnings can go to any security holder. However, if the securities are debt securities and the issuer agrees to repay the principal amount with or without interest, the security holders are not considered to be receiving part of the net earnings of the issuer. The debt securities may be secured or unsecured.

If investors could receive any special treatment as a result of purchasing securities, the security holders are not typically receiving part of the net earnings of the issuer and the sale may still fit within these exemptions. For example, if the not for profit issuer runs a golf course and offers security holders a waiver of greens fees for three years, it could still rely on ~~these exemptions~~this exemption, provided all other conditions are met (and the exemption remains available in the relevant jurisdiction(s)).

If, at the time of the distribution of~~, or trade in,~~ the security, the purchaser has an entitlement to the assets of the issuer on the basis that they would be getting part of the net earnings of the issuer, then the sale would not fit within ~~these exemptions~~this exemption.

In Québec, not for profit issuers may still rely on the broad exemption available for not for profit issuers under section 3 of the *Securities Act* (Québec).

(2) Meaning of "no commission or other remuneration"

~~Sections~~Section 2.38(b) ~~and 3.38(b) provide~~provides that "no commission or other remuneration is paid in connection with the sale of the security". This is intended to ensure that no one is paid to find purchasers of the securities. However, the issuer may pay its legal and accounting advisers for their legal or accounting services in connection with the sale.

~~**4.9 Exchange contracts**~~

~~The dealer registration exemption for exchange contracts contained in section 3.45 of NI 45-106 (and as limited by section 3.0 of NI 45-106) is only available in Alberta, British Columbia, Québec and Saskatchewan. In Manitoba and Ontario, exchange contracts are governed by commodity futures legislation.~~

~~Except in Saskatchewan, the dealer registration exemption for exchange contracts contained in section 3.45(1)(b) (and as limited by section 3.0) of NI 45-106 provides for trades resulting from unsolicited orders placed with an individual resident outside the jurisdiction. However, if the individual conducts further trades in the future, that individual will be deemed to be carrying on business in the jurisdiction and will not be able to rely on this exemption.~~

## PART 5 – FORMS

### 5.1 Report of ~~Exempt Distribution~~exempt distribution

(1) Requirement to file

An issuer that has distributed a security of its own issue under any of the prospectus exemptions listed in section 6.1 of NI 45-106 is required to file a report of exempt distribution, on or before the 10th day after the distribution. Alternatively, if an underwriter distributes securities acquired under section 2.33 of NI 45-106, either the issuer or the underwriter may complete and file the form. If there is a syndicate of underwriters, the lead underwriter may file the form on behalf of the syndicate or each underwriter may file a form relating to the portion of the distribution it was responsible for.

The required form of report is Form 45-106F1 *Report of Exempt Distribution* in all jurisdictions except British Columbia. In British Columbia, the required form of report is Form 45-106F6 *British Columbia Report of Exempt Distribution.*

In determining if it is required to file a report in a particular jurisdiction, the issuer or underwriter should consider the following questions:

(a) Is there a distribution in the jurisdiction? (Please refer to the securities legislation of the jurisdiction for guidance, if any, on when a distribution occurs in the jurisdiction.)

(b) If there is a distribution in the jurisdiction, what exemption from the prospectus requirement is the issuer relying on for the distribution of the security?

(c) Does the exemption referred to in paragraph (b) trigger a reporting requirement? (Reports of exempt distribution are required for distributions made in reliance on the prospectus exemptions listed in section 6.1 of NI 45-106.)

A distribution may occur in more than one jurisdiction. In this case, the issuer is required to file a single report in each Canadian jurisdiction where the distribution has occurred, except British Columbia. The report will set out all distributions in each Canadian jurisdiction.

If the distribution occurs in British Columbia and one or more other jurisdictions, the issuer is required to file Form 45-106F6 with the British Columbia Securities Commission and file Form 45-106F1 in the other applicable jurisdictions.

(2) Access to information in jurisdictions other than British Columbia

The securities legislation of several provinces requires that information filed with the securities regulatory authority or, where applicable, the regulator under such securities legislation, be made available for public inspection during normal business hours except for information that the securities regulatory authority, or where applicable, the regulator,

(a) believes to be personal or other information of such a nature that the desirability of avoiding disclosure thereof in the interest of any affected individual outweighs the

desirability of adhering to the principle that information filed with the securities regulatory authority or the regulator, as applicable, be available to the public for inspection,

(b) in Alberta, considers that it would not be prejudicial to the public interest to hold the information in confidence, and

(c) in Québec, considers that access to the information could result in serious prejudice.

Based on the above mentioned provisions of securities legislation, the securities regulatory authorities or regulators, as applicable, have determined that the information listed in Form 45-106F1 *Report of Exempt Distribution,* Schedule I ("Schedule I") discloses personal or other information of such a nature that the desirability of avoiding disclosure of this personal information outweighs the desirability of making the information available to the public for inspection. In addition, in Alberta, the regulator considers that it would not be prejudicial to the public interest to hold the information listed in Schedule I in confidence. In Québec, the securities regulatory authority considers that access to Schedule I by the public in general could result in serious prejudice and consequently, the information listed in Schedule I will not be made publicly available.

(3) Filings in British Columbia

For filings made in British Columbia, issuers are required to file Form 45-106F6 and pay the fees associated with that filing electronically using BCSC e-services. This requirement only applies to filings that are required to be made within 10 days of the distribution. It does not apply to filings made annually by investment funds under section 6.2(2) of NI 45-106. Please refer to BC Instrument 13-502 *Electronic Filing of Reports of Exempt Distribution* for further information.

### 5.2 Forms required under the offering memorandum exemption

NI 45-106 designates two forms of offering memorandum. The first, Form 45-106F2, is for non-qualifying issuers and the second, Form 45-106F3, can only be used by qualifying issuers (as defined in NI 45-106).

The required form of risk acknowledgment under sections 2.9(1)~~, 3.9(1), 2.9(2)~~ and ~~3.9~~2.9(2) of NI 45-106 is Form 45-106F4.

### 5.3 Real estate securities

Certain jurisdictions impose alternative or additional disclosure requirements in relation to the distribution of real estate securities by offering memorandum. Refer to securities legislation in the jurisdictions where securities are being distributed.

### 5.4 Risk ~~Acknowledgement Form Respecting Close Personal Friends and Close Business Associates~~ acknowledgement form for distributions to close personal friends and close business associates in Saskatchewan

In Saskatchewan, a risk acknowledgment is also required under section 2.6(1) of NI 45-106 ~~(and under section 3.6(1))~~ if the person intends to rely upon the "family, friends and business associates exemption" in section 2.5 ~~(or in section 3.5)~~ of NI 45-106, which is based on a relationship of close personal friendship or close business association. The form of risk acknowledgement required in these circumstances is Form 45-106F5.

### 5.5 Risk acknowledgement form for distributions to individual accredited investors

A person relying on the accredited investor exemption in section 2.3 of NI 45-106 and section 73.3 of the *Securities Act* (Ontario) to distribute securities to an individual must obtain a signed risk acknowledgement from that individual accredited investor. Under subsection 2.3(7) of NI 45-106, this requirement does not apply if the individual accredited investor meets the highest threshold to be an individual accredited investor, that is, the individual owns $5 000 000 of financial assets as set out in paragraph (j.1) of the definition of "accredited investor" in section 1.1 of NI 45-106. The required form of risk acknowledgement for the accredited investor exemption is Form 45-106F9 *Form for Individual Accredited Investors*.

## PART 6 – RESALE OF SECURITIES ACQUIRED UNDER AN EXEMPTION

### 6.1 Resale restrictions

In most jurisdictions, securities distributed under a prospectus exemption may be subject to restrictions on their resale. The particular resale, or "first trade", restrictions depend on the parties to the distribution and the particular exemption that was relied upon to distribute the securities. In certain circumstances, no resale restrictions will apply and the securities acquired under an exempt distribution will be freely tradable.

Resale restrictions are imposed under National Instrument 45-102 *Resale of Securities* (~~"~~NI 45-102~~"~~). While NI 45-106 contains text boxes providing commentary on resale, these text boxes are intended as guidance only and are not a substitute for reviewing the applicable provisions in NI 45-102 to determine what resale restrictions, if any, apply to the securities in question.

The resale restrictions operate by the resale transaction triggering the prospectus requirement unless certain conditions are satisfied. Securities that are subject to such restrictions in circumstances where the conditions cannot be satisfied may nevertheless be distributed under an exemption from the prospectus requirement, whether under NI 45-106 or other securities legislation.

~~**Amended and Restated September 28, 2009 except in Ontario.**~~

~~**In Ontario, Amended and Restated on the later of the following:**~~

~~**(a) September 28, 2009;**~~

~~**(b) the day on which sections 5 and 11, subsection 12(1) and section 13 of Schedule 26 of the *Budget Measures Act, 2009* are proclaimed in force.**~~

## PART 7 – TRANSITION

### 7.1 Transition – Application of ~~Amendments –~~ IFRS amendments

The amendments to NI 45-106 and this Companion Policy which came into effect on January 1, 2011 only apply in respect of an offering memorandum or an amendment to an offering memorandum of an issuer which includes or incorporates by reference financial statements of the issuer in respect of periods relating to financial years beginning on or after January 1, 2011.

~~[Amended October 3, 2011]~~

**Modified: Except in Ontario, this Companion Policy takes effect on May 5, 2015. In Ontario, this Companion Policy will take effect on the later of the following:**

**(a) May 5, 2015 and**

**(b) the day on which subsection 12(2) of Schedule 26 of the *Budget Measures Act, 2009* is proclaimed in force.**

**Annex E**
**Amendments to**
**National Instrument 51-102 *Continuous Disclosure Obligations***

***1. National Instrument 51-102 Continuous Disclosure Obligations is amended by this Instrument.***

***2. Paragraphs 13.3(2)(c)(iv), 13.3(3)(e)(iv) and 13.4(2)(c)(iv) are amended by replacing*** **"**exemptions from the prospectus requirement in section 2.35 and registration requirement in section 3.35 of National Instrument 45-106 *Prospectus and Registration Exemptions***" with "**exemption from the prospectus requirement in section 2.35 of National Instrument 45-106 *Prospectus Exemptions***".**

3. Except in Ontario, this Instrument comes into force on May 5, 2015. In Ontario, this Instrument comes into force on the later of the following:

(a) May 5, 2015 and

(b) the day on which subsection 12(2) of Schedule 26 of the *Budget Measures Act, 2009* is proclaimed in force.

**Annex F**
**Amendments to Specified Instruments**

***1. Multilateral Instrument 11-102 – Passport System, Multilateral Instrument 13-102 System Fees for SEDAR and NRD, National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations, National Instrument 33-105 Underwriting Conflicts, National Instrument 41-101 General Prospectus Requirements, National Instrument 45-102 Resale of Securities, National Instrument 51-102 Continuous Disclosure Obligations, National Instrument 52-107 Acceptable Accounting Principles and Auditing Standards, National Instrument 62-103 The Early Warning System and Related Take-Over Bid and Insider Reporting Issues, and Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids are amended by this Instrument.***

***2. The Instruments named in section 1 are amended***

***(a) by replacing "***National Instrument 45-106 Prospectus and Registration Exemptions***" with "***National Instrument 45-106 *Prospectus Exemptions****" wherever the expression occurs,***

***(b) by replacing "***National Instrument 45-106 — *Prospectus and Registration Exemptions****" with "***National Instrument 45-106 *Prospectus Exemptions****" wherever the expression occurs, and***

***(c) by replacing "***National Instrument 45-106 *Prospectus and Registration Exemptions****" with "***National Instrument 45-106 *Prospectus Exemptions****" wherever the expression occurs.***

3. Except in Ontario, this Instrument comes into force on May 5, 2015. In Ontario, this Instrument comes into force on the later of the following:

(a) May 5, 2015 and

(b) the day on which subsection 12(2) of Schedule 26 of the *Budget Measures Act, 2009* is proclaimed in force.

**Annex G**
**Changes to Specified Policies**

***1. Companion Policy 11-102CP to Multilateral Instrument 11-102 Passport System, National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions, Companion Policy 23-103CP Electronic Trading and Direct Electronic Access to Marketplaces, Companion Policy 31-103CP to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations, Companion Policy 45-102CP to National Instrument 45-102 Resale of Securities, Companion Policy 51-105CP to Multilateral Instrument 51-105 Issuers Quoted in the U.S. Over-the-Counter Markets are changed by this Instrument.***

***2. The Policies named in section 1 are changed***

***(a) by replacing "***National Instrument 45-106 *Registration and Prospectus Exemptions****" with "***National Instrument 45-106 *Prospectus Exemptions****" wherever it occurs, and***

***(b) by replacing "***National Instrument 45-106 *Prospectus and Registration Exemptions****" with "***National Instrument 45-106 *Prospectus Exemptions****" wherever it occurs.***

3. Except in Ontario, the changes to these policies take effect on May 5, 2015. In Ontario, the changes to these policies will take effect on the later of the following:

(a) May 5, 2015 and

(b) the day on which subsection 12(2) of Schedule 26 of the *Budget Measures Act, 2009* is proclaimed in force.