

Annex B

Proposed Changes to Companion Policy 45-106CP *Prospectus Exemptions*

1. ***Companion Policy 45-106CP Prospectus Exemptions is changed by this Document.***
2. ***Part 3 Capital Raising Exemptions is changed by adding the following section:***

3.12 Listed issuer financing exemption

(1) Issuer eligibility

The listed issuer financing exemption in section 5A.2 of NI 45-106 provides an exemption from the prospectus requirement for reporting issuers that have securities listed on an exchange recognized by a securities regulatory authority in a jurisdiction of Canada. The exemption is intended to allow an issuer to raise limited amounts of capital from any person based on the issuer's continuous disclosure filings. For this reason, the issuer must have been a reporting issuer in at least one jurisdiction of Canada for at least 12 months preceding the offering. In addition, the issuer must have filed all periodic and timely disclosure documents it is required to have filed.

In addition to the listing requirement, under paragraph 5A.2(1)(c), the exemption cannot be used by an issuer whose operations have ceased or whose principal asset is cash, cash equivalents or its exchange listing. Further, under paragraph 5A.2(1)(e), the exemption is not available to an issuer that intends to use the proceeds from the offering to complete a significant acquisition, a restructuring transaction or any other transaction that requires security holder approval. The purpose of these requirements is to ensure that an issuer using the exemption has an operating business that is already described in the issuer's current disclosure. If an issuer is intending to raise capital to finance a significant acquisition or a restructuring transaction by distributing securities to retail investors, we would expect the issuer to use the prospectus regime in order to ensure potential purchasers have full, true and plain disclosure about the intended use of proceeds.

(2) Listed equity securities

Under the listed issuer financing exemption, the issuer is restricted to offering listed equity securities, securities convertible into listed equity securities, such as warrants, or securities convertible into units comprised of listed equity securities and warrants, such as special warrants or subscription receipts. However, a distribution of subscription receipts that are convertible only upon the issuer completing a significant acquisition, a restructuring transaction or any other transaction that requires security holder approval under corporate law, exchange requirements or the issuer's constating documents, would not be permitted under paragraph 5A.2(1)(e).

(3) Sufficient available funds and minimum offering amount

There is no requirement to have a minimum offering amount under the listed issuer financing exemption. However, if, following completion of the offering, the issuer will not have sufficient available funds to meet the issuer's business objectives and all liquidity requirements for a period of 12 months, the issuer must set a minimum offering amount such that, following completion of the distribution, the issuer will have sufficient available funds to meet its business objectives and all liquidity requirements for a period of 12 months.

(4) Filing of Form 45-106F[x] *Listed Issuer Financing Document*

Before soliciting purchasers under the listed issuer financing exemption, the issuer must file both the news release announcing the distribution and the completed Form 45-106F[x] *Listed Issuer Financing Document* (Form 45-106F[x]). The issuer must file these documents with the regulator or securities regulatory authority in each jurisdiction where the offering is being conducted, even if the issuer is not a reporting issuer in that jurisdiction.

(5) Material facts and material changes

The issuer must ensure that the information provided to the purchaser in the completed Form 45-106F[x] and certain of the issuer's continuous disclosure discloses all material facts about the issuer and the securities being offered and does not contain a misrepresentation. The continuous disclosure that is subject to this requirement is any document filed by the issuer under Canadian securities legislation on or after the date which is the earlier of (i) the date that is 12 months prior to the date of the issuer's completed Form 45-106F[x], and (ii) the date that the issuer's most recent audited annual financial statements were filed.

Under securities legislation, a "material fact" in respect of a security issued or proposed to be issued is generally defined as a fact that would reasonably be expected to have a significant effect on the market price or value of the security. Issuers should refer to section 4.3 of National Policy 51-201 *Disclosure Standards* for examples of the type of events or information that may be material.

Section 5A.3 of NI 45-106 requires that, in the event that a material change occurs in the business of the issuer after filing the news release announcing the offering and before completion of the distribution, the issuer must cease the distribution until, amongst other things, it has amended the Form 45-106F[x] and issued a news release stating that the Form 45-106F[x] has been amended. The issuer is also required to comply with its obligations under Part 7 of NI 51-102. Material change is defined in Canadian securities legislation.

(6) Liability for misrepresentation

If a completed Form 45-106F[x] contains a misrepresentation, purchasers of securities distributed under the listed issuer financing exemption have a contractual right of rescission against the issuer. We remind issuers that they are required to certify on the

first page of Form 45-106F[x] that it, together with any document filed by the issuer under Canadian securities legislation on or after the date which is the earlier of the date that is 12 months before the date of the completed Form 45-106F[x] and the date that the issuer's most recent audited annual financial statements were filed, contains disclosure of all material facts about the issuer and the securities being offered and does not contain a misrepresentation. If any of the issuer's disclosure filed during this period contains a misrepresentation, then the certification is also a misrepresentation, providing purchasers under the listed issuer financing exemption a contractual right to rescind their agreement to purchase the securities.

The issuer would also be liable under secondary market liability provisions in Canadian securities legislation, both to any purchasers on the secondary market as well as to purchasers under the listed issuer financing exemption.

(7) Materials to be filed after distribution

Within 10 days of distributing securities under the listed issuer financing exemption, the issuer must file a report of exempt distribution in Form 45-106F1 *Report of Exempt Distribution* in every jurisdiction in which a distribution has been made. See section 5.1 of this Companion Policy for more information about filing a report of exempt distribution.

Subsection 6.3(3) of NI 45-106 provides an exemption from the requirement to complete Schedule 1 [*Confidential purchaser information*] of Form 45-106F1 for distributions made under the listed issuer financing exemption.

(8) Backdoor underwriting

Securities distributed under the listed issuer financing exemption are not subject to resale restrictions under National Instrument 45-102 *Resale of Securities*. An issuer can use the exemption to distribute securities to anyone; the exemption is not limited to a particular class of investor.

In securities legislation, the definition of distribution includes any transaction or series of transactions involving a purchase and sale or a repurchase and resale in the course of or incidental to a distribution. In Québec, the definition of distribution is broad enough to include these transactions.

In cases where the exemption is used to distribute securities to one purchaser or to a small group of related purchasers and those purchasers immediately resell the securities in the secondary market, it may appear that the purchasers did not have a *bona fide* intention to invest in the issuer. The distribution under the exemption and the subsequent resale may be considered in substance a single distribution. In order to comply with securities legislation, the subsequent purchasers should have the benefit of the issuer's completed Form 45-106F[x] and the rights provided under the exemption.

In addition, purchasers that purchase with an intention to immediately resell the securities in the secondary market should consider the definition of underwriter in securities

legislation and whether they are required to be registered. Section 1.7 of this Companion Policy provides guidance on the expectations on underwriters when purchasing securities under prospectus exemptions with a view to immediately resell (or distribute) those securities.

(9) Registration business trigger for trading and advising

The listed issuer financing exemption does not require the purchaser to have purchased the securities through a dealer. The exemption is an exemption from the prospectus requirement only; it does not provide an exemption from the dealer registration requirement.

An issuer conducting its own offering using the exemption should consider whether it, or any selling agents the issuer uses, may be required to be registered. See section 1.6 of this Companion Policy. Companion Policy 31-103CP gives guidance to issuers on how to apply the registration business trigger.

(10) Use of registered dealer in an offering under the listed issuer financing exemption

An issuer may engage a registered investment dealer or exempt market dealer to assist in the issuer's offering under the listed issuer financing exemption.

Exempt market dealers are permitted to facilitate distributions under the exemption because it is a prospectus-exempt distribution. However, once the distribution is complete, an exempt market dealer cannot facilitate resale of the securities because this activity is trading in listed securities contrary to subparagraph 7.1(2)(d)(ii) of NI 31-103.

(11) Role of registrant in an offering under the listed issuer financing exemption

A registrant involved in a distribution of securities under the exemption must comply with its registrant obligations, including know-your-client, know-your-product and suitability. We expect all registrants to be aware of other CSA guidance on registrant obligations with respect to know-your-client, know-your-product and suitability, and identify and respond to conflicts of interest.

3.13 Preparing the Form 45-106F[x]

Numbering system and general guidance

The numbering of this section corresponds to the numbering of Parts and Items in Form 45-106F[x].

Instructions, Item 1 *Overview of the offering document*

When preparing Form 45-106F[x], issuers should keep in mind that it is meant to be a concise, easy to understand disclosure document. Generally, we do not expect it to be longer than about 5 pages.

Part 1, Item 2 *Details of the offering*

Item 2 of Part 1 of Form 45-106F[x] requires details about the offering, including the date by which the offering is expected to close (if known). We remind issuers that under paragraph 5A.2(1)(o) of NI 45-106, the final closing of the offering must occur no later than the day that is 45 days after the date the issuer issues and files the news release announcing the offering.

Part 1, Item 3 *Required statement, paragraph (a) Representations*

Item 3 of Part 1 of Form 45-106F[x] requires the issuer to state certain representations. The issuer and its management must ensure that the representations in paragraph (a) are true and will continue to be true until the closing of the offering as they are conditions to using the exemption.

Part 1, Item 3 *Required statement, paragraph (b) Certification*

Item 3 of Part 1 of Form 45-106F[x] requires the issuer to certify that the Form, together with the issuer's continuous disclosure filings made on or after the date which is the earlier of the date that is 12 months prior to the date of the Form 45-106F[x] and the date that the issuer's most recent audited annual financial statements were filed, contains disclosure of all material facts about the issuer and securities being distributed and does not contain a misrepresentation.

We remind issuers that purchasers under the listed issuer financing exemption have contractual rights of rescission in the event of a misrepresentation in the issuer's Form 45-106F[x] or in the issuer's continuous disclosure filed in the specified period.

In addition, we remind issuers and their executives that they are liable under secondary market liability provisions for the disclosure in the Form 45-106F[x], both to purchasers under the exemption and to purchasers in the secondary market.

Part 2, Item 6 *Material facts*

Item 6 of Part 2 of Form 45-106F[x] requires disclosure of any material fact about the issuer or the securities being distributed that has not already been disclosed in the Form 45-106F[x] or in any other document filed by the issuer during the specified period. See subsection 3.12(5) for guidance on material facts.

If a person or company beneficially owns, or controls or directs, directly or indirectly, voting securities carrying 10% or more of the voting rights attached to any of the issuer's voting securities, that information may be a material fact under securities legislation. If the issuer has not disclosed information about the person or company during the 12 months immediately before the date of the Form 45-106F[x], the issuer should consider including disclosure of the following for any such person or company:

- (a) the person or company's name,

- (b) the number or amount of securities beneficially owned, controlled or directed by the person or company, and
- (c) the number or amount of securities of the issuer of any class to be beneficially owned, controlled or directed by the person or company after the distribution, and the percentage that number or amount represents of the total securities of the issuer that are outstanding.

Part 3, Item 8 Available funds

Item 8 of Part 3 of Form 45-106F[x] requires the issuer to provide an explanation if there has been a significant decline in working capital since the issuer's most recently audited annual financial statements. Working capital is the issuer's current assets (as of the most recent month end) less the issuer's current liabilities (as of the most recent month end).

We would consider a significant decline to include a change in the working capital that results in material uncertainty regarding the issuer's going concern assumption, or a change in the working capital balance from positive to deficiency.

Item 8 of Part 3 of Form 45-106F[x] requires the issuer to complete a table disclosing the amount and source of the funds available to the issuer after completion of the offering. It is a condition of the listed issuer financing exemption that an issuer cannot close the offering using the exemption unless, on completion of the offering, the issuer reasonably expects it will have sufficient available funds to meet its business objectives and all liquidity requirements for a period of 12 months. This means that the total dollar amount the issuer discloses in row G under the column "*Assuming minimum offering only*", or under the column "*Assuming 100% of offering*" in the table, if the minimum offering is the entire offering, must be sufficient to meet the issuer's business objectives (as disclosed in item 7 of Part 2 of Form 45-106F[x]) and all liquidity requirements for a period of 12 months.

Part 3, Item 9 Use of available funds

Item 9 of Part 3 of Form 45-106F[x] requires the issuer to disclose how it will use the available funds identified in item 8. Under the terms of the listed issuer financing exemption, the issuer cannot allocate proceeds from the distribution towards an acquisition that is a significant acquisition under Part 8 of NI 51-102, a restructuring transaction as such term is defined in NI 51-102, or any other transaction that requires approval of any security holder under corporate law, any exchange requirement or the issuer's constating documents.

Part 5, Item 13 Purchasers' rights

Item 13 of Part 5 of Form 45-106F[x] requires the issuer to provide mandated disclosure about purchasers' rights under the listed issuer financing exemption. See subsection 3.12(6) for a description of these contractual rights and rights under secondary market liability in Canadian securities legislation..

3. These changes become effective on *.