

November 14, 2022

**RE: AMENDMENTS TO NATIONAL INSTRUMENT 45-106 INTRODUCING THE LISTED ISSUER FINANCING PROSPECTUS EXEMPTION**

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For your convenience, we have prepared this summary of the new Listed Issuer Financing prospectus exemption (the “Exemption”). Assuming the Minister of Finance does not object, the amendments described herein will take effect on November 21, 2022.

**Why this new exemption?**

The Exemption will allow issuers with an established continuous disclosure record to more efficiently raise capital. Subject to the requirements detailed below, an issuer’s pre-existing continuous disclosure record need only be supplemented by a short offering document, which will not be reviewed by securities commissions, before the issuer may raise between \$5,000,000 and \$10,000,000 in any 12-month period. Additionally, securities offered under this exemption are freely and immediately tradeable.

**Who may take advantage of the Exemption?**

In order to use the Exemption:

- The issuer must have been a reporting issuer in a Canadian jurisdiction for the 12 months immediately before the filing of the offering’s kick-off news release;
- The issuer must have listed equity securities;
- The issuer, and any company with which it completed a restructuring transaction, must not have ceased operations or had cash, cash equivalents, or an exchange listing as its principal asset at any time during the 12 months immediately before the filing of the offering’s kick-off news release (such as capital pool companies, special purpose acquisition companies, etc.);
- The issuer must not be an investment fund;
- The total amount of funds which may be raised within any 12-month period under this exemption is between \$5 million and \$10 million, depending on the Issuer’s listed market capital; and
- All distributions under the Exemption within the last 12-month period, when taken together with the distribution now being made, may not dilute the Issuer’s listed equity securities by more than 50%.

Please note that a current annual information form (“AIF”) is not required. This alleviates a cumbersome requirement for similar offerings under short-form prospectuses.

**What disclosure and documentation are required?**

Before soliciting an offer to purchase under the Exemption, an issuer must have filed the following:

- All required periodic and timely disclosure documents;
- A news release announcing the offering and containing prescribed language<sup>1</sup>; and
  - NOTE: This prescribed language must also be included in any initial written communication with a prospective purchaser.
- A completed Form 45-106F19 (the “**Form**”), being the new *Listed Issuer Financing Document*, which must also be posted on the issuer’s website (should the issuer have one).
  - NOTE: Similar to a prospectus, the Form must be filed no later than 3 business days after the date of the Form.
  - The Form and the news release must be filed in all jurisdictions where the offering is taking place, even if the issuer is not a reporting issuer there.

The Offering itself must close within 45 days of the initial news release. Upon closing, a Form 45-106F1 *Report of Exempt Distribution* must be filed within 10 days, as with all private placements.

#### **What must the 45-106F19 Form contain?**

The CSA expect the Form to be concise, easy to understand and in plain language, and to generally be no longer than five pages. To this end, the Form is structured as a simple Q&A with general questions serving as headings. It must contain such items as:

- Any undisclosed material facts about the securities being offered;
- The amount and source of the funds available to the issuer after completion of the offering;
- How the issuer will use the funds described; and
- A certificate confirming that the Form, together with the issuer’s continuous disclosure record for the last 12 months (or longer if the most recent annual financial statements were filed more than 12 months ago), contains disclosure of all material facts about the securities being offered and does not contain a misrepresentation.

#### **What kinds of securities may be distributed under the Exemption?**

Only listed equity securities and units consisting of listed equity securities and warrants convertible into listed equity securities may be distributed under the Exemption. Therefore, the Exemption may not be used to distribute subscription receipts, special warrants, convertible debentures, etc.

As the ‘flow-through’ designation of flow-through shares is a tax rather than securities law matter, flow-through shares may be distributed under the Exemption so long as such shares qualify as listed equity securities.

#### **Who may purchase securities under the Exemption? Is an underwriter required?**

There are no restrictions: anyone may purchase securities offered under the Exemption. No underwriter or registrant must be engaged. Any registrants which are engaged will be held to their usual standards.

Additionally, the CSA is conscious of the potential this creates for ‘backdoor underwriting.’ Where the Exemption is used to distribute securities to one purchaser or a small group of purchasers who immediately resell the securities, the subsequent purchasers could have the benefit of the issuer liability explained below and the initial purchasers may be required to register as underwriters.

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<sup>1</sup> “There is an offering document related to this offering that can be accessed under the issuer’s profile at [www.sedar.com](http://www.sedar.com) and at [issuer website]. Prospective investors should read this offering document before making an investment decision.

### **What resale restrictions burden securities distributed under the Exemption?**

No resale restrictions will attach to securities distributed under the exemption: they are freely tradeable.

### **How much capital may be raised under the Exemption?**

While there is no formal minimum offering, the issuer must reasonably expect that it will have sufficient available funds to meet its business objectives and liquidity requirements for 12 months following the distribution. This could require an issuer to raise a minimum amount, depending on circumstances.

While the Exemption bears only a moderate maximum amount, issuers are able to distribute securities under multiple prospectus exemptions, provided they comply with all requirements. The hold period for any distributed securities is determined by the exemption under which the purchasers subscribe.

### **What Stock Exchange discount pricing regime will apply to securities offered under the Exemption?**

The TSXV has indicated that the private placement discount rules will apply. Other Exchanges have not made an indication, but we expect them to follow the TSXV.

### **Do any marketing restrictions apply to distributions under the Exemption?**

The rule relating to marketing under a prospectus offering will not apply when offering securities under the Exemption. Instead, the same regime as for private placements will apply, modified by the requirement that before making broad solicitations of interest the press release must be disseminated and the Form must be published.

### **How is the usage of proceeds restricted under the Exemption?**

The issuer may not allocate available funds to the following:

- An acquisition that is a significant acquisition under Part 8 of National Instrument 51-102 *Continuous Disclosure Obligations*;
- A restructuring transaction; or
- Any other transaction for which the issuer is obligated to seek approval of any security holder.

### **What is the required timeline for an offering under the Exemption?**

The final closing of an offering under the Exemption must occur no later than 45 days after the date of the kick-off news release.

### **What liabilities does the issuer bear in an offering under the Exemption?**

Purchasers under the Exemption will have the same rights as purchasers in the secondary market for misrepresentations contained in the short offering document and/or in the 12-month continuous disclosure record, as the offering document will constitute a “core document”. In addition, purchasers under the Exemption will have a right to rescind the purchase for 180 days should there be any misrepresentation, similar to prospectus offerings.

One should also note that the offering document will not be reviewed by regulators. Therefore, it is essential that thorough disclosure is provided independently by the issuer. Since the Form is shorter and less comprehensive than other offering documents, and forbids incorporating information by reference, it may be wise to include pointers to relevant parts of the issuer’s disclosure record.

### **What liabilities does the dealer bear in an offering under the Exemption?**

As with the Offering Memorandum system, the Exemption will not impose statutory liability on Investment Dealers. However, the dealer is still expected to comply with their KYC and KYP requirements, which will require them to conduct their own due diligence investigations.

**What are the US considerations for this new exemption?**

- The press release announcing the offering would need to be reviewed by US counsel, either to ensure that it is not released in the U.S. or that it complies with the circumscribed requirements for press releases issued in connection with an exempt offering (including the requirement that the underwriters or agents participating in the offering not be named in the press release).
- The approach toward posting the offering document on the issuer’s website would need to be considered, including whether the issuer should use some form of geofencing technology, mandatory questionnaires or other means to prevent the general public in the United States from accessing the offering document on the website.
- The typical U.S. offering language would need to be included in the offering document or in some kind of wrap around the offering document that is used for purposes of the U.S. portion of the offering. There would need to be a portion of this that would need to be completed by U.S. investors, to confirm the availability of the U.S. exemption (such as the accredited investor exemption).
- As before, any underwriters, agents or finders that are paid fees or commissions on U.S. sales must be registered in the U.S. (federally and with the applicable state).
- Any applicable U.S. post-closing filings or state securities law notices would need to be made.

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