June 24, 2016

ARTICLE

Another Change to Canada's Exempt Markets — New Harmonized Report of Exempt Distribution Effective June 30, 2016

Effective June 30, 2016, issuers distributing securities in Canada in the exempt market under certain prospectus exemptions will be required to use a new nationally harmonized form of exempt distribution report to report such trades to the applicable securities regulators. Amendments to National Instrument 45-106 *Prospectus Exemptions* (NI 45-106), including the new Form 45-106F1 *Report of Exempt Distribution* are expected to come into effect as of June 30, 2016.

Among other things, the new form of exempt distribution report requires additional information about the issuer and its insiders, the securities distributed, the prospectus exemptions relied on and any persons compensated for the distribution. For investment fund issuers, each fund must complete the new report and provide information regarding the size of the fund, the general nature of the fund and the net proceeds to the fund of the securities distributed during the reporting period. All issuers must report additional specific information about the investors acquiring the securities under the applicable prospectus exemptions in a separate schedule which will remain confidential.

The Canadian Securities Administrators (CSA) describe the new exempt distribution report as being aimed at reducing the compliance burden for issuers, while also providing securities regulators with the necessary information to facilitate effective regulatory oversight of the exempt market and improve analysis for policy development purposes. The introduction of a single harmonized report is a very positive development. However, it is also very clear that completing and filing exempt distribution reports will be more burdensome, certainly for the first few to be completed, with much more detailed information required to be collected and provided, as well as more precision required on both the format and filing of the report. We recommend that issuers initiate the preparation of the new reports well in advance of the applicable deadlines. We would be very pleased to assist you and answer any of your questions as to how to complete and file them.

As we reported in our October 2015 Securities and Capital Markets Bulletin *CSA's Proposed Harmonized Report of Exempt Distribution*, the CSA initially published proposed amendments to NI 45-106, including a revised Form 45-106F1 for comment in August 2015. In finalizing the amendments, the CSA have made some changes to the earlier proposed form, including:

- Removing the requirement for issuers making a distribution in more than one jurisdiction of Canada to file a single report in each Canadian jurisdiction where the distribution has occurred, identifying all purchasers. However, issuers will be permitted to do this in order to satisfy their obligations to file the report with the applicable regulators.
- Removing the requirement to provide information about beneficial owners of managed accounts where a registered adviser (portfolio manager) is purchasing the securities on behalf of that managed account. Rather the name and address of the applicable adviser (portfolio manager) will be provided.
- Allowing issuers and underwriters with System for Electronic Document Analysis and Retrieval (SEDAR) and National Registration Database (NRD) profiles or numbers, to provide those details, rather than providing the information that can be gathered by the CSA from these sources.
- Removing the proposed requirement for certain issuers to disclose information relating to the holdings of the issuer's securities by directors, executive officers, promoters and control persons.
- Moving the requirement for certain issuers to disclose information about control persons to the new Schedule 2 *Confidential Director, Executive Officer, Promoter and Control Person Information* that will not be publicly available. Investment funds will not be required to complete Schedule 2.
- Changing the transition period available to investment funds that file reports of exempt distributions annually – for distributions that occur before January 1, 2017, investment funds may elect to use the "old" form, however, the "new" form must be used for all distributions completed after January 1, 2017.
- Introducing a requirement for issuers to file the new Schedule 1 *Confidential Purchaser Information* and Schedule 2 *Confidential Director, Executive Officer, Promoter and Control Person Information* using the specific Excel templates developed by the CSA that are (or will be) available on the SEDAR website.

We note that issuers may have challenges completing the new reports in respect of syndicated private placements, particularly in relation to the new requirement to provide specified detailed information about compensation paid by the issuer to each underwriter in connection with the distribution. Issuers must identify the syndicate member who was compensated for the distribution to each purchaser.

The CSA have made no changes to the timing of the deadlines associated with filing the reports of exempt distribution. That is, the reports must be filed within 10 days of a distribution, with investment funds having the option of filing the reports annually. However for investment funds that chose to report annually, each fund must prepare a report of exempt distributions during the calendar year, and file the report within 30 days of the calendar year end, rather than financial year end of the fund. The reports must list each issuance of a security separately on the new Schedule 1, with specified information about the purchasers and the exemption relied upon. Fund managers should anticipate an increased work-load in collecting the information and preparing and filing the new exempt distribution reports. In this regard we note that a SEDAR profile must be created for each fund for the required SEDAR filings. We strongly recommend maintaining an up-to-date Schedule 1 throughout the year for each fund that distributes securities pursuant to prospectus exemptions so as to facilitate accuracy in completing the reports. Late fees apply in some jurisdictions if the reports are filed after the applicable deadlines.

We explained the new complexities associated with filing exempt distribution reports with the various members of the CSA in our January 2016 Securities and Capital Markets Bulletin *Increased Complexities for Exempt Market Filings in Canada Effective May 24, 2016*. The new reports must be filed electronically, in British Columbia, via BCSC eServices, in Ontario, via the OSC's Electronic Filing Portal, and in all other provinces and territories via SEDAR.

Reports of exempt distribution must be filed in all provinces and territories where a distribution has taken place. If you require assistance in determining the jurisdiction where reports are to be filed, we would be pleased to assist you, given that distributions can occur in more than one jurisdiction.

Further guidance on the preparation and filing of exempt distribution reports was provided by the CSA in two staff notices:

- CSA Staff Notice 45-308 (Revised) *Guidance for Preparing and Filing Reports of Exempt Distribution under National Instrument 45-106 Prospectus Exemptions* April 7, 2016.
- Multilateral CSA Staff Notice 13-323 *Frequently Asked Questions about Making Exempt Market Offering and Disclosure Filings on SEDAR* April 21, 2016.

Borden Ladner Gervais LLP has extensive experience assisting issuers, managers, underwriters and exempt market dealers in understanding regulatory requirements as they relate to private placements and the exempt markets. We would be pleased to assist you in making the required exempt market regulatory filings on SEDAR and through the other filing portals, and to assist you in understanding the requirements and how they apply to you.

Our securities law clerks and paralegals are experts on SEDAR and the B.C. and Ontario filing portals and can make the required exempt market regulatory filings on your behalf.

Please contact your usual lawyer in BLG's Securities and Capital Markets Group, including BLG's Investment Management Group, any of the leaders of these groups or the authors of this Bulletin for more information about how we can assist you or if you would like more information about the regulatory developments in Canada and how they may affect your potential offerings.

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