



MAY 2012

# Securities *E-News*

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## CSA Provides Guidance to Improve Compliance of Disclosure Requirements Related to Prospectus Exemptions

On April 26, 2012, the Canadian Securities Administrators (CSA) published two notices aimed at improving market participant compliance with exemptions to prospectus requirements. [Staff Notice 45-308 \*Guidance for Preparing and Filing Reports of Exempt Distribution\*](#) (Staff Notice 45-308) and [Multilateral Staff Notice 45-309 \*Guidance for Preparing and Filing an Offering Memoranda\*](#) (Staff Notice 45-309).

These notices primarily focus on [Form 45-106F1 Report of Exempt Distribution \(Form F1\)](#) and [Form 45-106F2 Offering Memorandum for Non-Qualifying Issuers](#), and provide guidance to assist issuers in preparing and filing certain exempt market documents and also serve as a reminder to market participants who rely on prospectus exemptions that their filings or disclosure may come under staff review and that non-compliance may result in appropriate action by a CSA regulator. In this newsletter, we focus on Staff Notice 45-308.

### GUIDANCE AND ISSUES IDENTIFIED IN STAFF NOTICE 45-308

Staff Notice 45-308 outlines a number of issues observed by the CSA when reviewing reports of exempt distributions filed with them.

#### *Failure to use the correct reporting form*

Under [National Instrument 45-106 \*Prospectus and Registration Exemptions\*](#) (NI 45-106), the required form for a report of exempt distribution is Form F1, except in British Columbia, where since October 3, 2011, [Form 45-106 British Columbia Report of Exempt Distribution \(Form F6\)](#) is to be used. Form F6 is not to be used outside of British Columbia. Where a distribution occurs in British Columbia and elsewhere, the issuer or underwriter is required to file Form F6 with the British Columbia Securities Commission and file the Form F1 in the other applicable jurisdictions.

#### *Failure to timely file the report of exempt distribution*

The deadline for filing a report of exempt distribution (Form F1 or Form F6, as applicable) in each applicable jurisdiction where the distribution takes place is generally 10 days after the distribution.



#### *Failure to pay the required filing fee*

Issuers or underwriters must pay the applicable fee in each jurisdiction in which a distribution is made, when the report is filed.

#### *Failure to include a complete list of purchasers in the report of exempt distribution*

The CSA noted that some reports of exempt distribution only identified purchasers from the jurisdiction in which the report was filed, even though the distribution included purchasers from other jurisdictions. Reports of exempt distribution must identify all purchasers, including purchasers that reside in the jurisdiction of filing and those that do not.

#### *Failing to reconcile information in the report to the required schedule*

The number of securities distributed, total dollar value raised, number of purchasers or exemptions used set out in the report of exempt distribution must reconcile with the information provided in Schedule I to Form F1 (or, as the case may be, Form F6).

#### *Incorrectly identifying the number of purchasers*

The exempt distribution report requires the total number of purchasers in each jurisdiction to be reported. The number of purchasers refers to the number of investors and not to the number of securities each purchaser purchased.

#### *Relying on unavailable exemptions*

In certain instances, issuers distributing their securities in more than one jurisdiction have reported distributions under an exemption that is not available in one of the jurisdictions. Issuers or underwriters should note that not all exemptions set out in NI 45-106 are available in all jurisdictions. The report of exempt distribution must indicate the applicable exemption relied upon for each purchaser of securities. Accordingly, this may require the issuer or underwriter to report multiple exemptions relied on for the same purchaser in circumstances where the distribution is made in more than one jurisdiction and the same exemption is not available in all of the jurisdictions.

#### *Failure to disclose all commissions and finder's fees*

Form F1 (and Form F6) requires that compensation received or to be received by any person in connection with the distribution be disclosed. Compensation includes commissions, discounts or other fees or payments of a similar nature, which result from a distribution of securities, regardless of what the payment is called. Compensation does not include payments for services incidental to the distribution (such as clerical, printing, legal or accounting services).

#### *Failure to provide complete information regarding convertible or exchangeable securities distributed*

Where a security convertible or exchangeable into an underlying security is distributed, the report of exempt distribution must include a description of the underlying security, the terms of conversion or exercise, and any expiry date.



### *Improperly reporting distributions under the minimum amount exemption*

A person relying on the \$150,000 minimum purchase price exemption found in Section 2.10 of NI 45-106 should ensure that the purchase price reported is at least that minimum amount. Staff Notice 45-308 reminds us that it is not permissible to distribute securities under the minimum purchase price exemption to multiple purchasers acting in concert or as a “syndicate” in order to pool individual purchases and reach the \$150,000 minimum.

### *Failure to certify the report of exempt distribution*

Reports of exempt distributions must be dated and signed by the identified in the certificate section of the report of exempt distribution.

### NEED ASSISTANCE?

Heenan Blaikie has significant experience in connection with raising capital in Canada and compliance with applicable Canadian securities legislation, including in connection with private placements. If you have any questions on the subjects addressed in this Securities E-News or would like assistance in assessing the burdens and restrictions that issuers and investment dealers face in complying with the rules and regulations governing private placements in Canada, please feel free to contact us.

### CONTACTING HEENAN BLAIKIE

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Our clients range in size and sophistication from start-ups to the largest public companies, as well as public bodies such as health care and social services institutions, schools and universities, and numerous government entities. We also represent international clients seeking to protect and expand their interests in Canada as well as Canadian clients seeking to broaden their markets while continuing to benefit from our expert advice.