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# Introduction

Private placements provide a relatively simple and cost-effective means by which foreign issuers can access the Canadian capital market. Private placements are made in reliance upon exemptions from the requirement to deliver a prospectus to prospective Canadian purchasers and provide dealers and issuers with the following benefits:

- offering documents are not subject to review by provincial securities commissions
- financial statements do not have to conform to International Financial Reporting Standards (IFRS)
- issuers do not become subject to Canadian continuous disclosure obligations
- there is no obligation to translate offering documents into French
- foreign dealers are able to market securities to most accredited investors in all Canadian provinces without being registered as dealers under provincial law
- costs are low due to a simple offering process
- information relating to the offering is not generally disclosed to the public
- issuers are able to access the significant institutional segment of the Canadian capital markets

This Guide summarizes the legal requirements applicable to the private placement of a foreign issuer's securities in Canada made concurrently with a registered offering or private placement in the United States. In Canada, securities regulation is a matter of provincial jurisdiction, therefore, offerings must be conducted in compliance with the laws of each province or territory in which offers or sales are made. The relevant legal requirements are substantively similar in each of the ten Canadian provinces (the "Provinces"). This Guide summarizes the regulatory regime adopted by these Provinces, while noting any unique provincial variations.

# Prospectus Exemptions

As a general rule, securities may not be offered for sale in Canada without providing potential investors a prospectus approved by the securities regulatory authority in each of the Provinces in which offers are made. However, for the purposes of effecting private placements, issuers and dealers may rely upon certain exemptions from this requirement. The two private placement exemptions most commonly relied upon by foreign issuers are the accredited investor exemption (the "Accredited Investor Exemption") and the minimum amount investment exemption (the "Minimum Investment Exemption"). Some issuers also establish directed share programs where securities of the issuer are offered to current employees of the issuer pursuant to the employee, executive officer, director and consultant exemption (the "Employee Exemption").

## ACCREDITED INVESTOR EXEMPTION

Under National Instrument 45-106 – *Prospectus and Registration Exemptions* ("NI 45-106"), the Accredited Investor Exemption is available in all Provinces. The Accredited Investor Exemption is modelled on a concept found in the limited-offering rules under U.S. federal securities law. Generally speaking, accredited investors are purchasers who are presumed to be sophisticated due to certain characteristics they possess that minimize the need for the additional information contained in a prospectus. The definition of accredited investor ("Accredited Investor") is set out in its entirety in Schedule 1 and includes the following:

### INSTITUTIONAL INVESTORS

- institutional investors such as banks, credit unions, trust, loan and insurance companies and their wholly-owned subsidiaries, registered advisers and registered dealers, public boards or commissions and federal, provincial and municipal governments

- pension funds regulated by a federal or provincial pension authority

### PORTFOLIO MANAGERS AND ADVISERS

- fully managed accounts that are managed by a person that is registered as a portfolio manager under securities legislation in Canada or a foreign jurisdiction and, in Ontario, that are purchasing a security other than a security of a mutual fund or non-redeemable investment fund

### INVESTMENT FUNDS

- mutual funds or non-redeemable investment funds that distribute or have distributed securities either only to Accredited Investors or under a prospectus

- mutual funds or non-redeemable investment funds advised by a person registered as an adviser or a person that is exempt from the requirement to register as an adviser

### PERSONS OR COMPANIES THAT MEET INCOME OR ASSET TESTS

Accredited Investors also include any company, limited partnership, limited liability partnership, trust or estate (other than a mutual fund or a non-redeemable investment fund) that had net assets of at least Cdn.$5,000,000 as reflected in its most recently prepared financial statements, provided that the Accredited Investor was not created solely to purchase or hold securities on that basis.

An individual who meets certain asset or net income tests will qualify as an Accredited Investor. An individual is an Accredited Investor if he or she:

- beneficially owns (alone or together with a spouse) financial assets having an aggregate net realizable value (before taxes) in excess of Cdn.$1,000,000
- owns (alone or together with a spouse) net assets of at least Cdn.$5,000,000
- had a net income before taxes in excess of Cdn.$200,000 (or together with a spouse, in excess of Cdn.$300,000) in each of the two most recent calendar years and has a reasonable expectation of exceeding the same net income level in the current year

### RECOGNIZED EXEMPT PURCHASERS

A person (including an individual) or company may apply, on a province by province basis, to be recognized as an Accredited Investor. Sales of securities can be made on a prospectus exempt basis to purchasers who have been granted this status and who purchase as principal without regard to the aggregate value of the securities purchased.

## MINIMUM INVESTMENT EXEMPTION

In each Province, securities can be offered without a prospectus to any purchaser who purchases, as principal, securities of a single issuer, having an aggregate acquisition cost of not less than Cdn.$150,000, paid in cash at the time of the trade, provided that the purchaser was not created or used solely to purchase or hold securities on that basis.

## DIRECTED SHARE PROGRAMS

In each Province, securities of an issuer may be offered by an issuer or a controlling shareholder of an issuer to the employees, executive officers, directors or consultants of the issuer or a related entity of that issuer (for example, employees of a subsidiary) pursuant to the Employee Exemption. Securities may also be offered to permitted assigns of such persons including their spouses, trustees, holding entities and Registered Retirement Savings Plans (RRSPs) or Registered Retirement Income Funds (RRIFs) of the person or their spouse. Purchasers under the Employee Exemption are not entitled to the *statutory* rights of action described below available to purchasers under the Accredited Investor Exemption and Minimum Investment Exemption. Trades pursuant to the Employee Exemption must be voluntary, meaning that the purchaser cannot be induced into the trade through expectation of continued employment with the issuer or a related entity of the issuer. It is typical to include a "deemed representation" to this effect in the wrapper or subscription agreement delivered in connection with directed share programs marketed to employees of an issuer.

Occasionally, the group of purchasers included in a directed share program may extend beyond people who qualify under the Accredited Investor Exemption or the Employee Exemption such as suppliers, customers or friends and family. In such a case (if securities having an aggregate acquisition cost less than Cdn.$150,000 are offered) discretionary relief from the regulator in each Province where such purchasers are resident will be required. An application for discretionary relief may take six to eight weeks to complete.

# Dealer Registration

## INTERNATIONAL DEALER EXEMPTION

To make sales to Canadian residents, Canadian securities laws generally require a foreign dealer to either (a) become registered as a dealer in the Province in which the sale is made or (b) rely on an exemption from registration. The international dealer exemption is one such registration exemption commonly relied upon by foreign dealers that distribute certain types of securities to permitted clients in Canada.

To rely on the international dealer exemption in a particular Province, a foreign dealer must:

- have a head office or principal place of business in a foreign jurisdiction;
- be registered as a dealer under the securities legislation of such foreign jurisdiction;
- be engaged in the business of a dealer in such foreign jurisdiction;
- be acting as principal or as agent for the issuer of the securities, for a permitted client or for a person or company that is not a resident of Canada; and
- have submitted to the provincial securities regulatory authority a completed Form 31-103F2 – *Submission to Jurisdiction and Appointment of Agent for Service*.

Foreign dealers relying on the international dealer exemption have restrictions on the type of securities they can sell. Securities permitted to be sold include equity securities of non-Canadian issuers, so long as they are not sold during a distribution under a prospectus filed in Canada; debt securities of non-Canadian issuers; and debt securities of Canadian issuers so long as they are offered primarily outside Canada and a prospectus has not been filed in Canada. A foreign dealer relying on the international dealer exemption cannot sell Canadian equities under any circumstances.

Foreign dealers relying on the international dealer exemption have restrictions on the type of clients to whom they can sell securities. Permitted clients are a subset of Accredited Investors and include: banks; credit unions; trust loan and insurance companies; the Government of Canada or of any Province of Canada; individuals with "financial assets" (*i.e.*, cash, securities, insurance contracts or evidences of deposit) with a net realizable value in excess of Cdn.$5 million; and entities other than individuals with net assets in excess of Cdn.$25 million. A complete list of permitted clients is set out in Schedule 2.

In order to rely on the exemption, the foreign dealer must also notify its Canadian clients that it is not registered in Canada and that it may be difficult to enforce legal rights against the foreign dealer and must provide the name and address of its agent for service of process in the relevant provinces. Our recommendation is that the notice be provided in a "wrapper" that is attached to the offering document provided to Canadian purchasers or, where that is not possible, in the trade confirmation. Except in Ontario, the foreign dealer must also file a notice with the relevant regulator every 12 months if it intends to continue to rely on this registration exemption. In Ontario, this requirement does not apply if the foreign dealer complies with the filing and fee payment requirements applicable to an unregistered exempt international firm under Ontario Securities Commission Rule 13-502 – *Fees*.

## EXEMPT MARKET DEALER

A foreign dealer that is unable to rely upon a registration exemption must become registered as a dealer in the Province in which it intends to distribute securities. Many foreign dealers choose to become registered as exempt market dealers in Canada.

Exempt market dealers may act as dealers with respect to trades in any securities, including Canadian equities, pursuant to an available prospectus exemption discussed above under "Prospectus Exemptions". This permits the foreign dealer to transact with the "accredited investors" listed in Schedule 1 and to sell securities to any purchasers, accredited or not, so long as the purchaser purchases a minimum aggregate amount of Cdn.$150,000 of a security in one transaction.

# Resale Restrictions

As a rule, buyers of privately placed securities are prohibited from freely trading the securities (that is, selling the securities without providing a prospectus to subsequent purchasers) except either: (i) in reliance upon an available exemption from the prospectus requirement; or (ii) if the issuer of the securities is or becomes a "reporting issuer" in any Canadian jurisdiction, and a four-month restricted period has elapsed, and the certificate representing the securities carries a prescribed legend. Generally, the restricted period runs from the later of the date of the private placement and the date on which the issuer becomes a "reporting issuer" under the securities legislation of any jurisdiction of Canada.

All Provinces permit private placees to resell securities of foreign issuers freely on a foreign stock exchange or to a purchaser outside of Canada but only in limited circumstances. This resale exemption is available where, at the time of the initial private placement, the issuer was not a reporting issuer anywhere in Canada and, after giving effect to the private placement, persons in Canada did not directly or indirectly: (i) own more than 10% of the outstanding securities of the class or series; and (ii) represent more than 10% of the total number of owners of securities of the class or series, and the sale is made through an exchange or market outside of Canada, or to a purchaser outside of Canada. To support Canadian private placees' reliance on this resale exemption, a foreign issuer should represent in both the Canadian offering memorandum and in the purchase agreement that the issuer is not a reporting issuer in any jurisdiction of Canada. In Manitoba, purchasers under a private placement may freely resell the securities whether inside that province or outside of Canada, provided such persons do not hold a sufficient number of securities of that issuer to materially affect control of the issuer.

# Private Placement Offering Memorandum

## REQUIREMENT TO DELIVER AN OFFERING MEMORANDUM

Under the Accredited Investor Exemption, there is no requirement to provide an offering memorandum to a prospective purchaser. In most cases, however, issuers or dealers will voluntarily provide prospective purchasers of securities with a selling document, such as a U.S. prospectus or U.S. offering memorandum. Where such a document is provided and securities are offered in reliance upon the Accredited Investor Exemption or the Minimum Investment Exemption, the document is deemed to be an "offering memorandum" for purposes of Canadian securities law. If a document is so deemed, it may attract statutory liability for misrepresentations and in certain jurisdictions purchasers' rights of action must be disclosed in the document, as discussed below.

In Alberta, if any document purporting to describe the business and affairs of an issuer is delivered to a purchaser solely in connection with the Minimum Investment Exemption, the issuer must also deliver to the purchaser a prescribed form of offering memorandum or include in the document a certificate signed by the Chief Executive Officer and Chief Financial Officer and the directors of the issuer certifying there is no misrepresentation in the document and also a description of the purchasers' statutory rights of action in the event of a misrepresentation.

## REQUIREMENT TO FILE A TECHNICAL REPORT

Under National Instrument 43-101 – *Standards Of Disclosure For Mineral Projects* ("NI 43-101"), an issuer must file a technical report where an offering memorandum contains scientific and technical information regarding an issuer's material mineral properties. However, such a report is not required to be filed if the offering memorandum is delivered solely to Accredited Investors.

If a private placement memorandum containing information regarding the issuer's mineral properties is provided to purchasers other than Accredited Investors, a technical report must be filed in the prescribed form 43-101F1 – *Technical Report* ("43-101F1"). The requirements of such a report are beyond the scope of this memorandum, but its preparation is likely to involve significant costs and delay to the issuer. Accordingly, in such circumstances, the issuer may wish to offer its securities only to Accredited Investors or avoid using any disclosure document at all in the offering and sale of securities in Canada.

## PURCHASERS' RIGHTS OF ACTION FOR RESCISSION OR DAMAGES

Purchasers in Manitoba, Newfoundland and Labrador, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan and certain purchasers in Ontario have a *statutory* right of action for rescission or damages where an offering memorandum contains a misrepresentation (which includes an omission to state a material fact) if the private placement is made in reliance on the Accredited Investor Exemption or the Minimum Investment Exemption. In Ontario, this statutory right of action is not available to a purchaser that is a financial institution such as a bank, loan corporation, trust company or insurance company. A complete list of financial institutions to which the Ontario statutory right of action does not apply is set out in Schedule 3. A similar statutory right of action is applicable to private placements in Alberta if the trade is made in reliance on the Minimum Investment Exemption.

In general, the statutory rights of action in the Provinces referred to above are against the issuer and a selling security holder and, except in Ontario and New Brunswick, against the directors of the issuer and each person or company who signed the offering memorandum.  In Nova Scotia and Saskatchewan, the rights are also exercisable against a selling dealer or promoter.

If a private placement is made in reliance on the Accredited Investor Exemption or the Minimum Investment Exemption in the Provinces of New Brunswick, Nova Scotia, Saskatchewan or Ontario or in reliance on the Minimum Investment Exemption in Alberta, these rights must generally be described in the offering memorandum.  The statement describing these rights, as well as other information relevant to Canadian purchasers, is usually set out in a "wrapper" that is attached to the disclosure document provided to Canadian purchasers.  Sample statutory rights of action disclosure for sales to Accredited Investors is set out in Schedule 4.

# Special Considerations for Issuers Quoted in the U.S. Over-the-Counter Markets

Multilateral Instrument 51-105 – *Issuers Quoted in the U.S. Over-The-Counter Markets* ("MI 51-105") came into force on July 31, 2012 in each jurisdiction of Canada other than Ontario. The stated objective of MI 51-105 is to discourage the manufacture and sale of "shell companies" traded in U.S. over-the-counter ("OTC") markets that can be used for abusive purposes. However, the rule is overly broad and may have unintended consequences for legitimate foreign issuers that are not engaged in abusive practices.

In general, MI 51-105 deems an issuer to be a "reporting issuer" if: (a) the issuer does not have any class of securities listed on a limited number of designated stock exchanges[1]; (b) any class of the issuer's securities trade on any U.S. OTC market; and (c) the issuer, or someone acting on its behalf, has carried on "promotional activities" in or from any jurisdiction of Canada (other than Ontario), including any communications from outside of Canada with persons in any such jurisdiction, in a way that promotes, or could reasonably be expected to promote, the purchase or sale of the issuer's securities. For example, an issuer listed only in Brazil, whose securities also happen to trade on a U.S. OTC market, would automatically become a reporting issuer in a jurisdiction of Canada (other than Ontario) if it, or someone on its behalf, carries on "promotional activities" in such jurisdiction.

The requirements of MI 51-105 apply to all issuers and are not limited to Canadian companies. An issuer that becomes a reporting issuer by virtue of MI 51-105 will become subject to full Canadian public company continuous disclosure requirements, including the requirement to prepare and file an annual information form (annual report) and quarterly and annual financial statements.

MI 51-105 is particularly troubling because an issuer cannot control when or whether any U.S. broker-dealer may take the necessary steps to have the Financial Industry Regulatory Authority ("FINRA") assign a ticker symbol to a class of its securities for use in OTC trading. In some cases, the only requirement is that the issuer has a valid CUSIP number for the securities in question. Even if the issuer ensures that the securities are not traded OTC in the U.S. before it commences "promotional activities" in Canada, there is a risk (albeit remote) that its securities may become OTC-traded during the course of the distribution in Canada without the issuer's knowledge or consent. The issuer would then inadvertently become a reporting issuer in the jurisdictions (other than Ontario) in which it carried out such promotional activities.

As of the date of this Guide, each of British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick and Prince Edward Island has adopted substantially similar blanket orders that provide limited relief from MI 51-105 by expanding the list of stock exchanges the listing on which will exempt the issuer from the scope of the rule. A complete list of designated stock exchanges is set out in Schedule 5. Québec issued a

1 MI 51-105 itself lists only the Toronto Stock Exchange, the TSX Venture Exchange, the Canadian National Stock Exchange, the Alpha Exchange, the New York Stock Exchange, NYSE Amex and NASDAQ. This list was subsequently expanded in blanket orders issued in British Columbia, Alberta, Saskatchewan, Manitoba, Québec, Nova Scotia, New Brunswick and Prince Edward Island. These blanket orders are discussed below. It is important to note that there is a slight distinction between the treatment of issuers listed on one of the seven exchanges in MI 51-105 and those who are listed on an exchange set out in the blanket orders. A discussion of this distinction is beyond the scope of this Guide and you should seek specific legal advice regarding the potential application of MI 51-105 in connection with any particular transaction.

blanket order that provides for much broader relief which resolves virtually all concerns regarding the possible application of MI 51-105 in respect of promotional activities directed only at "permitted clients".

The most common scenario where MI 51-105 still raises a concern is in the context of an initial public offering of, typically, common shares where the (then unlisted) issuer, or the underwriters on its behalf, conduct promotional activities in a jurisdiction of Canada (other than Ontario) before the securities are actually listed on a designated exchange. If FINRA assigns a ticker symbol to the issuer's common shares for use on any OTC market in the U.S. before the promotional activities are conducted or at any time during the course of the promotional activities in Canada, the issuer would inadvertently become a reporting issuer in Canada. For that reason, many underwriters marketing IPOs in Canada on a private placement basis have elected to limit their promotional activities to the Provinces of Ontario and Québec only (and, in Québec, solely to permitted clients).

# Disclosure in the Canadian Wrapper

In a cross-border private placement, the Canadian offering memorandum typically will take the form of a U.S. prospectus or U.S. private placement memorandum coupled with a wrapper containing any required description of the statutory rights of action and other information of interest to prospective Canadian purchasers, such as a description of resale restrictions. The issuer will also include "deemed representations" from purchasers in the wrapper to support the issuer's reliance on the relevant private placement exemptions. In addition, other items of disclosure discussed below are included to satisfy formal disclosure requirements under Canadian securities law or to ensure that the wrapped offering document does not omit or misstate a material fact.

## TAX DISCLOSURE

Where the tax treatment of the securities in the hands of Canadian holders differs materially from the tax treatment in the hands of U.S. holders, we recommend that Canadian tax disclosure be included in order to ensure that the Canadian offering memorandum does not omit to state information that may be considered material to a Canadian purchaser.

## RELATED ISSUER OR CONNECTED ISSUER DISCLOSURE

Canadian securities laws require disclosure in an offering memorandum of any relationship between a dealer and an issuer that may create the appearance of a conflict of interest. Disclosure obligations arise where a dealer exercises influence over or is influenced by the issuer (including through one party's direct or indirect control of 20% or more of the voting securities of the other party). Similarly, disclosure obligations arise where, as is more typically the case, any indebtedness exists between a dealer (or its affiliates) and an issuer that a prospective purchaser would consider material in determining whether to purchase the securities or that would cause the purchaser to question whether, in light of the relationship, the issuer and dealer are independent of each other. The disclosure obligation arises whether or not any of the proceeds are being used to repay the indebtedness.

Where these disclosure obligations are triggered, a statement in bold face must be included on the front page of the offering document (generally the "wrapped" U.S. offering document): (i) indicating the existence of the relationship or connection between the issuer and the dealer; (ii) summarizing the nature of that relationship or connection (including if it is by way of indebtedness); and (iii) cross-referencing a section in the body of the offering memorandum in which the relationship or connection is described more fully. In the event that no such section exists in the body of the U.S. offering document, it is necessary to provide further information in the wrapper. Where the relationship between the dealer and the issuer is by way of indebtedness, the additional information required to be set out in the body of the wrapper includes: (i) the amount of the indebtedness; (ii) the nature of any security taken for the indebtedness; (iii) the extent to which the connected parties are in compliance with the terms of the agreement governing the indebtedness; (iv) the extent to which the connected party has waived a breach of the agreement; and (v) whether the financial position of the issuer, or the value of any security taken for the indebtedness, has changed since the debt was incurred. Additionally, if any portion of the proceeds of the offering will be used to repay such indebtedness, a statement to this effect must be made in the wrapper.

## FORWARD-LOOKING INFORMATION

Issuers that are reporting issuers in Canada must comply with rules that govern the disclosure of "forward-looking information" both of a financial and non-financial nature contained in offering memoranda (the "FLI Rules"). Under the FLI Rules, forward-looking information is any disclosure regarding possible events, conditions or results of operations that is based on assumptions about future economic conditions and courses of action. Accordingly, the FLI Rules apply not just to financial forecasts and projections but also to all other forward-looking information in or incorporated by reference in a Canadian offering memorandum, including statements contained in an issuer's MD&A and other documents incorporated by reference. In addition to a requirement that the issuer must have a reasonable basis for any forward-looking information included in an offering memorandum, there are additional disclosure requirements for material forward-looking information. Forward-looking information is considered material if a reasonable investor's investment decision would be influenced or changed if the information were omitted or misstated. The FLI Rules require that an issuer that discloses material forward-looking information must:

- identify the forward-looking information as such;
- caution users that actual results may vary from the forward-looking information;
- identify any material risk factors that could cause actual results to differ materially from the forward-looking information;
- identify the material factors or assumptions used to develop the forward-looking information; and
- describe its policy for updating the forward-looking information.

Often, these requirements will be met through disclosure already in the offering document that is provided to prospective non-Canadian investors. However, often offering documents used in other jurisdictions do not disclose the material factors or assumptions used to develop the material forward-looking information or describe the issuer's policy for updating forward-looking information. For offerings made by issuers that are reporting issuers in Canada, this information must be included in the wrapper.

Non-reporting issuers offering securities by private placement in Canada are not subject to the FLI Rules.

## COLLECTION OF PERSONAL INFORMATION

An issuer that privately places securities in a Province must provide certain information about purchasers to the securities regulatory authority in Provinces where sales were made. The wrapper will include a "deemed representation" to the issuer and the dealers from the purchaser that, among other things, it has been advised that the issuer must file such information with, and it has authorized the indirect collection of such information by, applicable securities regulatory authorities.

## CERTIFICATE REQUIREMENTS

If an offering memorandum is being used, it may be necessary, depending on the prospectus exemption to be relied on and the Provinces in which the offering is made, to include in the offering memorandum a certificate signed by specified officers of the issuer to the effect that the offering memorandum does not contain any misrepresentation. Generally, the certificate requirement can be avoided if the securities are marketed only to Accredited Investors. Any offering memorandum used in Alberta in connection with sales under the Minimum Investment Exemption requires that the offering memorandum be certified by the issuer.

## FINANCIAL STATEMENTS

There is no obligation to conform or reconcile financial statements to International Financing Reporting Standards (IFRS).

## TRANSLATION

There is no requirement to translate the offering memorandum into French for sales in Québec under the prospectus exemptions discussed above.

## EXCHANGE LISTING REPRESENTATIONS

Securities laws in Canada generally prohibit a statement to be included in an offering memorandum to the effect that a security will be listed on, or that an application has been or will be made to list the security on, any stock exchange. Where such a representation is included in an offering memorandum, absent an available exemption from this prohibition, consent to the inclusion of the representation must be obtained from that Province's securities regulatory authority prior to its distribution to prospective purchasers in the particular Province.

In all of the Provinces other than British Columbia and Manitoba, the prohibition against the inclusion of listing representations does not apply where: (i) an application has been made to an exchange to list the securities and other securities of the issuer are currently listed on any exchange (or, in Alberta and Saskatchewan, that exchange); or (ii) an exchange has granted approval or conditional approval to the listing of the securities or has consented to, or indicated that it does not object to the representation. The British Columbia Securities Commission has issued a blanket exemption order that permits an issuer to include a listing representation in an offering document. In Manitoba, listing representations can only be made with the written permission of the provincial securities regulator.

The amount of time it takes to obtain consent to the inclusion of a listing representation in an offering memorandum varies depending on the Province. In Manitoba, where there is no statutory exemption from the prohibition, consent is generally granted within two days after submission of the necessary documentation to the Manitoba Securities Commission. In certain other Provinces, obtaining consent can take considerably longer. Where available, relying on the statutory exemption is the preferred approach, although some foreign stock exchanges are reluctant to confirm that they do not object to the listing representation, which may result in delays.

## ROADSHOWS

When marketing activities in connection with a private placement in Canada are conducted, only Accredited Investors and those eligible to purchase under the Employee Exemption should be invited to the road show. Reasonable efforts should be made to restrict attendance by the general public and no written materials in connection with a Canadian private placement should be distributed at the road show other than the wrapped offering document. Information that is not contained in the wrapped offering document should not be conveyed to prospective purchasers during marketing activities. Additionally, access to road shows should be limited to only those Canadian purchasers who reside in the Provinces in which an offering will be made.

Special considerations apply to marketing a private placement into Canada electronically over the Internet. Access to the electronic road show should be password restricted and should be limited to Accredited Investors and those eligible to purchase under the Employee Exemption. Qualified prospective Canadian purchasers should either not be able to access the underlying offering document without being directed to a Canadian wrapper first or should only have access to a single wrapped document meeting Canadian securities requirements.

# Special Considerations for Investment Funds

In September 2012, Multilateral Instrument 32-102 – *Registration Exemptions for Non-Resident Investment Fund Managers* ("MI 32-102") came into effect in Ontario, Québec and Newfoundland and Labrador. Prior to that time, non-resident investment fund managers ("IFMs") were not required to register in any Canadian province and therefore securities offerings of investment funds into Canada on a private placement basis were generally subject to the same considerations as those that would be applicable to any other foreign issuer. As a result of MI 32-102, however, IFMs offering securities of investment funds into Ontario, Québec and Newfoundland and Labrador must either register with the appropriate securities regulatory authority – a lengthy and onerous process – or rely on the "permitted client" exemption discussed below. In all of the other Provinces, the registration requirement is not triggered unless the IFM also has "a real and substantial connection" to the jurisdiction, such as a physical place of business in the particular Province.

## INVESTMENT FUNDS

An "investment fund" is defined in the *Securities Act* (Ontario) as a "mutual fund" or a "non-redeemable investment fund". A "mutual fund" is an issuer whose primary purpose is to invest money provided by its security holders and whose securities entitle the holder to receive on demand, or within a specified period after demand, an amount computed by reference to the value of a proportionate interest in the whole or in part of the net assets, including a separate fund or trust account, of the issuer. A "non-redeemable investment fund" is an issuer that is not a mutual fund and whose primary purpose is to invest money provided by its security holders that does not invest for the purpose of exercising or seeking to exercise control of an issuer or for the purpose of being actively involved in the management of any issuer in which it invests.

The general nature of an investment fund is that the money invested in it is professionally managed on the basis of a stated investment policy, usually expressed in terms of investment objectives and strategies, and is typically invested in a portfolio of securities. The fund has the discretion to buy and sell investments within the constraints of its investment policy. An investment fund generally does not seek to obtain control of or become involved in the management of companies in which it invests.

Investment funds can be distinguished from holding companies and private equity funds, which generally exert a significant degree of control over the companies in which they invest. Examples of entities that would generally not be considered investment funds are real estate investment trusts and private equity funds.

Conversely, mortgage investment entities will generally be considered to be investment funds. These include entities whose purpose is to directly or indirectly invest substantially all of its assets in debts owing to it that are secured by mortgages, hypothecs or in any other manner on real property, and whose other assets are limited to deposits with a bank or other financial institution, cash, certain debt securities, real property which is directly or indirectly held on a temporary basis as a result of action taken to enforce its rights as a secured lender, or instruments intended solely to hedge specific risks relating to the debts owing to it that are secured by mortgages, hypothecs or in any other manner on real property. Similarly, "business development companies" regulated in the U.S. under the Investment Company Act of 1940 will also generally be considered to be investment funds, as they typically do not exert control over the portfolio companies in which they invest.

## PERMITTED CLIENT EXEMPTION

The permitted client exemption allows investment funds to be sold without the IFM being registered. However, eligibility for the exemption is difficult to achieve and we expect most investment fund issuers will forego one-off sales in Ontario and Québec rather than attempt to comply. The exemption allows the investment fund's securities to be sold to "permitted clients", but only if all securities of all investment funds managed by the particular IFM in Ontario, Québec and Newfoundland and Labrador are held by "permitted clients". If any of the fund's investors are persons other than permitted clients, potential investors cannot be actively solicited in Ontario, Québec or Newfoundland and Labrador unless either the non-permitted clients are redeemed out of the fund or the IFM registers as an investment fund manager. As a practical matter, it may be difficult for an IFM to confirm that no securities of any of its funds are held by non-permitted clients, which significantly diminishes the usefulness of this exemption. The exemption is not available to a non-resident IFM if any of the investment funds it manages are reporting issuers in any jurisdiction of Canada.

In order to rely on this exemption, the IFM must file a Form 32-102F1 – *Submission to Jurisdiction and Appointment of Agent for Service for International Investment Fund Manager* and notify purchasers of the investment fund's securities in writing (i) that it is not registered in the local jurisdiction, (ii) the location of its head office or principal place of business, (iii) that all or substantially all of its assets are situated outside of Canada, (iv) that, as a result, the purchaser may have difficulty enforcing its legal rights against the IFM and (v) the name and address for its agent for service of process in each relevant jurisdiction.

Within 10 days of the date on which a non-resident IFM first relies on this exemption, the non-resident IFM must file a completed Form 32-102F2 – *Notice of Regulatory Action* with the applicable securities regulatory authority, and notice of any change to the information contained in such form must be provided to the securities regulator within 10 days of the change. In addition, a non-resident IFM that has relied on this exemption at any time during the 12-month period preceding December 1 in any calendar year must provide the securities regulator in the applicable jurisdiction(s) with notice of the following by December 1 of that year: (i) the fact that it relied upon the permitted client exemption and (ii) for all investment funds for which it acts as IFM, the total assets under management, expressed in Canadian dollars, attributable to securities beneficially owned by residents of the relevant jurisdiction(s) as at the end of the most recently completed month.

## REGISTRATION PROCESS

IFM registration in Canada is a comprehensive process that may take up to eight weeks to complete once all of the necessary materials have been filed with the applicable securities regulatory authority. A registered IFM is subject to minimum capital and insurance requirements, financial reporting and record keeping obligations and compliance system requirements, including having written policies and procedures.

## ANNUAL PARTICIPATION FEE

An annual participation fee is payable in Ontario by both registered and unregistered IFMs. The participation fee is based on the IFM's revenues in Ontario during the year. For registered IFMs, the participation fee is payable by December 31 of each year. For unregistered IFMs, the participation fee is payable not later than 90 days following the end of its fiscal year. In addition, each registered and unregistered IFM must file a Form 13-502F4 – *Capital Markets Participation Fee Calculation* with the Ontario Securities Commission (the "OSC") by December 1 of each year.

# Fees and Filing Requirements

## REPORTS OF TRADES

In each of the Provinces, a report of an exempt trade made pursuant to the Accredited Investor Exemption or the Minimum Investment Exemption must be filed in each Province where sales were made on Form NI 45-106F1 – *Report of Exempt Distribution*. The filing requirements are similar across the Provinces, though some minor differences remain. Generally, the reports must be filed within 10 days after the trade and must include a purchaser's name, address, telephone number and the number and value of the securities purchased. The report of exempt trade is signed by or on behalf of the issuer. If a distribution is made in Ontario, the *Authorization of Indirect Collection of Personal Information for Distributions in Ontario* must be filed along with Form 45-106F1 with the OSC. No reports are required for exempt trades made in reliance on the Employee Exemption.

In British Columbia, there are post-closing reporting requirements (Form NI 45-106F6) which in certain circumstances require an issuer to disclose detailed information about the securities holdings of insiders of the issuer. However, if sales in British Columbia are limited to permitted clients only, then Form NI 45-106F1 may be filed instead of Form NI 45-106F6, thereby eliminating the requirement to include the insider disclosure. If sales are made to non-permitted clients, Form NI 45-106F6 must be filed, however the insider disclosure may be omitted so long as the issuer is either: (i) a "foreign public issuer", meaning it has a class of securities registered under section 12 of the 1934 Act or is required to file reports under section 15(d) of the 1934 Act; or (ii) the issuer is required to provide disclosure to security holders or a regulatory authority in certain "designated foreign jurisdictions", which include Australia, France, Germany, Hong Kong, Italy, Japan, Mexico, the Netherlands, New Zealand, Singapore, South Africa, Spain, Sweden, Switzerland or the United Kingdom.

Although most reports of exempt trades are made in paper to the relevant regulators and the form of report states that the schedule, which lists the details of purchasers, will not be placed on the public file of any securities regulatory authority, freedom of information legislation in certain Provinces may require the relevant securities regulatory authority to make this information available if requested.

## FEES

In Alberta, British Columbia and Québec, the fees for filing a report of exempt trade are calculated as a percentage of the aggregate proceeds raised in the Province. The fees in the other Provinces range from a flat fee of Cdn.$25 per purchaser to Cdn.$500 per report. The filing obligations, including the fees required in each of the Provinces, are set out in the chart included as Schedule 6. As noted, no reports are required for exempt trades made in reliance on the Employee Exemption.

## LIMITED PARTNERSHIP REGISTRATION

In Ontario, a limited partnership is deemed to conduct business in the Province if it distributes securities in Ontario using a prospectus or an offering memorandum. A limited partnership that conducts business in Ontario and its general partner may be required to register. If the general partner is a non-resident corporation, registration as an extra-provincial corporation will be required in Ontario. Upon registration, the general partner will become subject to annual tax return filing obligations in Ontario. Similar registration is also required in Saskatchewan and New Brunswick (only if the general partner conducts business in New Brunswick separate and apart from the limited partnership).

# Omnibus Wrapper Relief Application

In May 2011, an application was made on behalf of several investment dealers for exemptive relief from the requirements of Canadian securities laws which dictate, in connection with a private placement of foreign securities into Canada, that a foreign offering document provided to Canadian purchasers be wrapped by a disclosure document containing certain mandated Canadian disclosure. The requested relief, if granted, will significantly lower the technical barriers to entry for private placements by foreign issuers into Canada and improve access to foreign securities for the benefit of certain Canadian accredited investors and, indirectly, the many Canadian retail investors whose money they manage.

## SCOPE OF THE RELIEF

The requested relief will, if granted, allow the named applicants and certain of their affiliates to offer foreign securities to international investors using a prospectus prepared in compliance with U.S. securities laws, without any Canada-specific disclosure. In particular, the requested relief would include relief from: (i) the requirement to include in a Canadian offering memorandum a summary of statutory rights of action under relevant Canadian law; (ii) the requirement to include certain disclosure relating to the relationships between the underwriters and issuer in an offering ("connected and related issuer disclosure"); (iii) the requirement to provide notification of the indirect collection of personal information for Canadian purchasers; and (iv) relief from the prohibition against the inclusion in an offering document distributed in Canada of a statement to the effect that a security will be listed or that an application has or will be made to list the security on an exchange.

## LIMITATIONS OF THE REQUESTED RELIEF

### RELIEF FOR NAMED FIRMS ONLY

The relief will only be available to the registrant firms named in the application and certain of their affiliates. Registrant firms not named in the application will have to submit their own applications in order to obtain similar relief.

### UNDERWRITING CONFLICTS OF INTEREST DISCLOSURE MUST COMPLY WITH U.S. SECURITIES LAWS

The exemption from the requirement to provide connected and related issuer disclosure in respect of relationships between the issuer and/or a selling security holder and the underwriters in the offering will only be available where the offering document (i) complies with the requirements of the federal securities laws of the United States regarding the disclosure of conflicts of interests, to the extent applicable to such offering, and (ii) does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made therein, in the light of the circumstances under which they were made, not misleading. For U.S. registered offerings, this will generally mean that the offering document must comply with Section 229.508 of SEC Regulation S-K and FINRA Rule 5121. For Rule 144A offerings and other offerings not registered under U.S. federal securities laws, the offering document must contain the necessary conflicts of interest disclosure so as to ensure that the offering document is free from material misrepresentation.

### SALES ONLY TO PERMITTED CLIENTS

The exemption would be available only for sales to permitted clients. While this may limit the usefulness of the requested relief somewhat, in our experience, most purchasers in private placements of foreign securities into Canada are large institutional investors who qualify as permitted clients.

### NOTICE TO PERMITTED CLIENTS

In connection with granting the requested relief, the OSC will require that investment dealers relying on the relief provide certain of the disclosures currently provided in Canadian wrappers in a notice prior to the first sale of foreign securities to such permitted client. The permitted client will also be required to sign and return a written consent and acknowledgement to reliance on the relief. The investment dealers will therefore have to maintain adequate records in case the information is requested by the securities regulators.

### SUNSET PROVISION

The requested relief, if granted, will contain a three-year sunset provision. During this time, we expect that the OSC will monitor the impact the requested relief is having on the Canadian exempt market with a view to making permanent changes to the current rules applicable to foreign private placements in Canada.

### EXEMPT SALES REPORTS

Investment dealers or issuers making sales of securities into Canada via private placement using only a foreign offering document will still be required to file an exempt trade report and pay the requisite filing fee in any jurisdiction in which a sale is made.

## POTENTIAL LEGISLATIVE SOLUTION

The dialogue with the OSC relating to the requested relief has led to a discussion among Canadian market participants of the impact of existing securities legislation on private placements of foreign securities into Canada generally. The involvement of both investment dealers and Canadian institutional investors in the application and dialogue relating to the requested relief has highlighted for regulators the obstructive and often detrimental impact that the existing private placement securities law regime can have on the ability of Canadian institutional investors to participate in the market for foreign securities. It appears that the OSC is warming to this view and we are optimistic that, if granted, the requested relief will lead to the enactment of legislative changes to permanently enshrine such relief. Though there is no timetable for the enactment of these legislative changes, we are hopeful that they can be implemented prior to the expiry of the three-year sunset provision discussed above.

# Schedule 1
# Accredited Investors

(a) a Canadian financial institution[2], 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 referred to in paragraph (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) a person registered under the securities legislation of a jurisdiction of Canada as an adviser or dealer, other than a person registered solely as a limited market dealer under one or both of the *Securities Act* (Ontario) or the *Securities Act* (Newfoundland and Labrador);

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

(f) 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) 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) any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government;

(i) a pension fund that is regulated by either 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 Cdn.$1,000,000;

(k) an individual whose net income before taxes exceeded Cdn.$200,000 in each of the two most recent calendar years or whose net income before taxes combined with that of a spouse exceeded Cdn.$300,000 in each of the two 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 Cdn.$5,000,000;

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2 A "Canadian financial institution" means a bank named in Schedule I or II of the *Bank Act* (Canada), 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 or 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.

(m) a person, other than an individual or investment fund, that has net assets of at least Cdn.$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[3] 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:

(i) is registered or authorized to carry on business as an adviser or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction; and

(ii) in Ontario, is purchasing a security that is not a security of an investment fund;

(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; or

(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.

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3 A "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.

# Schedule 2
# 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 or dealer, other than as a scholarship plan dealer or a restricted 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 intermunicipal 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 Cdn.$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 Cdn.$25 million as shown on its most recently prepared financial statements; or

(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).

# Schedule 3
# Ontario Purchasers to Whom a Statutory Right of Action Does Not Apply

- a bank named in Schedule I or II of the *Bank Act* (Canada), 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
- an authorized foreign bank named in Schedule III of the *Bank Act* (Canada)
- the Business Development Bank of Canada incorporated under the *Business Development Bank Act* (Canada)
- 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
- a subsidiary of any of the foregoing if the person owns all of the voting securities of the subsidiary, except voting securities required by law to be owned by directors of that subsidiary

# Schedule 4
# Form of Disclosure of Statutory Rights of Purchaser

## ONTARIO

Securities legislation in Ontario provides an Ontario purchaser (other than (a) a "Canadian financial institution" or a "Schedule III bank" (each as defined in NI 45-106), (b) the Business Development Bank of Canada or (c) a subsidiary of any person referred to in (a) or (b) above, if the person owns all the voting securities of the subsidiary, except the voting securities required by law to be owned by the directors of that subsidiary) with a statutory right of action for damages or rescission against an issuer and any selling security holder where the related offering memorandum contains a misrepresentation without regard to whether the purchaser relied on the misrepresentation. The right of action for damages is exercisable not later than the earlier of 180 days from the date the purchaser first had knowledge of the facts giving rise to the cause of action and three years from the date on which payment is made for the securities. The right of action for rescission is exercisable not later than 180 days from the date on which payment is made for the securities. If a purchaser elects to exercise the right of action for rescission, the purchaser will have no right of action for damages against the issuer or any selling security holder. In no case will the amount recoverable in any action exceed the price at which the securities were offered to the purchaser and if the purchaser is shown to have purchased the securities with knowledge of the misrepresentation, the issuer and any selling security holder will have no liability. In the case of an action for damages, the issuer and any selling security holder will not be liable for all or any portion of the damages that are proven to not represent the depreciation in value of the securities as a result of the misrepresentation relied upon.

## BRITISH COLUMBIA

No additional disclosure required.

## ALBERTA

No additional disclosure required if sales are limited to Accredited Investors.

## SASKATCHEWAN

*The Securities Act, 1988* (Saskatchewan) (the "Saskatchewan Act") provides that where an offering memorandum, together with any amendment to the offering memorandum, sent or delivered to a purchaser contains a misrepresentation, a purchaser who purchases a security covered by the offering memorandum or an amendment to the offering memorandum is deemed to have relied on that misrepresentation, if it was a misrepresentation at the time of purchase, and has a right of action for damages against (a) the issuer or a selling security holder on whose behalf the distribution is made, (b) every promoter and director of the issuer or the selling security holder, as the case may be, at the time the offering memorandum or any amendment thereof was sent or delivered, (c) every person or company whose consent has been filed respecting the offering, but only with respect to reports, opinions or statements that have been made by them, (d) every person or company

that, in addition to those mentioned in (a) to (c) above, signed the offering memorandum or the amendment thereof and (e) every person or company that sells securities on behalf of the issuer or selling security holder under the offering memorandum or amendment thereof, where an offering memorandum contains a misrepresentation. In addition, such a purchaser that purchases the security from the issuer or a selling security holder may elect to exercise a right of rescission against such person where an offering memorandum contains a misrepresentation and, when the purchaser so elects, the purchaser shall have no right of action for damages against such person.

The Saskatchewan Act provides further that (a) where an individual makes a verbal statement to a prospective purchaser that contains a misrepresentation relating to the security purchased and the verbal statement is made either before or contemporaneously with the purchase of the security, the purchaser is deemed to have relied on the misrepresentation, if it was a misrepresentation at the time of purchase, and has a right of action for damages against the individual who made the verbal statement, (b) a purchaser of a security from a vendor who is trading in Saskatchewan in contravention of the Saskatchewan Act, the regulations thereunder or a decision of the Saskatchewan Financial Services Commission, whether that vendor is trading on his own behalf or by another person or agent on his behalf, may elect to void the contract and, if the purchaser so elects, the purchaser is entitled to recover all money and other consideration paid by him to the vendor pursuant to the trade and (c) if the distribution of securities has not been completed and (i) there is a material change in the affairs of the issuer, (ii) it is proposed that the terms or conditions of the offering described in the offering memorandum be altered or (iii) securities are to be distributed in addition to the securities previously described in the offering memorandum, and an amendment to the offering memorandum is not sent or delivered in accordance with the Saskatchewan Act, the purchaser has a right of action for rescission or damages against the dealer or offeror that failed to comply with the applicable requirement.

Subject to the Saskatchewan Act, these statutory rights are exercisable, in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action or, in the case of any action, other than an action for rescission, the earlier of (a) one year after the plaintiff first had knowledge of the facts giving rise to the cause of action and (b) six years after the date of the transaction that gave rise to the cause of the action.

## MANITOBA

No additional disclosure required.

## QUÉBEC

No additional disclosure required.

## NOVA SCOTIA

Nova Scotia securities legislation provides that if an offering memorandum or any advertising or sales literature (as defined in the *Securities Act* (Nova Scotia)) contains a misrepresentation, a purchaser of securities is deemed to have relied upon such misrepresentation if it was a misrepresentation at the time of purchase and has, subject to certain limitations and defences, a statutory right of action for damages against the seller of such securities, the directors of the seller and the persons who have signed the offering memorandum or, alternatively, while still the owner of the securities, may elect instead to exercise a statutory right of rescission against the seller, in which case the purchaser shall have no right of action for damages against the seller, the directors of the seller or the persons who have signed the offering memorandum. The rights described above are subject to certain limitations, including: (a) no action may be commenced to enforce the right of action for

rescission or damages by a purchaser resident in Nova Scotia later than 120 days after the date payment was made for the securities (or after the date on which initial payment was made for the securities where payments subsequent to the initial payment are made pursuant to a contractual commitment assumed prior to, or concurrently with, the initial payment); (b) no person will be liable if it proves that the purchaser purchased the securities with knowledge of the misrepresentation; (c) in the case of an action for damages, no person will be liable for all or any portion of the damages that it proves do not represent the depreciation in value of the securities; and (d) in no case will the amount recoverable in any action exceed the price at which the securities were offered to the purchaser.

The liability of all persons or companies referred to above is joint and several with respect to the same cause of action.

## NEWFOUNDLAND

No additional disclosure required.

## PRINCE EDWARD ISLAND

No additional disclosure required.

## NEW BRUNSWICK

New Brunswick securities legislation provides investors who purchase securities offered for sale in reliance on the exemption in Section 2.3 of NI 45-106 with a statutory right of action against the issuer and a selling security holder of securities for damages or against the seller of securities only, for rescission, in the event that any information relating to the offering provided to the purchaser contains a misrepresentation. Where an offering memorandum is delivered to a prospective purchaser of securities in connection with a trade made in reliance on the exemption in Section 2.3 of NI 45-106, and the document contains a misrepresentation, a purchaser who purchases the securities is deemed to have relied on the misrepresentation and has, subject to certain limitations and defences, a statutory right of action against the issuer and a selling security holder on whose behalf the distribution was made for damages or, while still the owner of securities, against the seller of securities for rescission. If the purchaser elects to exercise the right of rescission, the purchaser will have no right of action for damages. The right of action will be exercisable by the purchaser only if the purchaser gives notice to the defendant, in the case of any action for rescission, not more than 180 days after the date of the transaction that gave rise to the cause of action, that the purchaser is exercising this right and, in the case of any action for damages, before the earlier of (a) one year after the plaintiff first had knowledge of the facts giving rise to the cause of action and (b) six years after the date of the transaction that gave rise to the cause of action.

The liability of all persons and companies referred to above is joint and several. A defendant is not liable for a misrepresentation if it proves that the purchaser purchased the securities with knowledge of the misrepresentation. In an action for damages, the defendant shall not be liable for all or any portion of the damages that the defendant proves do not represent the depreciation in value of the securities as a result of the misrepresentation relied upon. In no case shall the amount recoverable for the misrepresentation exceed the price at which the securities were offered.

# Schedule 5
# List of Designated Exchanges

Toronto Stock Exchange

TSX Venture Exchange

Canadian National Stock Exchange

Alpha Exchange

New York Stock Exchange

NYSE Amex Equities

NASDAQ Stock Market

NASDAQ OMX

Borsa Italiana, MTA Tier

London Stock Exchange, except AIM

Hong Kong Stock Exchange

Deutsche Börse, except the First Quotation Board and the Entry Standard tier

Xetra, Prime Standard and General Standard tiers

SIX Swiss Exchange

Bourse de Luxembourg, except Euro MTF

Tokyo Stock Exchange, 1st Section and 2nd Section

Shanghai Stock Exchange

Stock Exchange of Thailand, except the Market for Alternative Investment

National Stock Exchange of India

Bombay Stock Exchange

Osaka Stock Exchange

Korea Exchange

Singapore Exchange

# Schedule 6
# Private Placement Filings and Fees

| PROVINCE | FORM TO BE FILED[4] | WHEN | FEE (CDN $) |
|---|---|---|---|
| Ontario | **Form 45-106F1**<br>(offering document also required to be filed) | within **10 days** of the trade | **$500** per report for non-reporting issuers |
| Québec | **Form 45-106F1**<br>(offering document also required to be filed) | When distributed to investors | **0.025%** of the aggregate proceeds realized in Québec subject to a minimum of **$260** |
| Manitoba | **Form 45-106F1**<br>(no requirement to file offering document) | within **10 days** of the trade | **$25** per report |
| Saskatchewan | **Form 45-106F1**<br>(offering document also required to be filed) | within **10 days** of the trade | **$100** for each exemption used |
| Alberta | **Form 45-106F1**<br>(no requirement to file offering document if relying on Accredited Investor Exemption)[5] | within **10 days** of the trade | **0.025%** of the gross proceeds realized in Alberta subject to a minimum of $120 |
| British Columbia | **Form 45-106F1**<br>(no requirement to file offering document) | within **10 days** of the trade | **0.03%** of the gross proceeds realized in British Columbia subject to a minimum of $100 |
| New Brunswick | **Form 45-106F1**<br>(offering document also required to be filed) | within **10 days** of the trade | None |
| Nova Scotia | **Form 45-106F1**<br>(two copies of offering document also required to be filed) | within **10 days** of the trade | **$26.26** per report |
| Newfoundland and Labrador | **Form 45-106F1**<br>(no requirement to file offering document) | within **10 days** of the trade | **$50** per report |
| Prince Edward Island | **Form 45-106F1**<br>(no requirement to file offering document) | within **10 days** of the trade | None |
| Northwest Territories/ Nunavut/Yukon | **Form 45-106F1**<br>(no requirement to file offering document) | within **10 days** of the trade | **$25** per per report + additional **$25** if offering memorandum is filed |

4 A report of exempt distribution does not need to be filed in respect of trades of debt securities (or equity securities distributed concurrently with debt securities) with purchasers that are "Canadian financial institutions" or "Schedule III banks" under NI 45-106.

5 Must file offering memorandum if relying on Minimum Investment Exemption.

**TORONTO**

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