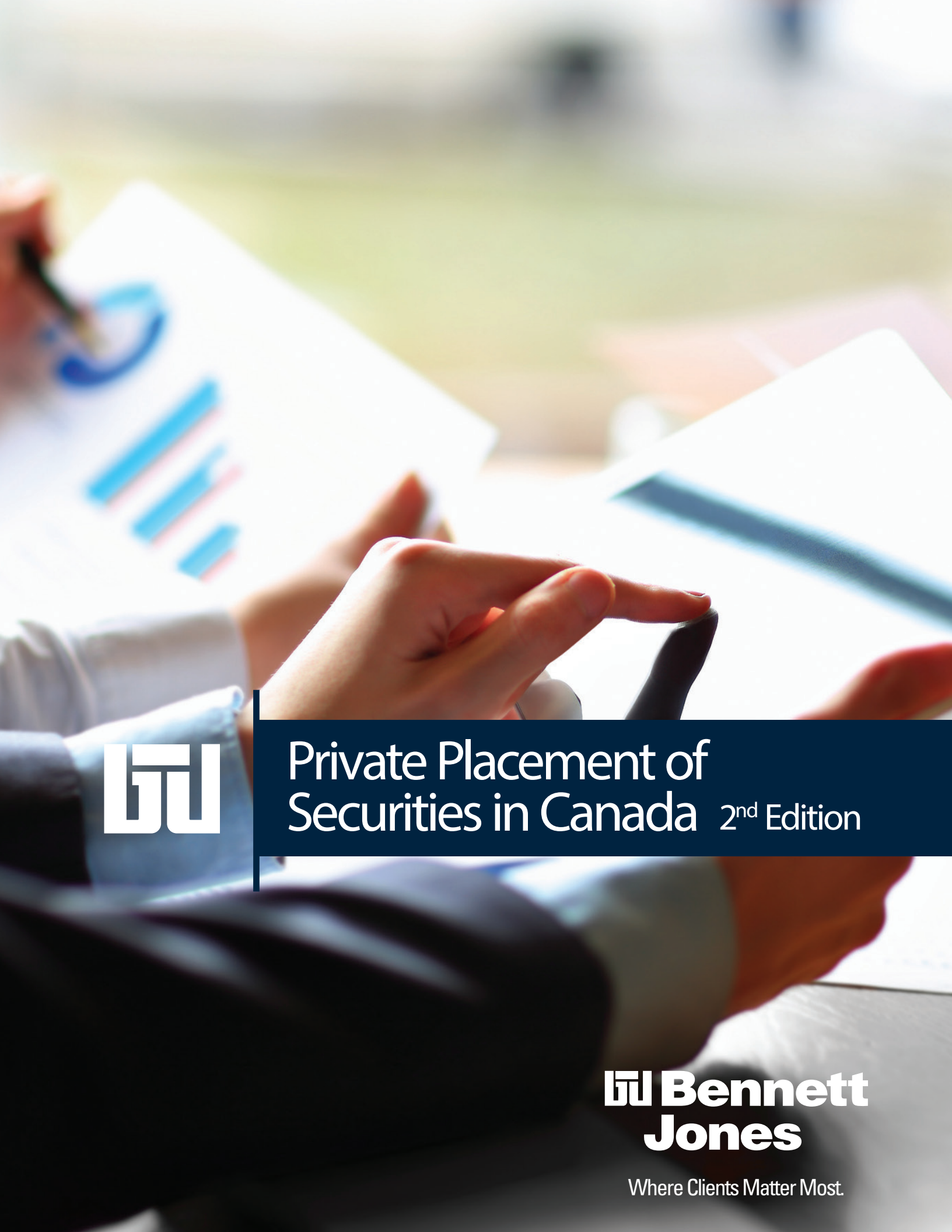

Private Placement of Securities in Canada 2nd Edition

Bennett Jones

Where Clients Matter Most.

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Table of Contents

Appendices

Disclaimer

This guide is intended as a general summary of the current legal requirements in connection with the private placement of securities in Canada and *is not legal advice*. Persons contemplating distribution of securities in Canada should seek specific advice based on the details and context of any proposed transaction from a qualified Canadian legal advisor *prior* to any offering of securities or marketing activity in connection therewith. We do not guarantee the law will not change or the existing laws will not develop or be construed in a manner that may diverge from the discussion herein.

All values in this document are expressed in Canadian dollars.

Introduction

Securities regulation in Canada is a matter of provincial jurisdiction and each of the ten Canadian provinces and three territories[1] has its own securities regulatory body that enforces local legislation and has the power to promulgate rules, regulations and policies with respect to securities trading. Although the legal requirements with respect to securities offerings are substantially similar in each province and territory, there are some unique features to each regime.

A common principle among all the Canadian securities regulatory regimes is that, absent an exemption, a distribution of securities cannot be effected in Canada without preparing and qualifying a prospectus with the relevant regulator describing the issuer and the offering in some detail. In the case of a Canada-wide offering, a single prospectus is typically qualified and cleared by the regulator in the province with the closest connection to the issuer. A prospectus so qualified by the principal regulator can become effective in each of the other provinces as opted by the issuer or selling securityholder through a Passport System implemented co-operatively among all the provinces.

A popular alternate way of distributing securities in Canada is by way of private placement to specified potential purchasers through prospectus exemptions available to issuers, selling securityholders and dealers. The process of selling securities on a private placement basis tends to be simpler and in most cases significantly less expensive than a prospectus offering. Private placement offering materials are normally not reviewed by provincial regulators. There is also normally no obligation to translate offering materials into French and financial information (if provided) is not required to be audited or presented in compliance with International Financial Reporting Standards. If the issuer is not already a reporting issuer in Canada, no ongoing compliance and disclosure obligations in Canada will typically become applicable in connection with a Canadian private placement other than the potential filing of a report of exempt distribution.

Although a significant audience of high-net-worth individuals and institutional investors can be addressed with a private placement, the exempt market is more circumscribed than with a prospectus offering, and the liquidity of privately placed securities is limited.

The discussion below regarding private placements of securities in Canada addresses two variables:

- whether the issuer is a "reporting issuer" or not; and
- whether the issuer and/or dealer is a Canadian resident or not.

A reporting issuer is generally a public entity in Canada with ongoing compliance and disclosure obligations, while a non-reporting issuer is a private entity with few compliance and disclosure obligations. An issuer may become a reporting issuer by qualifying a prospectus in one or more of the provinces, although there are other ways of becoming a reporting issuer in Canada which are beyond the scope of this discussion, such as exchanging securities with shareholders of a reporting issuer or listing the securities of an issuer on the Toronto Stock Exchange. Distributing securities in Canada by way of private placement will generally itself not cause an issuer to become a reporting issuer in Canada.

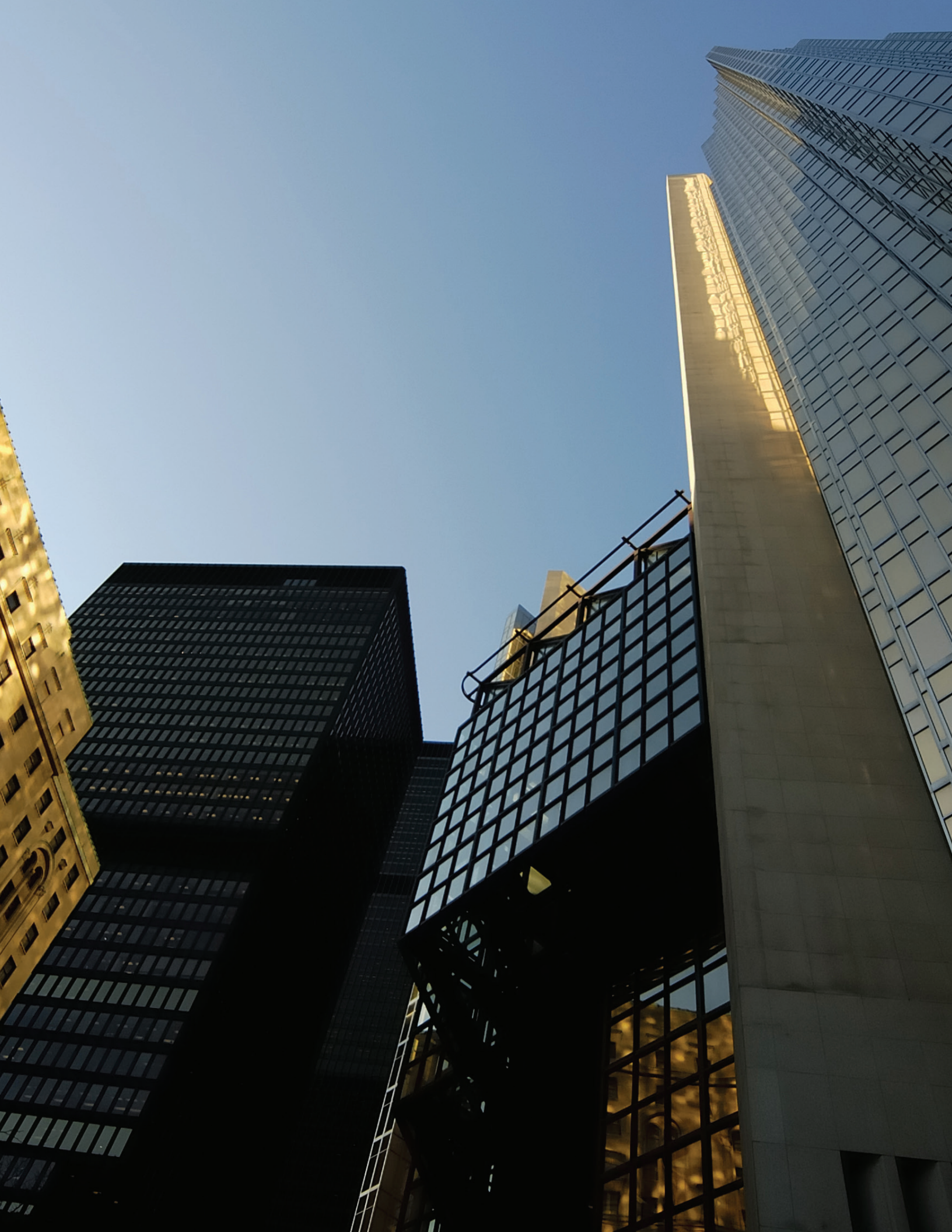
The discussion below also addresses two distinct legal requirements:

- prospectus exemptions allowing the sale of securities without a prospectus; and
- exemptions allowing the trading of securities without being registered as a dealer.

The private placement regime is available under all of the potential combinations of the variables above although with different features.

Some mention of the requirements associated with investment funds and advising Canadian clients with respect to investing in securities will be made, although these are topics unto themselves and will not be discussed in detail.

[1] The regulatory regime in the Canadian territories is substantially similar to the securities regimes in the provinces. The discussion below will focus on the specific rules in the provinces as purchasers and issuers resident in the territories or material sales of securities in the territories are relatively rare.



Prospectus Exemptions

In order to make an offering of securities in Canada without qualifying a prospectus with the relevant provincial regulators, a seller must rely on a prospectus exemption. Absent a prospectus exemption, the sale of securities in Canada without clearance of a prospectus is prohibited. The principal instrument setting out available prospectus exemptions is National Instrument 45-106 – *Prospectus Exemptions* (**"NI 45-106"**).

NI 45-106 has been amended several times over the past few years in connection with the Canadian regulatory authorities' broad review of the exempt market which began in 2011. The purpose of the review was to assess whether certain exemptions remained appropriate given investor protection concerns that were highlighted during the financial crisis beginning in 2008, and to facilitate greater access to capital through the exempt market and provide more financing alternatives, particularly for start-ups and small and medium-sized enterprises.

The most commonly utilized prospectus exemptions available in all provinces are the following:

- accredited investor exemption (the "**Accredited Investor Exemption**");
- $150,000 minimum amount investment exemption (the **"Minimum Amount Exemption"**);
- private issuer exemption (the **"Private Issuer Exemption"**);
- employee, executive officer and consultant exemption (the **"Employee Exemption"**); and
- business combination and reorganization exemption (the **"Transaction Exemption"**).

A summary of the exemptions discussed is set out for reference in Appendix A.

1. Accredited Investor Exemption

The Accredited Investor Exemption is premised on the concept that certain sophisticated Canadian investors do not require the additional information contained in a prospectus and are capable of managing the risks associated with acquiring securities by way of a private placement. Accredited investors include institutional investors, registered dealers and advisers, certain investment funds, high-income and high-net-worth individuals and companies. Generally, entities that are accredited investors in the U.S. will qualify as accredited investors in Canada. Some examples of accredited investors include:

- institutional investors such as banks, insurance companies, credit unions, trust and loan companies, Canadian federal and provincial governments, Canadian municipal governments, Crown corporations, and pension funds regulated by the federal or a provincial pension commission;
- dealers and advisers registered in Canada (other than exempt market dealers) automatically qualify as accredited investors;
- companies, partnerships, trusts and estates (other than investment funds) with net assets of at least $5,000,000, provided the entity is not created or used solely to purchase or hold securities on that basis;
- individuals who own financial assets (excluding a home) having an aggregate net realizable value before taxes in excess of $1,000,000 or who had a net income before taxes of at least $200,000 (or with a spouse, in excess of $300,000) in each of the two most recent years and expect the same income in the current year; and
- a trust established by an accredited investor for the benefit of the accredited investor's family members.

Investment funds are issuers which generally reinvest and manage an investor's funds in a portfolio of securities without the investor's input. Investment funds do not control or manage the underlying businesses in which they invest. Investment funds in Canada are classified as either "mutual funds" or "non-redeemable investment funds". A mutual fund is an issuer whose securities entitle the holder to receive on demand an amount based on the proportionate interest in the net assets of the fund. A non-redeemable investment fund is an issuer that does not allow unrestricted redemption on demand.

Investment funds may qualify as accredited investors if their securities have only been distributed to other accredited investors or under a prospectus.

Finally, a person or entity may also apply in each relevant province to be recognized as an accredited investor, although this is very rare.

Among the exemptions discussed in this guide, the Accredited Investor Exemption is the most frequently used prospectus exemption in Canada. Approximately 65% of all distributions rely on this exemption. In 2014, $121 billion of capital was raised in Ontario alone in the exempt market. Approximately 92% of this capital-raising relied on the Accredited Investor exemption. For reference, the full definition of accredited investor is set out in Appendix B.

When the Accredited Investor Exemption is relied upon to exempt a distribution of securities, filings must be made by the issuer with the relevant provincial regulator. See *Filings and Fees,* below. Additionally, an investor risk acknowledgement must be executed by the seller, the purchaser and any agent involved in the trade if the accredited investor is an individual. The risk acknowledgement must be retained by the issuer for eight years. See *Supplemental Canadian Disclosure for Foreign Offering Documents - 4. Risk Acknowledgement*, below.

2. Minimum Amount Exemption

Any purchaser that is not an individual (whether an accredited investor or not) is permitted under the Minimum Amount Exemption to purchase, on a prospectus-exempt basis, the securities of a single issuer having an aggregate acquisition cost of a minimum of $150,000. In order to rely on this exemption, the purchaser must pay the entire price of the securities in cash at the time of the trade. The purchasing entity must not be created or used solely for the purpose of using this exemption. A filing must be made with applicable securities commissions and fee paid. See *Filings and Fees,* below. In Alberta, additional rules apply if an offering memorandum is used. See *Offering Memoranda,* below.

3. Private Issuer Exemption

The Private Issuer Exemption is useful for startups and small issuers. Private issuers are permitted to distribute their securities to certain permitted persons without qualifying a prospectus. Private issuers are issuers:

- that are not reporting issuers or investment funds;
- the securities of which (other than non-convertible debt) are subject to some form of restriction on transfer in the constating documents of the issuer (including through a unanimous shareholder agreement);
- are beneficially owned by not more than 50 persons, excluding employees and former employees; and
- have only distributed securities to permitted persons and entities (see below) or have completed a reorganization resulting in only such permitted persons and entities holding their securities.

The Private Issuer Exemption allows a qualifying issuer to distribute (and continue to distribute) its securities to permitted persons and entities that are not the public. Permitted persons and entities include persons that are:

- directors, officers, employees, founders and control persons of the issuer and its affiliates;
- spouses, parents, grandparents, brothers, sisters, children or grandchildren of directors, executive officers, founders and control persons of the issuer;
- close personal friends and business associates of directors, executive officers, control persons and selling security holders (and their spouses) of the issuer;
- existing security holders of the issuer;
- accredited investors;
- entities owned by or of which the majority of the directors are persons listed above;
- trusts or estates of which all the beneficiaries or a majority of the trustees or executives are persons listed above; and
- not the public.

One of the advantages of this exemption is that no filings or associated fees are applicable to its use. Care must be taken in using this exemption. Any distribution to a person or entity that is not permitted will cause the Private Issuer Exemption to be unavailable going forward for that issuer.

4. Employee Exemption

The Employee Exemption is available to facilitate an issuer selling its securities to employees, executive officers, directors or consultants of the issuer or its affiliates without qualifying a prospectus. Securities may also be offered to certain permitted affiliated persons, including spouses, trustees, and registered retirement savings plans of the foregoing. Some issuers use the Employee Exemption to establish directed share programs in Canada. Key to using this exemption is that the trade with the person must be "voluntary". This means that the trade cannot be induced by expectation of employment or office or continued employment or office. Typically the issuer will have purchasers execute a certificate to this effect to provide support for relying on the exemption.

5. Other Capital Raising Exemptions

Some prospectus exemptions were historically available in certain provinces only. This has largely been superseded by revisions to NI 45-106 and harmonization of the exempt market regulatory regime across the provinces. Although some local exemptions remain, several exemptions have more recently become available in all provinces.

- Offering Memorandum

In British Columbia and Newfoundland, the requirement to prepare and qualify a prospectus does not apply to a distribution by an issuer of its own securities, if the purchaser purchases as principal, the issuer has provided an offering memorandum that complies with the form and content requirements set out in NI 45-106 and the purchaser executes a risk acknowledgement in the required form which is retained for eight years by the issuer (the **"Offering Memorandum Exemption"**).

In Manitoba, the Northwest Territories, Nunavut, Prince Edward Island, and the Yukon, the Offering Memorandum Exemption is available if, in addition, the purchaser is an "eligible investor" or the purchase price for the securities does not exceed $10,000. Eligible investors are (a) persons with net assets valued at $400,000 (with or without a spouse and, unlike the Accredited Investor Exemption, the assets may include their home); (b) persons with net income realized before taxes that exceeds $75,000, or $125,000 together with the person's spouse, in the most recent two years and it is reasonably expected to exceed this amount in the present year; and (c) certain entities made up of eligible investors.

The Offering Memorandum Exemption is also available in Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan. Investors who are not eligible investors in these provinces may invest a maximum of $10,000; eligible investors may invest up to $30,000; and eligible investors who receive professional advice may invest up to $100,000.

Non-reporting issuers who rely on the Offering Memorandum Exemption must make their audited annual financial statements "reasonably available" to their investors. Non-reporting issuers must also provide a notice along with the financial statements detailing how money raised under the exempt distribution has been used. Non-reporting issuers in Ontario, New Brunswick, and Nova Scotia must give investors notice of any discontinuance, change of industry, or change of control. Any marketing materials associated with the offering must also be incorporated by reference into the offering memorandum and the investor must sign a risk acknowledgement form to confirm status as an eligible, non-eligible or accredited investor. Investment funds are not permitted to use the Offering Memorandum exemption in New Brunswick, Ontario and Quebec. In Alberta, Manitoba, Prince Edward Island and Saskatchewan, the Offering Memorandum Exemption is available to investment funds but only to non-redeemable investment funds and mutual funds that are not reporting issuers.

Separate forms of offering memoranda are required in some provinces for real estate securities and syndicated mortgages. Additionally, an offering memorandum used in connection with this exemption in Québec may be required to be translated into French in some circumstances.

- Family, Friends and Business Associates

A prospectus exemption is available in all provinces for offerings to many of the same categories of person as for the Private Issuer Exemption (the **"Family, Friends and Business Associates Exemption"**), but with no limit on the number of security holders. No commission or finder's fee is allowable under this exemption. This exemption is open to reporting and non-reporting issuers and there are no limits on how much investors can invest. A report of exempt distribution must be filed when relying on this exemption.

For purposes of the Private Issuer Exemption and the Family, Friends and Business Associates Exemption a "close personal friend" of a director, executive officer, founder or control person of the issuer is an individual who has known the person affiliated with the issuer well enough and for a sufficient period of time to be able to assess the person's capabilities and trustworthiness and to have access to information regarding the investment. The relationship must be direct and it is the responsibility of the person relying on the exemption to ensure the potential purchaser meets the characteristics required under the exemption.

In Ontario and Saskatchewan, an investor must sign a risk acknowledgement form and disclose, if applicable, the nature of the relationship to the issuer. The risk acknowledgement is not required to be filed but must be retained by the issuer for eight years. Additionally, in Saskatchewan, a slightly broader group of potential purchasers is permitted.

- Crowdfunding

All provinces except Prince Edward Island and Newfoundland and Labrador have a prospectus exemption to permit capital raising by way of Internet crowdfunding (the **"Crowdfunding Exemption"**). An eligible crowdfunding issuer must:

  - be incorporated in Canada;
  - have its head office in Canada;
  - have a majority of its board of directors resident in Canada;
  - have incorporated its principal operating subsidiary, if any, in Canada or the U.S.; and
  - not be an investment fund.

The issuer must be a non-reporting issuer in British Columbia or Saskatchewan, and may be a reporting issuer in other provinces.

To qualify for the exemption, certain criteria must be met.

  - Only the eligible crowdfunding issuer's securities are permitted to be distributed and only limited types of securities may be sold, such as common shares, non-convertible preferred shares, securities that can be converted into the foregoing, non-convertible debt, limited partnership units and flow-through shares.
  - The offering cannot remain open for more than 90 days.
  - The total proceeds raised by the issuer in reliance on the exemption cannot exceed $1.5 million in a 12-month period. In British Columbia and Saskatchewan the limit is lower and allows only $250,000 per distribution and a maximum of two distributions in a calendar year.
  - In Alberta and Ontario, the acquisition cost of the securities acquired by a purchaser who is not an accredited investor cannot exceed $2,500 for the distribution and $10,000 for all distributions relying on the exemption in the same year. For a purchaser who is an accredited investor (but not a "permitted client") the acquisition cost cannot exceed $25,000 for the distribution and $50,000 for the year. For a purchaser who is a "permitted client", there is no limit. Permitted clients are a subset of accredited investors. Permitted clients include financial institutions, governments of a Canadian jurisdiction, persons with financial assets (not including their home) of realizable value in excess of $5,000,000 and entities with net assets of realizable value in excess of $25,000,000. The full definition of permitted clients is set out in Appendix C.

- In Manitoba, Quebec, New Brunswick and Nova Scotia, the acquisition cost of the securities acquired by a purchaser who is not an accredited investor must not exceed $2,500 for the distribution. For a purchaser who is an accredited investor, the acquisition cost must not exceed $25,000.
- In British Columbia and Saskatchewan, the acquisition cost of the securities for any purchase must not exceed $1,500.
- A risk acknowledgement must be executed by the investor and retained by the issuer.
- The issuer must distribute the securities through a single, approved funding portal.
- The issuer must make available to the purchaser a crowdfunding offering document through the funding portal. This document must contain a certificate executed by the issuer stating that the document does not contain a misrepresentation or untrue statement and that purchasers have a right of action for such errors.
- A report of exempt distribution must be filed together with the offering document.

Marketing permitted in connection with using the Crowdfunding Exemption is limited. At the time of sale a disclosure document must be provided, which includes basic information about the offering, issuer and crowdfunding portal, including disclosure of the issuer's cash and confirmation of funds held. Annual financial statements must be audited if the issuer has raised over $750,000 (through any exemption or combination of exemptions) over the course of its life.

The offering materials can only be posted on an approved Internet portal and on no other website. Offering materials must also be delivered to the regulator at the time they are made available to potential investors. Certain ongoing disclosure requirements will also become applicable after any sale of securities in Canada.

- Rights Offering

A prospectus exemption is available in each province for rights offerings by reporting issuers (**"Rights Offering Exemption"**). The exemption allows public companies to raise funds from existing security holders through the issuance of rights to acquire additional securities of that issuer. The Rights Offering Exemption applies to a distribution by a reporting issuer if all of the following apply:

- the issuer is a reporting issuer in at least one Canadian jurisdiction;
- the issuer has filed all required periodic disclosure documents in that jurisdiction;
- the issuer files and sends a rights offering notice and circular to all security holders in Canada prior to commencement of the exercise period for the rights; and
- the basic subscription privilege is available on a pro rata basis to the security holders resident in Canada.

On closing of the rights offering, the issuer is required to issue and file a press release containing details of the offering. To encourage use of this exemption, the dilution limit has been increased to 100% (from the previous 25%) within a twelve-month period. Investment funds are excluded from using this exemption.

- Distribution to Existing Security Holders

An exemption is available to issuers listed on the Toronto Stock Exchange, the TSX Venture Exchange, the Canadian Securities Exchange or the Acqeitas NEO Exchange to distribute securities to their existing shareholders without a prospectus (the **"Existing Security Holders Exemption"**).

The Existing Security Holders Exemption is only available to reporting issuers in Canada that are up to date with all disclosure requirements applicable under Canadian securities law. Investment funds are not permitted to rely on the exemption. The offering may only consist of securities of the issuer that are listed on the relevant exchange or a unit consisting of a listed security and a warrant. Any offering under this exemption must be made to all security holders of the issuer but there is no requirement to allocate the offering rateably among existing holders or restrictions on finder's fees payable in connection with such an offering. The issuer must file a news release describing the proposed distribution in reasonable detail. The release must also include a statement confirming that all material facts or changes have been disclosed.

Purchasers are only permitted to invest an aggregate of $15,000 in any 12-month period using the Existing Security Holders Exemption, unless the security holder has obtained advice regarding the suitability of the investment from a registered investment dealer. The Existing Security Holders Exemption is also subject to a dilution limit – it must not exceed 100% of the securities of the issuer that are outstanding immediately before the offering.

6. Private Investment Club

A prospectus exemption is available to private investment funds allowing trades in securities of that investment fund without a prospectus (the "**Private Investment Club Exemption**") if:

- the fund has no more than 50 beneficial holders;
- it has never borrowed money from the public;
- the fund has never distributed securities to the public;
- no management or administration fee is payable with respect to trades (other than normal brokerage fees); and
- security holders are required to make capital contributions in proportion to the value of securities held by them.

7. Transaction Exemption

Prospectus requirements apply to every distribution of securities in Canada regardless of whether the primary purpose of the distribution is to sell the securities or whether the distribution is only incidental to an overarching business transaction. The Transaction Exemption allows a distribution of securities to any person or entity without a prospectus in the case of a transaction that is an amalgamation, merger, reorganization or statutory arrangement.

Statutory arrangements are available to corporations organized under most Canadian corporate law statutes[2] and offer an efficient and flexible means of completing business transactions involving the issuance of securities and/or reorganization of the capital structure of one or more issuers, including mergers and acquisitions. Although the details involved in a statutory arrangement are beyond the scope of this discussion, an arrangement, together with the Transaction Exemption can be used in a reverse take-over transaction by a private issuer in order to go public in Canada without filing a prospectus. The TSX Venture Exchange maintains a Capital Pool Company program that allows shell companies with no assets to list on the exchange for the purpose of providing a vehicle for unlisted private companies with assets or a viable business, to go public and effectively become listed on the exchange. A private issuer may raise funds by issuing its securities through one or more prospectus exemptions. Such securities will not be freely tradable upon issuance, see *Resale Restrictions* below. The private issuer can immediately thereafter enter into an arrangement with a capital pool company allowing the exchange of its privately placed securities with newly issued securities of the publicly listed shell using the Transaction Exemption. If the shell company has been listed for at least four months (which is typically the case), the resulting securities are immediately freely tradable in Canada and can be listed on the TSX Venture Exchange, or depending on certain asset and income tests, the Toronto Stock Exchange. The TSX Venture Exchange and the provincial securities regulators allow such reverse take-over transactions to be completed with capital pool companies without the filing of a prospectus, other than in special circumstances, although a detailed information circular containing prospectus level disclosure must be prepared and delivered to shareholders.

Other useful transaction-based exemptions include: an exemption in the case of securities distributed in a take-over bid or issuer bid; an asset acquisition exemption that allows issuers to offer their securities for assets valued at a minimum of $150,000; issuance of securities of the issuer for an interest in petroleum, natural gas and mining properties; and the issuance of securities by an issuer in order to satisfy a *bona fide* debt. Each of these exemptions will allow the distribution of securities without a prospectus regardless of the nature of the purchaser or recipient of the securities.

8. Exemption Applications

It is possible for a potential purchaser, an issuer or a dealer to apply to the relevant securities regulator to obtain an exemption order with respect to the prospectus requirement in connection with a proposed distribution of securities. The application process can take up to eight weeks. Compelling reasons for an exemption must be demonstrated to the regulators when existing exemptions are not available. Additionally, applicable safeguards must be implemented to protect purchasers in place of the existing rules, or compelling reasons why such protections are not relevant in the particular circumstance must be provided.

[2] Statutory arrangements are also available to corporations incorporated in certain other jurisdictions; however, the U.S. does not currently have a similar concept.

Resale Restrictions

Secondary trades of securities must also comply with Canadian securities laws. Generally, any securities issued by way of a prospectus exemption enter into a closed system in Canada and cannot be freely resold unless: (a) a prospectus is qualified for a secondary offering; (b) a prospectus exemption is available for the secondary trade; or (c) the original issuer of the securities is or becomes a reporting issuer in Canada and the applicable "restricted period" or "seasoning period" discussed below has expired. Resale restriction rules in connection with privately placed securities are addressed in National Instrument 45-102 – *Resale of Securities* (**"NI 45-102"**), which is applicable in all provinces.

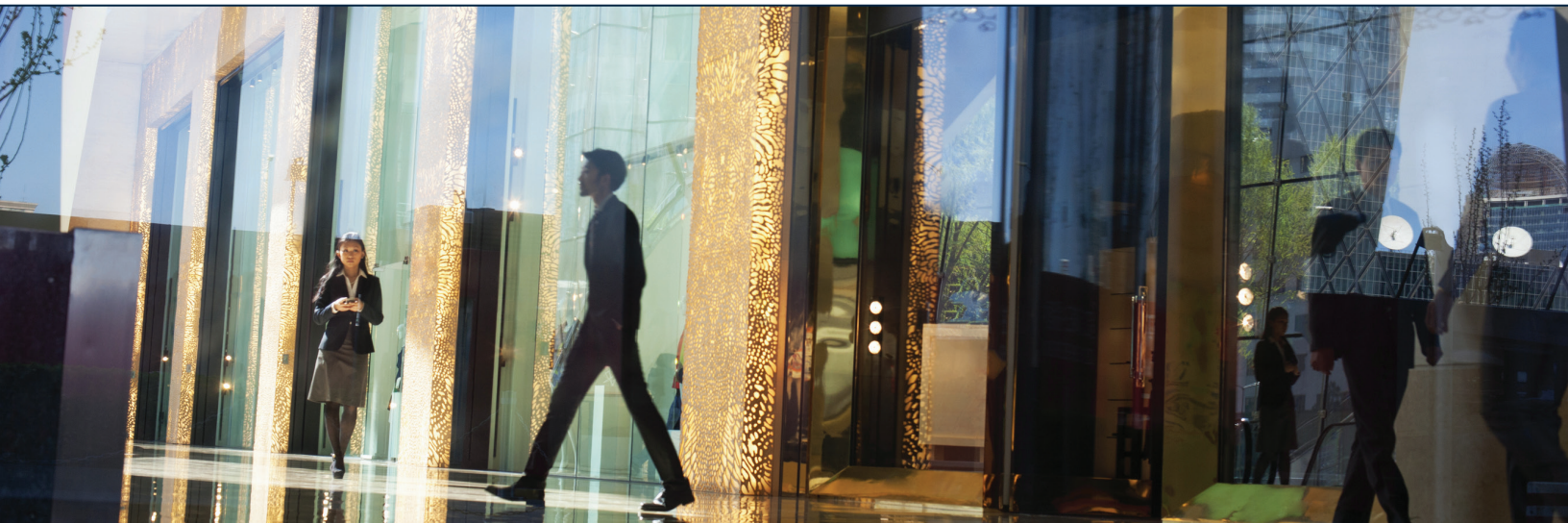
The practical difficulty of convincing an issuer to expend the resources necessary to qualify a prospectus to assist with a secondary trade of its securities makes this option unlikely to be feasible in most situations. The exception is where the shareholder has a registration rights agreement with the issuer or it has sufficient sway with the issuer and/or the qualification of the secondary offering is combined with a prospectus for a primary offering of newly issued securities. Most secondary offerings are made in reliance on a prospectus exemption or resold subsequent to the expiry of the applicable restricted or seasoning period. In the case of a secondary offering relying on the Accredited Investor Exemption or the Minimum Amount Exemption, no filings or fees are applicable unless the seller is an underwriter of the offering.

Apart from using a prospectus exemption, if the issuer is (or becomes) a reporting issuer in the relevant province, after a short restricted period or seasoning period the privately placed securities will become freely tradable without further action by the issuer or security holder.

1. Restricted Period

NI 45-102 provides that securities originally issued by a reporting issuer under the following prospectus exemptions, among others, are subject to a four-month *restricted period* and are then freely tradable:

- Accredited Investor Exemption;
- Minimum Amount Exemption;
- Offering Memorandum Exemption;
- Existing Security Holders Exemption;
- Family, Friends and Business Associates Exemption;
- Crowdfunding Exemption;
- exemptions in connection with asset acquisitions and petroleum, natural gas and mining property acquisitions; and
- exemptions in connection with issuing securities to cancel a debt.



The restricted period imposes a minimum time the securities must stay in the closed system before they become freely tradable. In order to qualify for the restricted period treatment for securities, among other things: (a) the issuer must be a reporting issuer in a Canadian jurisdiction for the four months preceding the secondary trade; (b) four months must elapse from original issuance before the secondary trade; and (c) the certificate (including any global certificate) representing the securities must contain a prescribed restricted-period legend.

2. Seasoning Period

NI 45-102 also provides that securities originally issued under the following prospectus exemptions, among others, by a reporting issuer are subject to a four-month *seasoning period* and then are freely tradable:

- Private Issuer Exemption;
- Private Investment Club Exemption;
- Transaction Exemption;
- Rights Offering Exemption;
- exemptions in connection with take-over bids and issuer bids; and
- Employee Exemption.

The seasoning-period treatment is more relaxed than the restricted-period treatment in that an issuer must only be a Canadian reporting issuer for four months prior to the secondary trade and no further time-based requirement is applicable. Unlike the restricted period, the seasoning period is focused on the issuer rather than the securities and requires an issuer to be public for a period of time in order to establish a disclosure record on which secondary investors can rely. As discussed above in connection with the Transaction Exemption, where the issuer has already been a reporting issuer for four months prior to the primary distribution, the issued securities would be freely tradable immediately upon issuance.

3. Trading on a Foreign Exchange

Generally, privately placed securities of a non-reporting issuer will never become freely tradable in Canada and any subsequent secondary trades must be made in reliance on a prospectus exemption. However, pursuant to NI 45-102, securities of non-reporting issuers are freely tradable by Canadian holders on foreign exchanges and to foreign purchasers under the following circumstances:

a) The issuer was not a reporting issuer anywhere in Canada at the time of (a) the primary distribution; or (b) the secondary distribution;

b) immediately after the secondary distribution Canadian residents (a) do not own more than 10% of the outstanding securities of that class; and (b) do not represent more than 10% of the number of holders of the security; and

c) the trade is made through a foreign exchange or to a foreign resident.

On occasion, where Canadian holders slightly exceed the 10% thresholds set out above or there are other compelling circumstances, issuers have applied for and received exemptions from the relevant securities regulators to allow Canadian shareholders to freely trade their securities on a foreign exchange.

Exemptions from the Requirement to Register – Trading and Advising Activities

Generally, any person or entity engaged in, or holding him, her or itself out as engaging in the business of trading securities in Canada must register as a dealer in the relevant province unless an exemption is available for the specific activity undertaken. This is known as the business trigger for registration and is a threshold question before an analysis of available exemptions becomes necessary. There is no bright-line test for the registration requirement and several factors contribute to the characterization of trading activities, including whether or not the individual or entity is:

- engaging in activities similar to those of a dealer, such as promoting securities or stating in any way that the individual or firm will buy or sell securities;
- intermediating trades between sellers and buyers of securities or making a market in securities;
- directly or indirectly carrying on the activity with repetition, regularity or continuity;
- receiving, or expecting to receive, any form of compensation for carrying on the activity; and
- directly or indirectly soliciting securities transaction (by any means).

The business trigger for registration is effective in all provinces; however some provinces have implemented it through legislation and others through adopting the national instrument described below. Absent an exemption, once the business trigger test has been met, engaging or purporting to engage in trading or advising activities without appropriate registration is prohibited.

Most issuers with an active non-securities based business will not trip the business trigger unless the issuer holds itself out as being in the business of trading securities, trades securities with repetition or is compensated for trading in securities beyond receiving funds in exchange for its securities. For example, an issuer or fund that goes to market frequently, employs persons that essentially act as securities dealers and directly solicits clients may be required to register as a dealer. Conversely, a venture capital or private equity fund would not normally trip the business trigger because these entities offer securities infrequently and funds raised are used to acquire target businesses with which the fund is actively involved in management.

One time activities generally do not require registration as a dealer, such as a person or entity acting as trustee, executor, administrator, personal or other legal representative, or in the case of a one-off sale of a business. Also, if trading activities are incidental to a person or entity's primary business, they will normally not trip the business trigger. However, once the business trigger test has been met, the person or entity will be required to register as a dealer in the relevant province. Dealer registration is a relatively involved process and subjects the registrant to a number of ongoing reporting and compliance obligations. Many persons and entities in such a situation opt to rely on a registration exemption rather than register as a dealer.

The principal instrument addressing registration-related matters is National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**"NI 31-103"**). In addition to setting out the requirements for dealer, adviser and investment fund manager registration and ongoing requirements for registered dealers, advisers and investment fund managers, NI 31-103 provides a number of registration exemptions.

1. Trades To or Through a Registered Dealer

The simplest registration exemption allows trading to or through a registered dealer in Canada (the **"Registered Dealer Exemption"**). This exemption allows the non-registrant to (a) use a registered entity as agent to book the trade or (b) trade directly with a registered Canadian dealer where the dealer is acting as principal. Solicitation of purchasers can amount to trading activity under Canadian securities laws. Non-registered persons acting in furtherance of securities offerings by soliciting potential purchasers for remuneration based on the trade, and then merely executing a sale through a registered dealer, would therefore not qualify for the Registered Dealer Exemption.

No filings are necessary by the non-registrant and no fees are payable by the non-registrant to any regulator in order to avail itself of the Registered Dealer Exemption beyond any necessary prospectus exemption filings (which are the responsibility of the issuer of the security). A caveat to this exemption is that when using the Canadian registrant as agent, the dealer must be permitted by the terms of its registration to act as agent in respect of that trade. This is normally addressed by representations and indemnification in an agency agreement. The negative aspect to this exemption is that typically dealer registrants will charge a fee for intermediating trades, although a reciprocal cross-border relationship where the non-registrant is a foreign dealer may address this pitfall in some cases.

2. Specified Debt

The dealer registration requirement does not apply to trades of debt securities if such securities are:

- issued or guaranteed by the Government of Canada or the government of a jurisdiction of Canada;
- issued by or guaranteed by a government of a foreign jurisdiction if the debt security has a designated rating from a designated rating organization;
- issued by or guaranteed by a municipal corporation in Canada;
- secured by property taxes of a Canadian jurisdiction;
- issued by or guaranteed by a Canadian financial institution or a scheduled bank, other than subordinate debt; or
- issued by or guaranteed by a permitted supranational agency if the debt securities are payable in Canadian or U.S. dollars.

Designated rating agencies include Moody's and S&P, among others, and designated ratings are generally P-1/A-1 or higher for short-term debt and A2/A or higher for long-term debt. Supranational agencies include the African and Asian Development Banks, among others.

3. International Dealer Exemption

The most common exemption used by foreign dealers that trade with frequency in Canada in order to avoid registration requirements is the international dealer exemption (the **"International Dealer Exemption"**). The International Dealer Exemption is only available to a foreign entity that:

- has a head office or principal place of business outside Canada;
- is registered as a dealer in its home jurisdiction, permitted to engage in similar trading activity in that jurisdiction and normally engaged in such business.

There are two principal restrictions in using this exemption: trades must be made to Canadian "permitted clients" and only certain types of securities can be traded. Permitted clients are a subset of accredited investors discussed above. For reference, the full definition of permitted clients is set out as Appendix C.

The types of securities permitted to be sold under the International Dealer Exemption include:

- debt securities, whether issued by a Canadian or foreign issuer, if offered primarily in a foreign jurisdiction and no prospectus has been cleared for the offering in Canada;
- previously issued foreign debt securities; and
- foreign equity securities where no prospectus has been cleared for the offering in Canada.

Although the sale of equity securities issued by Canadian issuers is not permitted under the International Dealer Exemption, activities other than sales (in connection with any form of security offering) are permitted if they are reasonably necessary to facilitate offerings made primarily in a foreign jurisdiction.

In order for the International Dealer Exemption to be available, foreign dealers must comply with the following disclosure and reporting obligations.

- The foreign dealer must file documents formally submitting to the jurisdiction of the relevant provincial regulatory authority and appoint a local agent for service.
- A notice must be provided to Canadian clients regarding the non-residence of the foreign dealer, the difficulty in enforcing Canadian rights against such entity and the contact information for its local agent for service.
- In Ontario, an annual filing and participation fee must be made (see *Filings and Fees,* below, and Appendix E).
- In provinces other than Ontario, a notice must be provided annually to the relevant regulator that the foreign dealer intends to continue to rely on the exemption for the next 12 months. In Alberta and Saskatchewan, an annual fee is applicable. See *Filings and Fees,* below.
- Even though foreign dealers availing themselves of the International Dealer Exemption are not specifically required to be registered with the Investment Industry Regulatory Organization of Canada (**"IIROC"**), the Ontario Securities Commission requires all market participants to make anti-terrorism filings in the same form as IIROC registrants.

In the case of the notice to Canadian investors, some foreign dealers provide a stand-alone letter to their clients and others provide the required notice in a "wrapper" attached to the offering document provided to Canadian purchasers. Requirements in connection with offering memoranda and wrappers are discussed below.

4. Exempt Market Dealer

In cases where an entity is determined to be in the business of trading securities in Canada and is unable to rely on a registration exemption, such an entity must become registered as a dealer in each province in which such activities are undertaken. Some dealers choose to become registered as "exempt market dealers" in Canada, a category for which the licensing requirements are less onerous.

An entity registered as an exempt market dealer in a province may trade securities in that province that are distributed in reliance on an exemption from the prospectus requirement as discussed above including equity securities of Canadian issuers, whether or not a prospectus was filed in respect of the distribution. An exempt market dealer may also act as an underwriter for offerings of securities in Canada distributed under a prospectus exemption.

Entities registered as exempt market dealers are subject to a number of requirements, including appointment of compliance officers, book and record-keeping standards, capital and insurance requirements, and financial reporting requirements. The exempt market dealer is required to designate and register an ultimate designated person (**"UDP"**) and a chief compliance officer (**"CCO"**). The UDP must be the chief executive officer of the registered firm. The CCO can be any officer or partner of the registered firm, provided the individual meets the proficiency requirements discussed below. Aside from the UDP and CCO, the determination of which individuals must register under NI 31-103 in connection with dealing activities depends on the business trigger discussed above. Any persons acting as dealers or soliciting trades for the entity are required to register as dealing representatives.

The CCO and dealing representatives of the exempt market dealer must meet proficiency requirements, including completing the Canadian Securities Course exam, the Exempt Market Products exam or the U.S. American Series 7 exam and the New Entrants Course exam. The UDP is not required to meet these requirements. Additionally, in most instances the CCO will be required to pass the Canadian Partners, Directors and Senior Officers exam.

The exempt market dealer entity is required to demonstrate and maintain sufficient working capital of at least $50,000 and maintain bonding or insurance. Ninety days after the end of its financial year, the exempt market dealer must deliver to its principal regulator audited annual financial statements (comprised of an income statement, balance sheet and notes) prepared on an unconsolidated basis.

5. Advising Canadian Clients

The business trigger is applicable to other activities related to securities trading performed in Canada or for Canadian residents. Any entity that is characterized as being in the business of offering advice to Canadian clients in connection with the trading of securities is required to register as an adviser in the provinces in which these activities are undertaken or where the Canadian clients reside. The adviser registration requirement is not applicable in the case of persons or entities otherwise acting as advisers if the advice provided is not tailored to their Canadian clients. For example, in cases of investment or venture capital funds, although the allocation of clients funds to certain investments could be considered "advising" in some cases, if all clients participate in the same portfolio and no individualized advice is provided, then registration is normally not necessary. Any interests the adviser may have in any securities proposed to be purchased must be disclosed to the client even when registration is not required.

The principal exemption relied on by foreign advisers with Canadian clients is the international adviser exemption (the **"International Adviser Exemption"**) which is very similar to the International Dealer Exemption. Similar residency, foreign registration, client notice and annual regulator notice requirements apply to the International Adviser Exemption. In addition, an entity relying on the International Adviser Exemption is not permitted to realize more than 10% of its aggregate consolidated gross revenue (including through affiliates) from portfolio management for Canadian clients.

6. Investment Fund Managers

Although investment fund managers may be exempt from registration as advisers by avoiding individualized advice to clients or pursuant to the International Adviser Exemption, in Ontario, Québec and Newfoundland, such persons are required to register as an investment fund manager. Investment funds are described above under the Accredited Investor Exemption and include mutual funds and non-redeemable investment funds. In other provinces, the investment fund manager registration requirement only applies where there is a real and substantial connection to the province, which normally would require more than the investment fund in question having some Canadian investors.

As registration is an onerous and involved process, entities often seek an available exemption for their activities rather than register. The principal exemption used for avoiding registration of investment fund managers is a parallel exemption with the same features as the prospectus Private Investment Club Exemption discussed above. This exemption allows non-registered investment fund managers with Canadian clients to trade in a security of an investment fund if that investment fund meets the requirements of the Private Investment Club Exemption. No filings or fees are required in connection with this exemption.

Another investment fund manager registration exemption is based on an investment fund having only Canadian permitted clients. This exemption requires submission to jurisdiction in the relevant province and the payment of annual market participation fees.

Offering Memoranda

Materials provided to Canadian investors and potential investors in connection with an offering of securities may be characterized as an "offering memorandum" under certain provincial securities laws. The general term "offering memorandum" should be distinguished from the specific form of offering memorandum contemplated by the Offering Memorandum Exemption discussed above. An offering memorandum is defined as any document purporting to describe the business and affairs of an issuer that has been prepared primarily for prospective purchasers to assist them in making an investment decision in respect of securities being offered by that issuer under a prospectus exemption. Regulators have taken the position that electronically provided information (including on a website) may constitute an offering memorandum. However, a term sheet describing only the securities offered, or a subscription agreement that does not provide further information about the issuer and its business, is normally not considered an offering memorandum under Canadian securities laws.

There is no requirement to provide Canadian purchasers and prospective purchasers an offering memorandum in connection with a private placement (other than when relying on the Offering Memorandum Exemption). However, where any information or documentation is provided to potential investors and can be characterized as an offering memorandum and it is used in reliance on certain prospectus exemptions (including the Accredited Investor Exemption, Minimum Amount Exemption and Private Issuer Exemption), certain disclosure requirements will apply in certain provinces to the offering memorandum. Further, statutory rights of action with respect to misrepresentations in the offering memorandum are available to certain Canadian purchasers.

1. Rights of Action for Canadian Purchasers

A misrepresentation is defined as an untrue statement of material fact or an omission to state a material fact that is required to make a statement not misleading in light of the circumstances in which it is made. Securities purchased under an offering memorandum containing a misrepresentation may be actionable by Canadian purchasers against the issuer (and in some provinces, the directors of the issuer and any dealer or agent).

In Saskatchewan, Manitoba, Ontario, Québec, Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island, securities legislation provides purchasers with a statutory right of action for rescission or damages where an offering memorandum provided in connection with the Accredited Investor Exemption, the Private Issuer Exemption or the Minimum Amount Exemption contains a misrepresentation. In Ontario, the rights of action are not available to certain large financial institutions. Although statutory rights are not available to purchasers in British Columbia with respect to misrepresentations in offering memoranda, regulatory penalties for misrepresentation can include fines of up to $3,000,000 or imprisonment not exceeding three years. Other provinces have similar regulatory penalties.

In Alberta, any offering memorandum used in connection with the Minimum Amount Exemption is required to be in a prescribed form and must contain a certificate executed by the issuer's chief executive officer, chief financial officer, its directors and any promoter of the offering stating, among other things, that the document contains no misrepresentations. The offering memorandum must be filed with the regulator. Any misrepresentations are actionable by Alberta purchasers. Additionally, in British Columbia and Alberta, misrepresentations are actionable in the case of an offering memorandum that is provided in connection with the Offering Memorandum Exemption.

Saskatchewan, Ontario, New Brunswick, Nova Scotia and Newfoundland (in most circumstances) require the respective rights of action of purchasers resident in those provinces to be described in the offering memorandum if one is used in connection with certain prospectus exemptions. This is discussed further under *Supplemental Canadian Disclosure* below.

The rights discussed above are in addition to any common law and equitable remedies (which vary by province) that a person may have against any dealer, promoter or issuer of securities.

2. Mineral Project Disclosure

National Instrument 43-101 – *Standards of Disclosure for Mineral Projects* (**"NI 43-101"**) governs disclosure by an issuer of any scientific or technical information with respect to a mineral project, including "mineral resources" and "mineral reserves" as defined by the Canadian Institute of Mining, Metallurgy and Petroleum (**"Technical Information"**). The details of NI 43-101 are beyond the scope of this guide but in the context of Canadian private placements, any disclosure of Technical Information must be based on supporting data prepared by a qualified person or approved by a qualified person as defined in NI 43-101.

If Technical Information appears in an offering memorandum (including through incorporation by reference), a current technical report in the prescribed form must be filed with the relevant regulators. The preparation and filing of a technical report is time-consuming and potentially costly. The technical report requirement can be avoided in circumstances where the offering memorandum is only provided to persons and entities in Canada that are qualified as accredited investors.

3. Financial Statements

Issuers providing purchasers or prospective purchasers of their securities an offering memorandum (other than under the Offering Memorandum Exemption) containing financial information are not required to present such information according to any specific reporting standard (such as IFRS) and such information need not be audited. Financial information must always, however, be presented such that it does not constitute a misrepresentation, which includes failing to provide additional information that may be necessary for the financial information not to be misleading under the circumstances in which it is provided.

4. Listing Representations

Each of the provinces has securities legislation that prohibits what is commonly termed a "listing representation". An example of a listing representation is a representation, either oral or in writing (including in an offering memorandum), that a security will be listed on, or that an application has been or will be made to list the security on, a stock exchange. Foreign securities laws generally do not prohibit the making of listing representations. This can become an issue when securities of foreign issuers are offered into Canada on a private placement basis concurrently with a foreign public offering.

Where a listing representation is included in an offering memorandum, an issuer has three choices: (a) to redact all instances of the listing representation in the documents provided to Canadian investors; (b) where available, rely on a carve-out to this prohibition pursuant to the relevant provincial legislation (discussed below); or (c) obtain the consent of the relevant provincial regulator to allow dissemination of the listing representation *prior* to any document containing the listing representation being provided to prospective purchasers.

Redaction may be a feasible alternative where few Canadian investors will receive the offering memorandum. Simply blacking out the language in the offering memoranda delivered to these Canadian purchasers is sufficient. If the documents are available online, the version accessed by Canadian investors can be made available without the listing representation.

An exemption permits listing representations made by foreign issuers in securities offerings that are restricted to permitted clients. Multilateral Instrument 45-107 – *Listing Representation and Statutory Rights of Action Disclosure Requirements* (**"MI 45-107"**) provides that the prohibition on listing representations does not apply in connection with an eligible foreign security if (a) the distribution is made only to permitted clients; (b) the representation does not constitute a misrepresentation; and (c) the representation is made in compliance with applicable rules. MI 45-107 has not been adopted by British Columbia or Ontario. The exemption is effectively available in Ontario through local rules and is not necessary in British Columbia because in that province, listing representations are permitted in offering documents provided they do not constitute a misrepresentation.

In order to rely on the MI 45-107 exemption (or the equivalent rule in Ontario), an offering must be issued by a foreign government, guaranteed by a foreign government, or have all of the following features:

(a) the offering must be made primarily in a jurisdiction outside Canada;

(b) the issuer of the securities must:

  (i) be incorporated or organized under the laws of a foreign jurisdiction;

  (ii) have its head office outside Canada;

  (iii) have the majority of its directors and executive officers resident outside Canada; and

  (iv) not be a reporting issuer in Canada.

In all provinces except British Columbia and Manitoba, the relevant securities legislation allows listing representations (regardless of the nature of the purchaser) in limited circumstances where: (a) an application has already been made to list the securities and other securities of that issuer are already listed on an exchange; (b) an exchange has granted at least conditional approval to the listing; or (c) has consented to or indicated it does not object to the representation. In Alberta and Saskatchewan, in order for an issuer to avail itself of part (a) of the carve-out, prior securities of the issuer must be listed on the same exchange as in the proposed offering. In the case of part (c) of the carve-out, an email confirmation solicited from the relevant exchange will be sufficient in order to meet the consent requirement.

In Manitoba, all listing representations require the prior written consent of the provincial securities regulator, for which an application must be made on a case-by-case basis. The application process in Manitoba is relatively quick and usually approval can be obtained within two business days of filing a complete application. In other provinces, the application process to obtain consent for the use of a listing representation, beyond the statutory carve-out, is more involved and takes significantly longer.

5. Marketing

Generally, the definition of "trade" in Canadian securities law includes acts in furtherance of a trade of securities such as investor meetings, road shows and other marketing activities. The dealer registration requirements and exemptions discussed above in connection with trading activities will apply. Similarly, the prospectus exemptions discussed above are applicable to marketing activities. In order to support reliance on a specific prospectus exemption, issuers should only provide offering memoranda and marketing materials in connection with an offering to persons and entities that have demonstrated they qualify for a prospectus exemption. Some effort should be made to restrict access by the general public to materials and meetings in connection with the offering. For example, in the case of the Accredited Investor Exemption, only accredited investors should be invited to investor meetings and provided offering materials. Obtaining a written confirmation from potential investors regarding their status as accredited investors prior to any marketing activity is recommended.

Issuers often number each offering memorandum provided to investors and keep track of the documents delivered. Materials additional or supplemental to the offering memorandum should be avoided. If such materials are provided, they should bear an appropriate legend and be collected after investor meetings if possible and/or should come under the cover of the offering memorandum, which itself should comply with Canadian disclosure requirements.

Many issuers market private placements into Canada through the Internet. An electronic document or a website can qualify as an offering memorandum and if this is the case, Canadian securities laws will be applicable. The same care should be taken with electronic documents as with printed materials. Only offering memoranda with the appropriate Canadian disclosure should be accessible by Canadian clients. Canadian clients should demonstrate they meet the requirements of any exemption to be relied upon before access to online materials is provided.

Supplemental Canadian Disclosure for Foreign Offering Documents

In most provinces any document describing the business and affairs of an issuer, including a foreign qualified prospectus or information circular, if provided to Canadian purchasers or potential purchasers in connection with a contemplated offering of securities, will constitute an offering memorandum for purposes of Canadian securities laws. As discussed above, an offering memorandum (whether Canadian or foreign) used in connection with certain prospectus exemptions is subject to Canadian disclosure requirements. In many cases foreign offering documents contain additional disclosure at the end of the document specific to the foreign jurisdictions in which the securities are offered. Additional disclosure can be incorporated at the end of the document in this fashion, subject to certain rules surrounding disclosure of potential conflicts (discussed below), in order to satisfy Canadian disclosure requirements.

Providing necessary Canadian disclosure within a foreign offering document before any Canadian interest has been confirmed is often impractical as many different jurisdictions require supplemental disclosure specific to their respective securities regimes. In global securities issuance programs, it is lengthy and difficult to include disclosure for every potential jurisdiction in an offering document. Reprinting after Canadian interest has been confirmed is also impractical. Typically, any necessary additional Canadian disclosure for foreign offering documents used in a private placement is provided in a Canadian "wrapper" – a disclosure supplement of a few pages that is attached to the cover of the offering document.

1. Rights of Action

As discussed above, offering memoranda used in Saskatchewan, Ontario, New Brunswick, Nova Scotia and Newfoundland in connection with certain prospectus exemptions, including the Accredited Investor Exemption, the Minimum Amount Exemption and the Private Issuer Exemption, are required to describe the respective rights of action that are statutorily available to purchasers in those provinces.

In Alberta, if the Minimum Amount Exemption is used, statutory rights must also be described for this province and any offering memorandum must be in the prescribed form. Additionally, local dealers often request that a summary of statutory rights of action available in Manitoba and other provinces be provided in combination with the summary of rights for the required provinces. In the past it was common for issuers to provide a contractual right of action to purchasers resident in provinces that had no statutory rights available to their residents; however this practice has become less common. Under the Offering Memorandum Exemption, issuers are required to provide equivalent contractual rights of action to any purchasers resident in provinces that do not have statutory rights of action.

The description of statutory rights comprises the largest part of the Canadian wrapper and typically requires a few pages. The description of statutory rights concludes with a statement that the disclosure is only a summary and reference should be made by purchasers to the complete legislation in their respective province. The securities law statutory rights discussed in the wrapper are in addition to and without derogation from any other right or remedy which purchasers may have at common law. Immediately after describing the statutory rights in the Canadian wrapper, if applicable, a statement is typically added regarding the difficulty of enforcing Canadian rights against foreign entities.

In addition to exempting listing representations in some circumstances, MI 45-107 (described above) allows a notice to be provided to purchasers of the entitlement to statutory rights rather than having to include a description of them in the offering document or wrapper, if the offering is restricted to permitted clients. This exemption is available in Ontario as well through local rules, and is not necessary in British Columbia because that province does not otherwise require that statutory rights be set out in an offering memorandum.

2. Disclosure of Potential Conflicts of Interest

Canadian securities laws seek to ensure that issuers and underwriters deal with each other as independent parties, free of relationships that might adversely affect the performance of their respective obligations under securities laws. National Instrument 33-105 – *Underwriting Conflicts* (**"NI 33-105"**) requires any person or entity acting as a dealer, adviser or investment fund manager, including such foreign persons and entities acting with respect to Canadian transactions, to disclose certain relationships between the person or entity and/or its affiliates and the issuer of the securities. Generally, the types of relationships that are required to be disclosed are ones that could cause a Canadian investor to question the independence of the parties for the purpose of the securities offering. The two specific relationships that must be disclosed are relationships that result in "connectedness or relatedness".

- Connected Issuer

An issuer is a "connected issuer" of a dealer if that issuer or its affiliate is in a relationship with the dealer or the dealer's affiliates or officers that may lead a reasonable prospective purchaser of the securities to question whether the dealer and the issuer are independent of each other for the distribution. Two common relationships that lead to characterizing an issuer as a connected issuer of a dealer are where (a) the dealer or an affiliate has provided or is providing strategic advice to the issuer on related matters or other matters; and (b) the dealer or an affiliate has lent or is a member of a syndicate that has lent a material amount of funds to the issuer, such as by way of involvement in a syndicated loan facility.

If an issuer is connected in this way to an underwriter/dealer, a disclosure obligation arises. In the case where the connectedness was established through a lending relationship, disclosure is required whether or not any of the proceeds of the securities offering will be used to repay any portion of the debt. A dealer may not act on an offering by a connected issuer without providing the disclosure discussed below required by NI 33-105.

- Related Issuer

An issuer is a "related issuer" of a person if (a) the person holds directly or indirectly more than 20% of the voting power in the issuer; (b) the person holds directly or indirectly more than 10% of the voting power in the issuer and is entitled to appoint 20% of the directors of the issuer or its affiliate; (c) the issuer holds an interest in the person equivalent to (a) or (b) above; or (d) each of the person and the issuer is related to the same third person or entity.

The common relationship that leads to characterizing an issuer as a related issuer of a dealer is where the dealer, an affiliate or a director or officer of the dealer owns a significant number of voting securities of the issuer. If an issuer is related in this way to a dealer, a disclosure obligation arises. A dealer may not act on an offering by a related issuer without providing the disclosure required by NI 33-105.

- Required Disclosure

Where an issuer is determined to be connected or related to a dealer in the offering, a boldface statement must appear on the front page of the offering document. If a foreign offering document is used and it does not contain the required statement on the cover, the statement can be added on the first page of the Canadian wrapper, which in turn is attached to the front page of the underlying document. The front-page disclosure includes a statement indicating there is a direct or indirect relationship between one or more of the dealers and the issuer and identifies the dealers. The statement must also include a description of the relationship or a cross-reference to the place in the offering document where such additional information is provided.

In addition to the bold statement, details regarding the issuer/dealer relationship must be provided either in the body of the offering document or in the wrapper. In the case of registered U.S. offerings, the required information is often available in the body of the original document and apart from the cover statement, no further disclosure is required. The necessary disclosure includes naming the dealers that are connected or related with the issuer, a description of their involvement in the decision to distribute the securities being offered and the determination of the terms of the distribution, including whether the offering was required, suggested or consented to by the relevant dealers. If the relationship is based on relatedness, securities holdings must be disclosed. In the case of a relationship based on indebtedness, NI 33-105 prescribes the following disclosure:

a) the amount of the indebtedness;

b) the extent to which the issuer is in compliance with the terms of the agreement governing the indebtedness or the extent to which any party has waived a breach of the agreement;

c) the nature of any security taken for the indebtedness; and

d) the extent to which the financial position of the issuer, or the value of any security taken for the indebtedness, has changed since the debt was incurred.

If any portion of the proceeds of the offering will be used to repay any portion of the indebtedness or will benefit a dealer that is connected or related to the issuer unlike other interest holders, a statement to this effect must be made and details provided.

An exemption from the requirement to list underwriting conflicts is available pursuant to NI 33-105 for eligible securities issued by a foreign issuer or a foreign jurisdiction's government, provided certain conditions are satisfied:

- the distribution must be made only to permitted clients through a registered dealer or a foreign dealer that qualifies as an international dealer in Canada;
- the dealer must deliver a written notice to each permitted client specifying the exemption relied on;
- a concurrent distribution of the security is made to investors in the U.S. and the offering document used in Canada must contain the same disclosure as provided to U.S. investors; and
- the disclosure provided in the offering document must comply with Section 229.508 of the U.S. Securities and Exchange Commission Regulation S-K under the 1933 Act and U.S. Financial Industry Regulatory Authority Rule 5121 – Public Offerings of Securities with Conflicts of Interest (**"FINRA Rule 5121"**).

The principal difficulty in relying on this exemption is that, in the case of U.S. or foreign offerings that are not U.S. registered offerings, it may be difficult to confirm whether the disclosure in the offering documents meets the standards of U.S. federal securities law and FINRA Rule 5121. For offerings not registered under U.S. federal securities laws, an opinion can be obtained from U.S. counsel to the effect that the offering document meets the registered offering standard. In cases where an opinion is unavailable, we recommend providing the connected and/or related relationship disclosure in a Canadian wrapper.

3. Collection of Personal Information

Information provided in exempt trade reports that are required to be filed under securities regulation in connection with a private placement of securities in Canada (discussed below) includes personal information about the purchasers, including name, contact information, securities purchased, exemption relied on and other information if applicable. Although information provided in an exempt trade report is not generally available to the public, basic information regarding an exempt offering is published by securities regulators and additional information regarding such offerings can be obtained by any person (subject to privacy exceptions) through freedom-of-information requests to the relevant province.

In Ontario, issuers and dealers must confirm for each offering that each purchaser has authorized the collection and provision of his or her information to the securities regulator. Issuers and dealers are also required to notify Ontario purchasers that information regarding the trade will be delivered to the regulator, what information will be delivered and why.

Typically the Canadian wrapper will contain disclosure regarding the provision of information to regulators along with deemed representations by any person seeking to rely on the offering memorandum that the person understands and authorizes the collection and provision of personal information in connection with the transaction to the relevant securities regulators.

4. Risk Acknowledgement

Sellers that are relying on the Accredited Investor Exemption must obtain an executed risk-acknowledgement form from the purchaser when distributing securities to individuals (but not companies) who qualify as accredited investors. A similar form must be completed in certain cases where the Family, Friends and Business Associates Exemption is relied on in Ontario or Saskatchewan. The acknowledgements are in a prescribed format and must also be completed by the seller and any salesperson involved in the trade. The forms are not required to be submitted to regulators but the purchaser must be provided a copy of the completed acknowledgement and the seller is required to keep its copy for eight years after the sale. Individual accredited investors who are classified as permitted clients are not required to execute a risk acknowledgement in connection with relying on the Accredited Investor Exemption. See Appendix C.

5. Certificate Requirements

In connection with a distribution of securities using the Offering Memorandum Exemption or in Alberta using the Minimum Amount Exemption, the offering document provided to purchasers must contain a certificate executed by the chief executive officer, chief financial officer and two directors of the issuer. The certificate must state that the offering document (together with the Canadian wrapper if applicable) does not contain a misrepresentation. As discussed above, misrepresentations include incorrect statements as well as the omission of statements necessary not to misconstrue other statements. The offering memorandum certificate can also be provided in a Canadian wrapper, where necessary, but where an offering document is prepared specifically to comply with the Offering Memorandum Exemption the certificate is normally added to the end of the document, which will itself include all necessary Canadian disclosure.

6. Deemed Representations

In addition to the deemed representations regarding the collection of personal information discussed above, in cases where no stand-alone subscription agreement is used, issuers also typically include other deemed representations in the Canadian wrapper to support the prospectus and registration exemptions relied upon in each case. Often the Canadian wrapper will state that receipt of a purchase confirmation by a Canadian investor will constitute a deemed representation by the purchaser to the issuer and the relevant dealer that the purchaser qualifies as an accredited investor, supporting use of the Accredited Investor Exemption from the prospectus requirements, or that the investor is a permitted client, supporting the use of the International Dealer Exemption from registration requirements. The deemed representations can be modified to support any of the prospectus or registration exemptions discussed above.

Although inclusion of deemed representations in the Canadian wrapper is common and preferable to not obtaining the representations at all, a better vehicle to capture purchaser representations is a stand-alone purchase/subscription agreement or indirectly through the dealer's know-your-client documentation that the dealer will rely upon in providing its representations to the issuer in the agency, purchase or underwriting agreement.

As mentioned above, in the case of the Employee Exemption, if there is no formal subscription agreement, the preferred practice is to obtain a standalone acknowledgement from the subscriber in order to confirm that the purchaser meets one of the categories of the Employee Exemption and that the trade was made on a voluntary basis.

7. Resale Restrictions

As discussed above under *Resale Restrictions*, securities only become freely tradable in Canada after a prospectus has been cleared or an issuer becomes a reporting issuer in at least one province and sufficient time passes. As restrictions on resale are a significant consideration for any Canadian investor and omitting disclosure regarding reporting issuer status could constitute a misrepresentation in some circumstances, Canadian wrappers include statements addressing whether the issuer (a) is or (b) is not a reporting issuer and whether or not the issuer (c) expects it will become or (d) expects it will cease to be a reporting issuer in the future. Typical Canadian wrapper disclosure also generally advises purchasers regarding resale restrictions applicable to privately placed securities. Where an issuer is not a reporting issuer and has no intention of becoming a reporting issuer, the wrapper advises that the securities will likely remain in the closed system permanently and will require the use of a prospectus exemption for resale.

8. Foreign Dealer Notice

In order for dealers and advisers to rely upon the International Dealer Exemption or International Adviser Exemption, Canadian wrappers often contain the disclosure required by NI 31-103 in order to support that the exemptions are applicable and can be relied upon. If the Canadian permitted client is not itself a registered dealer or adviser, the foreign dealer or adviser must disclose:

- that it is not registered in the province to make the trade;
- the foreign jurisdiction in which the head office or principal place of business of the entity is located;
- that all or substantially all of the assets of the foreign entity may be situated outside Canada and enforcement for Canadians could prove difficult; and
- the contact information for the foreign dealer's agent for service of process in the relevant province in which sales are sought to be made.

Some dealers opt to provide their clients the notice required by NI 31-103 in a sales confirmation or by other means.

9. Tax Disclosure

Although there is no specific securities law requirement, most Canadian wrappers will contain a brief statement warning Canadian purchasers to consult with their own tax advisers regarding their specific situations and the expected tax treatment of owning and disposing of the securities offered. If the tax treatment for Canadian holders is unusual compared to what the average investor would expect or significantly diverges from the treatment of holders in other jurisdictions, adding appropriate tax disclosure to the Canadian wrapper is recommended. Tax treatment disclosure may be necessary in some cases in order to provide sufficient information for purchasers to understand the potential return on the investment and to avoid any claim an investor may raise in the future that the omission of tax disclosure constituted a misrepresentation.

10. Forward-Looking Information

Canadian reporting issuers must comply with securities law rules governing the disclosure of forward-looking information, including such information provided in an offering memorandum. Forward-looking information is generally any disclosure about future events, conditions or results and includes both financial and non-financial statements. Forward-looking information is also often incorporated by reference into an offering memorandum through the reporting issuer's public disclosure.

An issuer must have a reasonable basis on which to make or include any forward-looking statement in an offering memorandum. This obligation is in addition to the requirement that the offering memorandum not contain any misrepresentations. Forward-looking information that is disclosed by reporting issuers and could be material to investors is required to be accompanied by:

- a notice identifying the forward-looking information;
- a cautionary statement regarding relying on forward-looking information and identifying material risks to its accuracy;
- a statement of material factors or assumptions used to develop forward-looking information; and
- a description of the reporting issuer's policy for updating forward-looking information.

In the case of foreign-prepared offering documents, most of the Canadian disclosure requirements in connection with forward-looking information are usually met through the disclosure required in the foreign document. In the case of U.S. prospectuses and offering circulars, these documents often lack sufficient disclosure of the material factors and assumptions used to generate the forward-looking information or fail to describe the issuer's policy for updating forward-looking information. If this is the case, the additional disclosure can be included in the Canadian wrapper.

Only Canadian reporting issuers are subject to the additional disclosure in connection with forward-looking information. Non-reporting issuers are not subject to the additional disclosure requirement. Despite this, non-reporting issuers often include a comprehensive forward-looking information disclaimer and discussion in their offering memorandum or Canadian wrapper.

11. Translation

There is no requirement to translate any of the offering documents or supplemental Canadian disclosure into French to support sales in Québec under the prospectus exemptions discussed above, though these requirements may arise in connection with the use of the Offering Memorandum Exemption. Most issuers will include a short statement in the wrapper in both English and French stating that the parties have agreed that documentation with respect to the offering will be provided in English only.

12. Currency Disclosure

Statements regarding currency conversion into or out of Canadian dollars are not required in an offering memorandum. It may be possible in some circumstances that such information is required to ensure that other statements in the offering document do not constitute misrepresentations. Historically, Ontario required disclosure of currency conversion but the rule was revoked. Some issuers continue to provide currency conversion disclosure in offering documents provided to Canadians to maintain consistency with past offerings or as a marketing tool necessary in connection with bonds denominated or paid in Canadian dollars and purchased primarily by non-Canadians or denominated in a foreign currency but purchased by Canadians.

Typically the Bank of Canada noon rate of exchange on the date of the offering memorandum is provided, as well as a range of yearly information. As shown in the chart below, for the years indicated, this sets out the period-end, high, low and average Canadian Noon Rates[(A)], in this example between the U.S. dollar and the Canadian dollar (expressed in CAD$ per US$1.00).

Year	Period-end[(B)]	High	Low	Average
2016	1.3477	1.4223	1.2818	1.3249
2015	1.3840	1.4004	1.1680	1.2787
2014	1.1601	1.1643	1.0614	1.1045
2011	1.0170	1.0604	0.9449	0.9891
2010	0.9946	1.0778	0.9946	1.0299

(A) The term "Canadian Noon Rate" means the Bank of Canada noon exchange rate.
(B) Represents the noon rates as reported by the Bank of Canada on the last trading day of the period.

These exchange rates are typically provided only for the convenience of the reader and a disclaimer of any representation regarding realizing the disclosed rates is normally included.

Issuers Quoted on the U.S. Over-the-Counter Markets

Multilateral Instrument 51-105 – *Issuers Quoted in the U.S. Over-The-Counter Markets* (**"MI 51-105"**) is effective in every province other than Ontario. The purpose of the instrument is to protect Canadian investors from inequitable practices in connection with the sale of securities of shell companies traded on the U.S. over-the-counter (**"OTC"**) market.

In certain circumstances MI 51-105 can *deem* an issuer to be a reporting issuer in Canada – involuntarily. On becoming a reporting issuer in Canada, the issuer will become subject to significant ongoing Canadian disclosure and compliance rules. This will include preparation and filing of an annual report, quarterly and annual financial statements and compliance with Canadian securities requirements applicable to a public company in Canada. Each province's requirements to allow a reporting issuer to transition to a non-reporting issuer vary slightly, and the details of applying to cease to be a reporting issuer in Canada are beyond this discussion. Generally, it is fairly difficult to cease being a reporting issuer in Canada if the issuer continues to have Canadian security holders. Any issuer (whether foreign or domestic) can be deemed to be a reporting issuer in Canada (other than in Ontario) if:

- no class of securities of the issuer is listed for trading on a recognized exchange (set out in Appendix D);
- any class of the issuer's securities trades on the OTC market (have been assigned a ticker symbol); and
- the issuer carried on "promotional activities", directly or indirectly, in any jurisdiction or province other than Ontario.

It should be noted that promotional activities can include merely contacting potential Canadian investors from another jurisdiction in order to facilitate, or potentially assist with realizing, Canadian sales. In some cases, it is difficult or impossible for an issuer to control whether a third party applies for and receives a ticker symbol for OTC trading of its securities in the U.S. Even if the issuer confirms its securities are not traded in the OTC market, there is no guarantee they will not become traded in the future after Canadian promotional activities are undertaken.

British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Newfoundland, Québec, and Prince Edward Island have each issued blanket orders clarifying the requirements of MI 51-105 and providing some relief from its provisions that may inadvertently cause an otherwise legitimate issuer to become a reporting issuer in Canada. British Columbia additionally adopted an instrument to address issues relating to MI 51-105 which provides for an exemption from MI 51-105 for issuers which (a) have securities listed on a designated exchange; (b) whose only listed securities are non-convertible debt securities; or (c) which only distribute securities to permitted clients. In Québec, there is also a carve out from the applicability of MI 51-105 if promotional activities in Canada are only undertaken with respect to permitted clients.

Fees and Filing Requirements

1. Reports of Exempt Trades

In each of the provinces where sales are made on an issuance from treasury pursuant to certain prospectus exemptions, a report of an exempt trade providing certain details about the trade must be filed in the prescribed form. Exempt trade reports are required to be filed within 10 days after the trade and must include details and contact information regarding the purchasers and the number and value of the securities purchased. In the case of a foreign issuer, only Canadian purchasers need to be reported. In some cases the offering documents must also be filed with the report. The report of exempt trade is signed by or on behalf of the issuer. In Ontario, an *Authorization of Indirect Collection of Personal Information for Distributions in Ontario* must be filed along with the exempt trade report.

Reports are required for trades made in connection with the following exemptions:

- Accredited Investor Exemption
- Minimum Amount Exemption
- Offering Memorandum Exemption
- Existing Security Holders Exemption
- Family, Friends and Business Associates Exemption
- Crowdfunding Exemption
- Existing Security Holders Exemption
- exemptions in connection with asset acquisitions valued over $150,000, acquisitions of oil, gas and mineral properties and retiring debt by way of securities offerings

No exempt trade reports are required for the:

- Private Issuer Exemption
- Transaction Exemption
- Employee Exemption
- Private Investment Club Exemption
- Rights Offering Exemption

Canadian Securities Administrators have effectively harmonized reporting requirements throughout Canada. The new Form 45-106F1 reporting form requires more detailed disclosure from issuers about their operations, directors and officers, and the distribution. The new form also requires detail about the prospectus exemption on which the issuer seeks to rely. Foreign public issuers offering their securities only to Canadian permitted clients (see Appendix C) are still exempt, however, from providing certain disclosure about insiders. The new form must be filed online through the System for Electronic Document Analysis and Retrieval (**"SEDAR"**) database for all provinces except Ontario and British Columbia. These two jurisdictions will rely on their own securities commission portals, so the objective of full harmonization has not yet been fully achieved.

2. Fees

- Exempt Trade Reports

Alberta, British Columbia and Québec charge fees for filing a report of an exempt trade based on a percentage of the aggregate proceeds raised in the province through that offering. The fees in other provinces are flat rate, ranging from $25 to $500 per report or $28.65 to $50 per purchaser. The filing obligations and fees required in each of the provinces are summarized as Appendix E. In the case where no exempt trade report is required in connection with the prospectus exemption used, no fees are payable. A$25 SEDAR system fee is also applicable in jurisdictions where the reports are filed through SEDAR.

- International Dealer Exemption and International Adviser Exemption Filings

The securities regulatory authorities require an entity relying on the International Dealer Exemption or the International Adviser Exemption to file a Form 31-103F2 in those provinces where the exempt dealer or adviser will be carrying on its activities and to confirm each year with the securities regulatory authorities that it will continue to rely on the relevant NI 31-103 exemption. The majority of securities regulatory authorities do not charge fees in connection with filing the form, except for Alberta, Saskatchewan and Ontario. Saskatchewan charges $1,150 and Alberta charges $1,400 for filing the form. Ontario has a different fee system and charges an Ontario participation fee as described below.

- Ontario Participation Fees

In Ontario, by December 1 of each year, entities relying on the International Dealer Exemption or the International Adviser Exemption and registered dealers (including exempt market dealers doing business in Ontario) must file a report in the prescribed form under Ontario Rule 13-502 – *Fees* (**"Rule 13-502"**) showing the information required to determine market participation fees payable to the regulator in Ontario. The participation fee must be paid no later than December 31 each year.

If the annual financial statements of the entity for the previous fiscal year have not been completed by December 1 in the calendar year in which the previous fiscal year ends, the entity must, (a) on December 1 in that calendar year, file a report under Rule 13-502 showing a good faith estimate of the information required to calculate its specified Ontario revenues as at the end of the previous fiscal year, and (b) on December 31 in that calendar year, pay the applicable participation fee based on the estimated revenues derived from Ontario.

A firm that estimated its specified Ontario revenues must file, when its annual financial statements for the previous fiscal year have been completed, a revised report reflecting the annual financial statements, calculate the Ontario participation fee on the basis of those completed financial statements, and, if the estimated fee paid differs from the actual fee owing, make an additional filing under Rule 13-502. In these circumstances, the entity must either remit any amount owing within 90 days of its fiscal year end, or become entitled to a refund of the balance. For details on calculating the Ontario participation fees, See Appendix E.

- Exempted Investment Fund Managers

Within 90 days after the end of each of its fiscal year, an unregistered fund manager must pay Ontario participation fees. See Appendix E.

- Registration as Exempt Market Dealer

Registration of a firm as an exempt market dealer, dealer representative and the CCO is accomplished by filing prescribed forms and fees required by the various securities regulators in those provinces in which the exempt market dealer will be carrying on the business through the National Registration Database (**"NRD"**) in which the registered entity must first enroll. For details on NRD registration see Appendix E.

Limited Partnership Registration

Limited partnerships organized under the laws of a foreign jurisdiction that offer their securities into Canada may need to be registered as limited partnerships in the Canadian jurisdictions in which they conduct such activities. The general partner of a foreign limited partnership may also be required to be registered on a province-by-province basis. Registration is a straightforward process involving an initial filing, subsequent annual filings and the appointment of a local agent for service in each province where activities may be conducted.

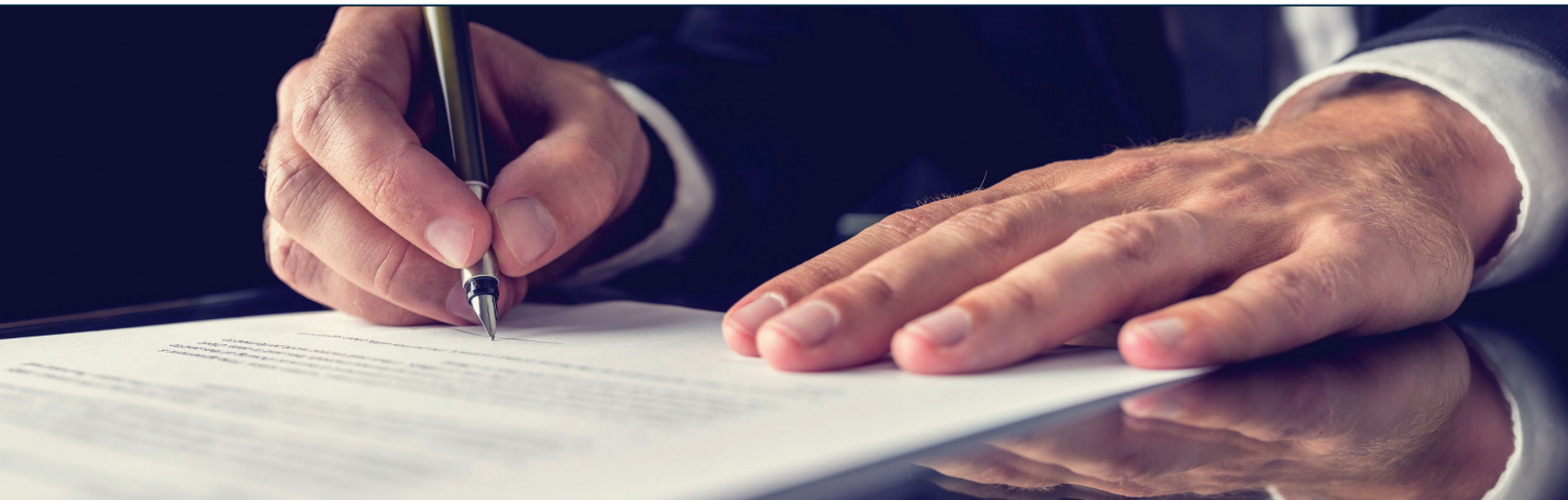
In Ontario, Saskatchewan, New Brunswick and Prince Edward Island, the relevant legislation requires the registration of a foreign limited partnership if it "is doing business" in one of these provinces. The legislation provides that a securities offering to Canadian residents, under most circumstances, is classified as "doing business" in these provinces and thus attracts the partnership registration requirements.

Alberta, Manitoba, British Columbia, Québec, Nova Scotia and Newfoundland have legislation that permits optional registration by foreign limited partnerships. Registration is only mandatory in cases of substantial connection, such as an active business or office located in the province. However in Alberta, British Columbia, Manitoba, Nova Scotia and Newfoundland, local legislation provides that foreign firms that do not register as extra-provincial partnerships may be treated as general partnerships with respect to any rights and obligations arising in that province, regardless of their governing legislation. For this reason, in order to avoid such potential difficulties, we recommend registration of limited partnerships as an extra-provincial partnership in each of the provinces where securities will be offered. In Alberta, the legislation only allows foreign partnerships based in Canada, the U.S. or the United Kingdom to register in that province. This can be problematic for partnerships based in other jurisdictions.

Foreign Banks

Although strictly speaking not a Canadian securities law issue, it should be mentioned that there is some risk that a foreign bank or its affiliates offering debt securities to Canadian residents could be seen as doing business in Canada as a bank. Any bank engaging in business in Canada is governed by the *Bank Act* (Canada) which, among other things, classifies financial institutions and provides a comprehensive set of rules governing the registration and activities of financial institutions operating in Canada.

In 2007, the Office of the Superintendent of Financial Institutions Canada ruled that it is permissible for a foreign bank to carry out a debt issuance program in Canada provided that (a) the foreign bank does not otherwise engage in business in Canada; and (b) the debt instruments are sold through Canadian dealers and the foreign bank interacts only with the Canadian dealers and has no contact with the ultimate purchasers of the debt instruments.



Proposed Regulatory Changes

1. Federal Securities Regulation

As discussed above, Canadian securities regulation is governed primarily by laws and agencies established separately by each of the provinces and territories. Each province and territory has its own securities commission or equivalent authority, and legislation regulating securities and securities trading in such province or territory.

Unlike some other developed countries, Canada does not have a securities regulatory authority at the federal government level. The Supreme Court of Canada has in the past affirmed that law-making with respect to business and trade within a province, including the offer, sale and ownership of securities, is constitutionally within the authority of each province and not the federal government (barring extraordinary circumstances). Notwithstanding the lack of a federal regulator, the majority of provincial securities commissions currently coordinate securities regulation under a mutually respected Passport System, so that the approval of one commission generally allows for reciprocal orders in other provinces.

Over the past 45 years, the majority of studies by independent experts and academic analysts have come out in favour of establishing a Canadian federal securities regulator. The federal government of Canada has been working towards establishing a national securities regulatory system that will provide:

- more consistent securities laws across Canada;
- improved and co-ordinated regulatory and criminal enforcement;
- faster policy responses to emerging market trends; and
- more effective international representation for Canada.

In June 2009, the federal Government of Canada announced the launch of a Canadian Securities Transition Office to co-ordinate efforts to establish a national securities regulator. The Canadian Securities Transition Office is mandated to lead all aspects of the transition, including the development of the proposed federal securities act and the accompanying regulations, collaborating with the provinces and territories, and developing and implementing a transition plan for organizational and administrative matters.

The federal government has invited each of the Canadian provincial and territorial jurisdictions to join in the effort. In May 2010, the Government of Canada tabled for information in the House of Commons the proposed national *Canadian Securities Act* (the **"Canadian Securities Act"**). The proposed Canadian Securities Act was based on existing provincial securities regulation and its objective is to harmonize existing regimes under a single statute.

The proposed legislation was reviewed by the Supreme Court of Canada to determine whether the proposed Canadian Securities Act would be within the legislative authority of the Parliament of Canada or challengeable by a province on constitutional grounds. On December 22, 2011 the Supreme Court concluded that the proposed Canadian Securities Act would not be valid under the general branch of the federal trade and commerce power under the Constitution of Canada. The court did indicate, however, that some aspects of the Canadian Securities Act could be valid under that power, and that a national securities regulator was possible if each province voluntarily "opted in" to the scheme.

Following the Supreme Court of Canada decision, the federal Government of Canada has continued to negotiate with the provinces to gain their support for a national securities regulator. To date, Ontario, British Columbia, Saskatchewan and New Brunswick have expressed support for a national securities regulator and on September 8, 2014 a memorandum of agreement between those provinces and the federal government was announced. The provinces of Alberta and Québec have opposed the initiative. In May 2016, the federal *Capital Markets Stability Act* (**"CMSA"**) was circulated by the federal government for consultation. The CMSA is the legislation proposed to create a national Capital Markets Regulatory Authority (**"CMRA"**). The CMRA would be responsible for identifying risks inherent to capital markets and developing regulatory policies to combat those issues. Additionally, the CMRA would adopt an investigatory role in order to enforce criminal sanctions.

The *Capital Markets Act*, which is part of the CMSA, is designed to replace provincial securities laws in the participating provinces: British Columbia, Yukon, Saskatchewan, Ontario, New Brunswick and Prince Edward Island. Alberta and Québec have remained firm in their opposition to the regulatory scheme, and Manitoba and Nova Scotia have declined to participate.

The federal government has been negotiating with the provinces for decades now and it is unlikely a national securities regulator will become operative in the near future, although it seems inevitable that in the long run some form of truly national regime will be implemented.

2. CSA Registrant Proposals

In April 2016, the Canadian Securities Administrators, an umbrella organization comprising of representatives of each provincial securities regulator, published a new consultation paper relating to advisers, dealers and representatives (referred to as registrants). The purpose of the paper is to work toward improving the relationship between clients and registrants. Reforms to NI 31-103 are proposed to enhance the obligations of advisers, dealers and representatives towards their clients, such as: (a) prioritizing the client's interests before the interests of the firm in the event a conflict of interest develops; (b) ensuring that registrants are fully aware of their clients' needs, circumstances, and potential risks; (c) ensuring that registrants are knowledgeable about the product they sell; (d) ensuring that potential investment decisions are actually suitable; (e) disclosing certain relationships in an easily digestible format; (f) developing specific titles and designations for representatives; and (g) potentially imposing a fiduciary duty on firms which manage client funds.

All provinces except British Columbia are in consultation regarding the development of a "best-interest standard" to be imposed on registrants. This would require registrants to act at all times in the best interests of their client, minimize conflicts of interest, provide additional disclosure, and perform services with appropriate care.

Appendix A - Summary of Prospectus Exemptions

Exemption	Features	Filings	Comments
Accredited Investor Exemption	Available to sophisticated purchasers, including institutions and high-net-worth individuals.	Yes	Currently the most commonly used exemption in Canada.
Minimum Amount Exemption	Purchases of securities valued at minimum $150,000. Full price of securities must be paid at the time of trade.	Yes	This exemption is available other than to individuals.
Private Issuer Exemption	Private issuers with less than 50 security holders (excluding employees). Securities only distributed in the past to permitted persons (including accredited investors).	No	Upon failing to meet the definition of "private issuer" the exemption becomes unavailable, even if the issuer later meets the definition.
Transaction Exemption	Available in the case of issuances of securities in connection with amalgamations, mergers, reorganizations and statutory arrangements.	No	Can be used to exchange securities with a reporting issuer in order to enhance liquidity.
Employee Exemption	Available to employees, executive officers, directors, consultants and certain affiliated persons.	No	The trade with the employees or affiliated persons must be voluntary.
Private Investment Club Exemption	Exemption for private investment funds with no more than 50 beneficial security holders.	No	Can be used in conjunction with parallel registration exemptions.
Offering Memorandum Exemption	Offering memorandum in a prescribed form must be provided to investors.	Yes	In some provinces the purchaser must be an "eligible investor" or the investment cannot exceed $10,000.
Family, Friends and Business Associates Exemption	Available to similar categories of purchasers as the Private Issuer Exemption.	Yes	Not limited to 50 securities holders.
Distribution to Existing Security Holders	Only available to reporting issuers.	Yes	Offering must be made to all security holders of the issuer.
Exemption Application	An application is made on a case-by-case basis to the relevant securities regulators.	Yes	Compelling reasons must be shown supporting grant of an exemption order. Can be time-consuming.
Crowdfunding Exemption	To facilitate private placements through the Internet.	Yes	Limited to $1.5 million raised capital, per year; or only $250,000 twice each 12 months in some provinces.

Appendix B - Accredited Investors

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;
j)	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;
(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;
k)	an individual whose net income before taxes exceeded $200 000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300 000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year;
l)	an individual who, either alone or with a spouse, has net assets of at least $5 000 000;
m)	a person, other than an individual or investment fund, that has net assets of at least $5 000 000 as shown on its most recently prepared financial statements;
n)	an investment fund that distributes or has distributed its securities only to: (i) a person that is or was an accredited investor at the time of the distribution, (ii) a person that acquires or acquired securities in the circumstances referred to in sections 2.10 [Minimum amount investment], or 2.19 [Additional investment in investment funds], or (iii) a person described in paragraph (i) or (ii) that acquires or acquired securities under section 2.18 [Investment fund reinvestment];
o)	an investment fund that distributes or has distributed securities under a prospectus in a jurisdiction of Canada for which the regulator or, in Québec, the securities regulatory authority, has issued a receipt;
p)	a trust company or trust corporation registered or authorized to carry on business under the *Trust and Loan Companies Act* (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a fully managed account managed by the trust company or trust corporation, as the case may be;
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;
r)	a registered charity under the *Income Tax Act* (Canada) that, in regard to the trade, has obtained advice from an eligibility adviser or an adviser registered under the securities legislation of the jurisdiction of the registered charity to give advice on the securities being traded;
s)	an entity organized in a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs (a) to (d) or paragraph (i) in form and function;

t)	a person in respect of which all of the owners of interests, direct, indirect or beneficial, except the voting securities required by law to be owned by directors, are persons that are accredited investors;
u)	an investment fund that is advised by a person registered as an adviser or a person that is exempt from registration as an adviser;
v)	a person that is recognized or designated by the securities regulatory authority or, except in Ontario and Québec, the regulator as an accredited investor; or
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.

In Ontario, paragraphs (a) to (h) of subsection 73.3(1) of the *Securities Act* (Ontario) correspond to paragraphs (a) to (d) and paragraphs (f) to (i) of the definition of "accredited investor" in section 1.1 of this Instrument.

For the purposes forgoing, the following definitions are included for convenience:

"**bank**" means a bank named in Schedule I or II of the *Bank Act* (Canada);

"**Canadian financial institution**" means

(a) an association governed by the *Cooperative Credit Associations Act* (Canada) or a central cooperative credit society for which an order has been made under section 473(1) of that Act, or

(b) a bank, loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction of Canada;

"**director**" means

(c) a member of the board of directors of a company or an individual who performs similar functions for a company, and

(d) with respect to a person that is not a company, an individual who performs functions similar to those of a director of a company;

"**financial assets**" means

(a) cash,

(b) securities, or

(c) a contract of insurance, a deposit or an evidence of a deposit that is not a security for the purposes of securities legislation;

"**fully managed account**" means an account of a client for which a person makes the investment decisions if that person has full discretion to trade in securities for the account without requiring the client's express consent to a transaction;

"**investment fund**" has the meaning as in National Instrument 81-106 - *Investment Fund Continuous Disclosure*;

"**person**" includes

(a) an individual,

(b) a corporation,

(c) a partnership, trust, fund and an association, syndicate, organization or other organized group of persons, whether incorporated or not, and

(d) an individual or other person in that person's capacity as a trustee, executor, administrator or personal or other legal representative;

"**related liabilities**" means

(a) liabilities incurred or assumed for the purpose of financing the acquisition or ownership of financial assets, or

(b) liabilities that are secured by financial assets;

"**Schedule III bank**" means an authorized foreign bank named in Schedule III of the *Bank Act* (Canada);

"**spouse**" means, an individual who

(a) is married to another individual and is not living separate and apart within the meaning of the *Divorce Act* (Canada) from the other individual,

(b) is living with another individual in a marriage-like relationship, including a marriage-like relationship between individuals of the same gender, or

(c) in Alberta, is an individual referred to in paragraph (a) or (b), or is an adult interdependent partner within the meaning of the *Adult Interdependent Relationships Act* (Alberta); and

"**subsidiary**" means an issuer that is controlled directly or indirectly by another issuer and includes a subsidiary of that subsidiary.

Appendix C - Permitted Clients

a)	a Canadian financial institution or a Schedule III bank;
b)	the Business Development Bank of Canada incorporated under the *Business Development Bank of Canada Act* (Canada);
c)	a subsidiary of any person or company referred to in paragraph (a) or (b), if the person or company owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of the subsidiary;
d)	a person or company registered under the securities legislation of a jurisdiction of Canada as an adviser, investment dealer, mutual fund dealer or exempt market dealer;
e)	a pension fund that is regulated by either the federal Office of the Superintendent of Financial Institutions or a pension commission or similar regulatory authority of a jurisdiction of Canada or a wholly-owned subsidiary of such a pension fund;
f)	an entity organized in a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs (a) to (e);
g)	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;
h)	any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government;
i)	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 inter-municipal management board in Québec;
j)	a trust company or trust corporation registered or authorized to carry on business under the *Trust and Loan Companies Act* (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a managed account managed by the trust company or trust corporation, as the case may be;
k)	a person or company acting on behalf of a managed account managed by the person or company, if the person or company 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;
l)	an investment fund if one or both of the following apply: i. the fund is managed by a person or company registered as an investment fund manager under the securities legislation of a jurisdiction of Canada; ii. the fund is advised by a person or company authorized to act as an adviser under the securities legislation of a jurisdiction of Canada;
m)	in respect of a dealer, a registered charity under the *Income Tax Act* (Canada) that obtains advice on the securities to be traded from an eligibility adviser, as defined in section 1.1 of NI 45-106, or an adviser registered under the securities legislation of the jurisdiction of the registered charity;
n)	in respect of an adviser, a registered charity under the *Income Tax Act* (Canada) that is advised by an eligibility adviser, as defined in section 1.1 of NI 45-106, or an adviser registered under the securities legislation of the jurisdiction of the registered charity;
o)	an individual who beneficially owns financial assets, as defined in section 1.1 of NI 45-106, having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $5 million;
p)	a person or company that is entirely owned by an individual or individuals referred to in paragraph (o), who holds the beneficial ownership interest in the person or company directly or through a trust, the trustee of which is a trust company or trust corporation registered or authorized to carry on business under the *Trust and Loan Companies Act* (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction;
q)	a person or company, other than an individual or an investment fund, that has net assets of at least $25 million as shown on its most recently prepared financial statements;
r)	a person or company that distributes securities of its own issue in Canada only to persons or companies referred to in paragraphs (a) to (q).

Appendix D - Recognized Exchanges

For the purpose of MI 51-105, the following exchanges have been recognized in the instrument:

- Toronto Stock Exchange
- TSX Venture Exchange
- Canadian Securities Exchange
- Alpha Exchange
- New York Stock Exchange
- NYSE MKT
- NASDAQ
- Aequitas NEO Exchange

The list of recognized exchanges has been expanded by regulatory blanket orders to include:

- NASDAQ OMX
- Borsa Italiana, MTA tier
- London Stock Exchange, not including AIM
- Hong Kong Stock Exchange
- Deutsche Börse, except First Quotation Board and Entry Standard tier
- Xetra, Prime Standard and General Standard tiers
- SIX Swiss Exchange
- Bourse de Luxembourg, other than Euro MTF
- Tokyo Stock Exchange, 1st and 2nd sections
- Shanghai Stock Exchange
- Stock Exchange of Thailand other than MAI
- National Stock Exchange of India
- Bombay Stock Exchange
- Osaka Stock Exchange
- Korea Exchange
- Singapore Exchange

Appendix E - Private Placement Filings and Fees

Province	Form to be Filed	Offering Document Filed	Timing of Filing	Fee (CAD$)
Ontario	Form 45-106F1	Electronic copy of the offering memorandum ("**OM**") and any subsequent amendments to a previously filed offering memorandum	Within 10 days after trade	$500 per form. If the Offering Memorandum Exemption is used, the fee is the greater of $500 and 0.025% of the gross proceeds realized by issuer from distribution. Late fee of $100 per business day (subject to a maximum aggregate fee of $5,000 per fiscal year, for an issuer).
British Columbia	Conformed copy of BC Form 45-106F1	None	N/A	Greater of $100 or 0.03% of the proceeds realized by the issuer from the distribution of the securities to purchasers in British Columbia. Fees are not payable on securities sold to purchasers who are not residents of British Columbia (except for the $100 minimum filing fee). No late fee.
Alberta	Form 45-106F1	None, unless an OM is used under the Minimmum Amount Exemption	N/A	Greater of $200 or 0.025% of the proceeds realized by the issuer from the distribution of the securities to purchasers in Alberta (unless the issuer is a reporting issuer, in which case a $200 flat fee applies). Fees are not payable on securities sold to purchasers who are not residents of Alberta (except for the $200 minimum filing fee). Late fee of $100 per business day to a maximum of $1,000 per report.
Saskatchewan	BC Form 45-106F1	OM, if marketing to "substantial purchaser" or "recognized exempt purchaser"	Prior to or contemporaneously with any marketing	$125 for each exemption used (no late fee).
Manitoba	Form 45-106F1	None	N/A	$25 per form.
Québec	Form 45-106F1	One copy of any document provided to investors	When distributed to investors	0.025% of gross value of the securities distributed in Québec, subject to a minimum of $277. No late fee.
New Brunswick	Form 45-106F1	One copy of OM	Within 10 days after trade	No fee for OM or 45-106F1 unless filed by an investment fund then the fee is $100 for the report and $350 for the offering memorandum.
Nova Scotia	Form 45-106F1	2 copies of OM	Within 10 days	$27.80 per purchaser.
Prince Edward Island	Form 45-106F1	None	Within 10 days	None.
Newfoundland	Form 45-106F1	2 copies of OM if advertising used and substantial purchaser exemption relied upon	Within 10 days after trade	$50 per purchaser.
Yukon	Form 45-106F1	1 copy if under OM exemption	Within 10 days	$25 per report. If using OM exemption, $100 to file OM.
Nunavut	Form 45-106F1	1 copy if under OM exemption	Within 10 days	$25 per report. If using OM exemption, $100 to file OM.
Northwest Territories	Form 45-106F1	1 copy if under OM exemption	Within 10 days	$25 per report. If using OM exemption, $100 to file OM.

Other Fees

- Ontario participation fees are calculated based on revenues derived by dealers and advisers from activities conducted in Ontario that would normally require registration. A person or firm that is late in filing Form 4 under Rule 13-502 or paying the applicable participation fee is liable to pay an additional late fee of $100 per business day, subject to a maximum aggregate fee of $5,000 for all late filings required to be filed within that calendar year. If the person or company is subject to a participation fee and the estimated specified Ontario revenues for the previous financial year are above $500 million, the maximum late penalty is $10,000 for all forms required in the calendar year.

Ontario participation fees are set out in the table below. "Specified Ontario Revenues" is calculated:

- for IIROC – [as defined in *Exemption from the Requirement to Register - Trading and Advising Activities*] and Mutual Fund Dealers Association of Canada (**"MFDA"**) members: (total revenue for the previous financial year – revenue not attributable to capital markets activities in Ontario) x (Ontario taxable income / Canadian taxable income)
- for non-IIROC and non-MFDA Members as: (firm's total revenues as shown in audited financial statements for the previous financial year – revenue not attributable to capital markets activities in Ontario – certain other fees) x (Ontario taxable income / Canadian taxable income).

The Specified Ontario Revenues of a foreign dealer relying on the International Dealer Exemption for its reference fiscal year are calculated by multiplying (a) the firm's gross revenues, less certain permitted deductions by (b) the percentage of firm's revenues realized in or from Ontario.

Specified Ontario Revenues for Previous Fiscal Year	Participation Fee
under $250,000	$835
$250,000 to under $500,000	$1,085
$500,000 to under $1 million	$3,550
$1 million to under $3 million	$7,950
$3 million to under $5 million	$17,900
$5 million to under $10 million	$36,175
$10 million to under $25 million	$74,000
$25 million to under $50 million	$110,750
$50 million to under $100 million	$221,500
$100 million to under $200 million	$367,700
$200 million to under $500 million	$745,300
$500 million to under $1 billion	$962,500
$1 billion to under $2 billion	$1,213,800
$2 billion and over	$2,037,000

National Registration Database (NRD) Enrolment and Fees

The NRD (as defined in *Fees and Filing Requirments*) requires an initial enrolment fee of $500 payable in the firm's principal jurisdiction of activity at the time the firm submits its enrolment forms. Thereafter, all NRD fees are calculated and collected by the NRD system via Electronic Funds Transfer through a bank account that is required to be set up by the registrant firm for NRD purposes.

The NRD system fees cover the cost of operating NRD across Canada and are separate and in addition to the regulatory fees charged by the various securities commissions.

- Submission Fee

Each individual registered on NRD is required to pay a submission fee of: (a) $75 for each individual applying for registration or review as a permitted individual in the principal jurisdiction, and (b) $20.50 for each individual applying for registration or review as a permitted individual in each additional province.

- Annual Registration Fee

NRD annual user fees are payable for each active individual on NRD on December 31 of each year. The fees are deducted from the registrant's NRD bank account on the first business day after December 31 each year as follows: (a) $75 for each registrant or permitted individual in the principal jurisdiction, and (b) $20.50 for each registrant or permitted individual in each additional jurisdiction.

- Canadian Bank Account Requirements

Each NRD registered firm must set up an electronic account with a member of the Canadian Payments Association.

Registration and Annual Fees charged by Securities Regulators Authorities for Exempt Market Dealers

The following list is a summary of the initial registration fees payable upon registration as an exempt market dealer in the various provinces, together with the annual fees payable thereafter. These fees are in addition to the NRD fees set out above.

Province	Exempt Market Dealer Fees			
	Initial Registration of Firm	Initial Registration of Representative, Permitted Individual, CCO or UDP per category	Annual Fee for Firm	Annual Fee For Individual
British Columbia	$2,500	$250	$2,500	$250
Alberta	$1,400	$400 regardless of the number of categories	$1,200	$300
Saskatchewan	$1,150	$300 regardless of the number of categories	$1,150	$300
Manitoba	$750	$300 regardless of the number of categories	$750	$300
Ontario	$1,300	$200 CCO and UDP (if not registered as a representative) $200	See Ontario annual participation fee above	
Québec	$1,661	$332 CCO and UDP - $332	$1,661	$415
New Brunswick	$600	$300	$600	$300
Nova Scotia	$699.50	$350.35	$679.15	$340.15
PEI	$850	$350	$750	$250
Newfoundland and Labrador	$600	$250 $25 for UDP	$600	$250 $25 for UDP

Fees for individuals are charged per category in some cases, except if the same person applies as CCO and UDP, only one fee for that person is charged, in addition to the fee applicable as an exempt market dealer representative.

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