CFA Societies Canada

Canadian Advocacy Council

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VIA EMAIL

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Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Service NL
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
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Re: Proposed Amendments to National Instrument 45-106 Prospectus Exemptions to introduce the Listed Issuer Financing Exemption (the "Proposed Amendments")

The Canadian Advocacy Council of CFA Societies Canada[1] (the "CAC") appreciates the opportunity to provide the following general comments on the Proposed

[1] The CAC is an advocacy council for CFA Societies Canada, representing the 12 CFA Institute Member Societies across Canada and over 19,000 Canadian CFA Charterholders. The council includes investment

Amendments and responses to select questions set out below. We are directionally supportive of the CSA's intent to create a new prospectus exemption for reporting issuers already listed on a Canadian stock exchange (the "Listed Issuer Financing Exemption") which is premised on the issuer having an up-to-date continuous disclosure record for investor reliance in connection with a financing/offering. We agree with most of the conditions to the exemption, including the caps, the limit on the use of the exemption to those issuers with an existing business, and the requirement to file a report of exempt distribution while omitting individual purchaser details. However, we believe that some small but material changes to the proposed exemption are required to ensure that investor protection principles are upheld in creation and use of the exemption. The most important of these changes is that we believe distributions under the exemption should be subject to prospectus-level liability for misrepresentation.

We agree that it is important to encourage issuers to raise capital in the public markets, but it is just as important to preserve confidence in the quality of the public markets. Liability for representations made in a prospectus, as well as underwriter involvement in offerings have long been understood as important safeguards against fraud and abuse. Prospectus exemptions should not inadvertently allow potentially bad actors to take advantage of the system and thus shake confidence in our capital markets. In addition, we understand that in the United States, a prospectus remains the cornerstone of most secondary offerings and there could be implications to moving out of step with our most interconnected foreign capital market.

We understand that the Listed Issuer Financing Exemption would provide purchasers under the exemption with two options for recourse if there is a misrepresentation, namely a right of action under the existing secondary market civil liability regime, and a contractual right of action against the issuer for rescission. However, we believe the standard of prospectus liability should also be applied against the issuer's continuous disclosure record at time of offering in order to ensure that the issuer has sufficient incentive to ensure full, true and plain disclosure. We are not convinced that the argument that applying prospectus liability would increase underwriter due diligence costs and result in a longer offering document is compelling. If issuers have robust and complete continuous disclosure records, and the offering document does not in fact disclose any new material facts, it should be possible to still utilize an offering document that is shorter and less expensive to prepare than a short-form prospectus.

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professionals across Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. Visit www.cfacanada.org to access the advocacy work of the CAC.

CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion of ethical behavior in investment markets and a respected source of knowledge in the global financial community. Our aim is to create an environment where investors' interests come first, markets function at their best, and economies grow. There are more than 178,000 CFA Charterholders worldwide in over 160 markets. CFA Institute has nine offices worldwide and there are 160 local member societies. For more information, visit www.cfainstitute.org.

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There are a number of mitigating factors that should prevent issuers from preparing excessively long disclosure documents for use under the exemption. First, the offering caps in themselves mitigate liability risk arising from any offering under the Listed Issuer Financing Exemption, which should lead issuers to take a proportionate approach when drafting disclosure. Second, regardless of the liability regime that applies, the condensed offering document form requirements should lead to more condensed disclosure as issuers are likely to respond to the disclosure requirements that are placed in front of them. We speculate that the short-form prospectus regime would not otherwise have had the benefits it did.

With respect to the potential added costs, we agree with a number of the statements made by staff of the Ontario Securities Commission in its local published annex to the Proposed Amendments. It was noted that the expectation was that the costs to prepare the offering document used with the Listed Issuer Financing Exemption would be lower than that of a short-form prospectus because, among other reasons, there would be no requirement to prepare new personal information forms or expert consents, and auditors would not have to review any existing continuous disclosure filings as they would not be incorporated by reference into the offering document.

We support the requirement to report sales pursuant to the exemption on Form 45-106F1 *Report of Exempt Distribution* within 10 days of a distribution for consistency with other prospectus exemptions and to ensure that the issuer is required to keep up to date investor records. It will also assist regulators to gather information on the use of the exemption in "real time". We agree that given the nature of the purchasers, it would not be necessary to gather the information otherwise required to be included in Schedule 1 to the Form. It would be useful for a variety of capital markets stakeholders if the information contained in the Form was more easily publicly searchable than existing functionality allows.

We expect that many issuers will utilize the services of a dealer in connection with the Listed Issuer Financing Exemption in order to reach the broadest possible number of investors. Regulators should carefully monitor issuers that engage in direct distribution or marketing efforts without a registrant, to help determine if additional supervision or policy work is required in this area.

Responses to Select Questions

1. Under the Proposed Amendments, the total dollar amount that an issuer can raise using the Listed Issuer Financing Exemption would be subject to the following thresholds:

(a) the greater of 10% of an issuer's market capitalization and $5,000,000
(b) the maximum total dollar limit of $10,000,000
(c) a 100% dilution limit.

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Are all of these thresholds appropriate, or should we consider other thresholds?

While not opining directly on the appropriateness of these thresholds, we believe that close supervision of the use of this exemption and responsive modification of these thresholds to address where problems arise will be critical to the success of the exemption, investor protection, and broadly the maintenance of capital markets integrity. There exists real potential for misuse and investor abuse within these thresholds, particularly in combination with any incomplete or misleading disclosure record – caution and close supervision is warranted.

4. We propose that the securities eligible to be distributed under the Listed Issuer Financing Exemption would be limited to listed equity securities, units consisting of a listed equity security and a warrant exercisable into a listed equity security, or securities, such as subscription receipts, that are convertible into a unit consisting of a listed equity security and a warrant. These are securities that most investors would be familiar with and which are easier for an investor to understand. This list would allow for the Listed Issuer Financing Exemption to be used to distribute convertible debt. Are there reasons we should exclude convertible debt from the exemption?

We are not aware of policy reasons to exclude convertible debt from the eligible securities available under the exemption, though would highlight the need for monitoring against the dilution threshold on a fully converted basis.

5. We designed the Listed Issuer Financing Exemption contemplating that it would be used, from time to time, for discrete private placements, with a single closing date. Do you expect issuers would want to use the exemption to provide continuous, non-fixed price offerings as well? If so, what changes would be necessary to permit continuous distributions under the exemption? Do you see any concerns with permitting continuous distributions?

We would caution against the consideration (at least in the near-term) of allowing this exemption to be utilized for continuous non-fixed offerings. We believe the challenges of maintaining an accurate disclosure record and preparing an appropriate offering document in a continuous offering scenario are considerable, and present serious practical challenges. The post-offering reporting of a continuous offering is also potentially unnecessarily onerous. We would recommend a separate follow-on policy project examining this possibility in future, once data is available from use of this exemption, if the issues raised in this question remain a policy question or objective.

6. Over the last several years, the CSA has tried to address various capital raising challenges by introducing a number of streamlined prospectus exemptions targeted to reporting issuers with listed equity securities, including the existing security holder exemption and the investment dealer exemption. The use of these exemptions has been limited. We have heard from market participants that the existence of these rarely used

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prospectus exemptions may contribute to the complexity of the exempt market regime. If we adopt the proposed Listed Issuer Financing Exemption, should we consider repealing any of these other exemptions?

We're sympathetic to concerns that the exempt market regime is complex and believe that both market participants and investors could benefit from broad policy simplification. However, each potential exemption repeal should be subject to study as to the original policy reasons, historical usage (across different financing conditions/regimes), and the effect of similar exemptions on usage before any policy action is taken. We are generally supportive of regulatory efficiency, though encourage thoughtful consideration in its pursuit.

7. Investment dealers and exempt market dealers may participate in an offering under the proposed Listed Issuer Financing Exemption; however, there is no requirement for dealer or underwriter involvement. In addition, no exemption from the registration requirement is provided for acts related to distributions under the exemption, so any persons in the business of trading in securities will require registration or an available registration exemption for any activities undertaken in connection with distributions under the exemption.

(a) If adopted, do you anticipate that issuers would involve a dealer in offerings under the exemption?

(b) If not, how do you expect issuers will conduct their offerings, for example, via their own website?

While we expect many issuers to involve a dealer in offerings under the exemption, we expect that some will opt to conduct their own offerings directly with investors. We would encourage close regulatory supervision of this activity by issuers where it occurs, as we believe dealer involvement acts as an effective secondary check on the integrity of an issuer's continuous disclosure record and the content and form of its offering document. Lacking these controls, we believe investors are left in a potentially more vulnerable situation dealing directly with the issuer, with less expert and liability-concerned eyes trained on the offering.

8. We propose that distributions under the Listed Issuer Financing Exemption would be subject to secondary market liability and provide original purchasers with a contractual right of rescission against the issuer. We propose secondary market liability because the exemption is premised on the reporting issuer's continuous disclosure and limited to distributions of listed equity securities that are traded on the secondary market. Although the exemption provides for the distribution of freely tradeable securities to any class of purchaser, similar to a prospectus offering, the quantum of liability is more limited than it would be for a prospectus offering.

(a) Does the proposed liability regime provide appropriate incentives for issuers to provide accurate and complete disclosure under the exemption and adequate investor protection or should we consider imposing prospectus level liability?

Per our prior comments, we're of the strong view that prospectus level liability better ensures or encourages issuers maintain a complete disclosure record and produce appropriate offering documents in connection with an offering under the exemption.

(b) Some of the key objectives of the exemption include reducing the costs to an issuer of accessing the public markets and providing investors with a briefer document that they are more likely to read. Would imposing prospectus-level liability impact the objectives of the exemption?

We're not of the view that brevity of offering document is necessarily directly correlated to the liability standard attached to the offering. We believe that prevailing legal and market practices in drafting of offering documents have often bent towards verbose and exhaustive disclosure to the detriment of utility. We believe that use of this exemption could be an important step forward in utilizing the benefits of a robust continuous disclosure record in combination with a novel and non-prescriptive form of offering document for more efficient and useful information delivery to investors. We believe that in the early going that 'key elements' guidance from regulators will be useful, and encourage the regulatory community to foster innovation and the promotion of best practices to the extent possible.

(c) Would the absence of statutory liability for dealers lead to lower standards of disclosure?

For the reasons cited above, we believe that the liability a dealer carries relating to an offering acts as an important mechanism in motivating the qualification of an issuer's continuous disclosure record and offering document. We believe this is investor-friendly and in the interest of capital market integrity broadly.

(d) One of the conditions of the exemption is that the issuer must provide a contractual right of rescission in the agreement to purchase the security with the purchaser. Would a requirement for the issuer to enter into an agreement with purchasers be unduly burdensome?

While the intent of this condition is laudable, the practical considerations could be challenging. We would encourage examination of alternative avenues to achieve the same policy goal rather than requiring execution of individual purchaser agreements in connection with offerings under this exemption.

Question on Local Matters

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The Capital Markets Modernization Taskforce Final Report dated January 2021 (the Taskforce Report) included a recommendation to introduce a prospectus exemption similar to what is being proposed by the CSA Proposed Amendments. The Taskforce Report suggested that issuers who adopt semi-annual reporting should not be permitted to use the prospectus exemption recommended in the Taskforce Report. If the CSA were to adopt a semi-annual reporting regime should we consider excluding issuers who report semi-annually from using the Exemption?

As noted in multiple prior comments to the CSA in connection with prior policy projects and to the Ontario CMMTF, we are not in support of the introduction of a semi-annual reporting regime, for reasons relating to the continuity, timeliness and reliability of an electing issuer's continuous disclosure record, concerns that would seem to underlie this question. For these reasons, were a semi-annual reporting regime created in the future, we do not believe that this exemption should be available to those electing issuers, as it would compound the challenge of maintaining a complete continuous disclosure record and increases the risk that investors would make an investment decision on stale or incomplete disclosure.

Concluding Remarks

We support efforts to eliminate unnecessary barriers to capital raising while maintaining investor protection mechanisms. The proposed Listed Issuer Financing Exemption seems to generally strike a balance between introducing a lower-cost prospectus exemption and reasonable conditions that protect investors. We believe that issuers should be held to the higher prospectus-level standard for misrepresentation in connection with the exemption.

We thank you for the opportunity to provide these comments and would be happy to address any questions you may have. Please feel free to contact us at cac@cfacanada.org on this or any other issue in future.

(Signed) *The Canadian Advocacy Council of CFA Societies Canada*

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