CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Staff Consultation Note 45-401
Review of Minimum Amount and Accredited Investor Exemptions
Public Consultation

November 10, 2011

Staff of the Canadian Securities Administrators (the CSA or we) are conducting a review of the minimum amount prospectus exemption and the accredited investor prospectus exemption contained in National Instrument 45-106 *Prospectus and Registration Exemptions*.

At the conclusion of the review, CSA staff may recommend either retaining the exemptions in their current form or may propose changes.

As part of the review, we are consulting with stakeholders, including investors, issuers, dealers and legal and other advisors. The attached consultation note (the Note) provides more information on the scope of the review, including some background on the history of these exemptions and specific consultation questions for consideration.

Next steps
At this time we invite you to review the Note and provide us with your written comments. We also anticipate additional consultations with interested stakeholders as part of the review.

The consultation period is open until February 29, 2012. Please send your comments electronically in Word format.

Address your submission to all of the Canadian securities regulatory authorities, as follows:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Please deliver your comments only to the two addresses that follow. Your comments will be forwarded to the remaining CSA jurisdictions.

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Please note that all comments received will be posted at www.osc.gov.on.ca and on the websites of certain other securities regulatory authorities to improve the transparency of the policy-making process.

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REVIEW OF MINIMUM AMOUNT AND ACCREDITED INVESTOR EXEMPTIONS
Consultation Note

1. Introduction

Purpose of consultation

Staff of the Canadian Securities Administrators (CSA) are reviewing the $150,000 minimum amount prospectus exemption (minimum amount exemption) and the accredited investor prospectus exemption (AI exemption) contained in National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106).

We are consulting with stakeholders, including investors, issuers, dealers, and legal and other advisors. This consultation note provides background information and sets out consultation questions for input from stakeholders.

At the conclusion of the review, CSA staff may recommend either retaining the exemptions in their current form or may propose changes.

Reason for review

The global financial crisis and recent international regulatory developments have raised questions about the use of the minimum amount exemption and the AI exemption.

The CSA is engaging in this consultation to identify any issues that stakeholders may have about the use of the exemptions and to obtain information that will assist in deciding whether changes are necessary or appropriate.

Framework for review

In deciding whether changes to the minimum amount exemption and the AI exemption are necessary or appropriate, and if so, in developing recommendations for changes, we will be governed by our regulatory mandate of:

- protecting investors from unfair, improper or fraudulent practices, and
- fostering fair and efficient capital markets, and confidence in those markets.

We will also be guided by the principles that

- regulatory initiatives must effectively address the risks to investors and markets that are identified, and
- the benefits of any regulatory initiative must be proportionate to its cost to industry and the restrictions it imposes on market participants.

Proposals regarding securitized products

On April 1, 2011, the CSA published for comment a proposed new regulatory regime for certain securitized products in a Notice of Proposed National Instrument 41-103 *Supplementary Prospectus Disclosure Requirements for Securitized Products* (NI 41-103 Notice). Among other things, the CSA has proposed amendments to NI 45-106 to create a new regulatory regime for the distribution of securitized products on a prospectus-exempt basis. The new regulatory regime would narrow the class of investors who can buy securitized products on a prospectus-exempt basis, and require issuers of securitized products to provide disclosure at the time of distribution,

as well as on an ongoing basis. The NI 41-103 Notice seeks comment on a number of aspects of the proposal, including whether there are any existing registration categories or registration exemptions that should be modified or made unavailable for the distribution and resale of securitized products in the exempt market.

While the NI 41-103 Notice is focused on the distribution of securitized products in the exempt market, we will consider the comments we received in response to that notice as part of our general review of the minimum amount exemption and the AI exemption. We believe it is important that our assessment of those exemptions be informed by the CSA's proposals concerning securitized products and the comments of stakeholders with respect to those proposals.

2. Principles underlying the minimum amount exemption and the AI exemption

The minimum amount exemption and the AI exemption have been premised on an investor having one or more of:

- a certain level of sophistication,
- the ability to withstand financial loss,
- the financial resources to obtain expert advice, and
- the incentive to carefully evaluate the investment given its size.

Consultation questions

1. What is the appropriate basis for the minimum amount exemption and the AI exemption? For example, should these exemptions be premised on an investor's:
   - financial resources (ability to withstand financial loss or obtain expert advice),
   - access to financial and other key information about the issuer,
   - educational background,
   - work experience,
   - investment experience, or
   - other criteria?

   Please explain.

2. Does the involvement in the distribution of a registrant who has an obligation to recommend only suitable investments to the purchaser address any concerns?

3. Minimum amount exemption

Background

The terms of the current minimum amount exemption, a background discussion of the exemption, and a summary of comparable exemptions under the exempt market regimes in foreign jurisdictions are included at Appendix A.

Issues involving the minimum amount exemption

- **No assurance of sophistication.** The size of investment alone does not assure investor sophistication or access to information, particularly where the minimum amount exemption is

used to sell novel or complex products without any accompanying disclosure. At most, the size of the investment is an indicator only of the investor's ability to withstand financial loss.

- **Current threshold for the minimum investment.** The current $150,000 threshold for the minimum amount exemption was set in 1987 and has not been changed or adjusted for inflation since. The $150,000 threshold is equivalent to over $265,000 in 2011 dollars.[1] Some stakeholders have suggested that the $150,000 threshold is too low and allows unsophisticated, retail investors to participate in the exempt market. Conversely, if the threshold is increased, the exemption may not be available to investors who do not need the protections provided by a prospectus offering.

- **Impact of a minimum amount concept on investment decisions.** An exemption based on a minimum amount invested may cause an investor to invest more than business or investment considerations may dictate solely to meet the threshold; for example, by investing $150,000 when it may have made more sense to invest only $50,000. Similarly, a higher minimum threshold may cause an investor to make a single investment of $150,000 or more when a staged investment in smaller increments may better protect the investor's interests.

- **Use of the exemption to raise capital.** The minimum amount exemption is widely used by issuers to raise capital in some jurisdictions. If the investment threshold was increased or the minimum investment exemption was repealed, this could affect capital raising, especially by small and medium sized enterprises.

Consultation questions

3. Do you have comments on the issues described above?

4. Are there other issues you may have with the minimum amount exemption?

Potential options regarding the minimum amount exemption

Depending on the results of this consultation process, we may propose:
(1) retaining the minimum amount exemption in its current form,
(2) adjusting the $150,000 threshold,
(3) limiting the use of the exemption to certain investors, such as institutional investors and not individuals,
(4) using alternative qualification criteria,
(5) imposing other investment limitations, or
(6) repealing the exemption.

Consultation questions

(a) Maintain the status quo

5. Do you agree with maintaining the minimum amount exemption in its current form?

(b) Adjust the $150,000 threshold

6. How much should the minimum investment threshold be increased? Would your answer to this question change depending on whether:

[1] Source for inflation adjustments: Bank of Canada Inflation Calculator (http://www.bankofcanada.ca/rates/related/inflation-calculator/)

- any disclosure is provided to investors, including risk factor disclosure?
- the purchaser is an individual, instead of an institutional investor?
- the security is novel or complex?
- the issuer of the security is a reporting issuer?
- a registrant is involved in the distribution who has an obligation to recommend only suitable investments to the purchaser?

7. Should the $150,000 threshold be periodically indexed to inflation?

8. If we changed the $150,000 threshold what would the impact be on capital raising?

(c) Limit the use of the exemption by individuals

9. Should individuals be able to acquire securities under the minimum amount exemption? Would your answer to this question change depending on whether:
   - any disclosure is provided to investors, including risk factor disclosure?
   - the security is novel or complex?
   - the issuer of the security is a reporting issuer?
   - a registrant is involved in the distribution who has an obligation to recommend only suitable investments to the purchaser?

10. If individuals are able to acquire securities under the minimum amount exemption, should there be any limitations?

11. If we limited the use of the exemption to persons who are not individuals, what would the impact be on capital raising?

(d) Use alternative qualification criteria or impose other limitations

12. Are there alternative qualification criteria for the minimum amount exemption?

13. Are there other limitations that should be imposed on the use of the minimum amount exemption?

(e) Repeal the exemption

14. Should the minimum amount exemption be repealed? Would your answer to this question change depending on whether:
   - any disclosure is provided to investors, including risk factor disclosure?
   - the purchaser is an individual, instead of an institutional investor?
   - the security is novel or complex?
   - the issuer of the security is a reporting issuer?
   - a registrant is involved in the distribution who has an obligation to recommend only suitable investments to the purchaser?

15. If the minimum amount exemption was repealed:
   - would that materially affect issuers' ability to raise capital?
   - is the AI exemption (in its current or modified form) an adequate alternative to the minimum amount exemption?

(f) Other options

16. Are there other options for modifying the minimum amount exemption that we should consider?

4. AI exemption

Background

The terms of the current AI exemption, a background discussion of the exemption, and a summary of comparable exemptions under the exempt market regimes in foreign jurisdictions are included at Appendix B.

Issues involving the AI exemption

- **Current thresholds for income and assets.** The thresholds for individuals to qualify as accredited investors were originally set by the Securities and Exchange Commission (SEC) in 1982, and subsequently adopted by the CSA in the early 2000s. The thresholds have not been changed or adjusted for inflation since. Some stakeholders submit that these thresholds are too low by today's standards. The current threshold for an individual's income is $200,000; in 2011 dollars, the threshold would be over $443,000 based on 1982 dollars (the year of SEC adoption) or $245,000 based on 2001 dollars (the year the Ontario Securities Commission first adopted the exemption).[2] As with the minimum amount exemption, some say these thresholds are too low and allow unsophisticated, retail investors to participate in the exempt market, yet an increase in the thresholds may exclude investors who do not need the protections provided by a prospectus offering.

- **Qualification criteria.** Some stakeholders have suggested that income and asset thresholds are not adequate proxies for sophistication. Individuals may have significant wealth, but may lack investment or other experience that enables them to make an investment decision without the protections afforded by a prospectus offering.

- **Use of the exemption to raise capital.** The AI exemption is widely used by issuers to raise capital. If the exemption was changed or repealed, this could affect capital raising, especially for small and medium sized enterprises.

- **Compliance with qualification criteria.** Regulators have concerns that some individuals purchasing securities under the AI exemption are not, in fact, accredited investors.

Consultation questions

17. Do you have comments on the issues described above?

18. Are there any other issues you may have with the AI exemption?

[2] Ibid.

Potential options regarding the AI exemption

Depending on the results of this consultation process, we may propose:
(1) retaining the AI exemption in its current form,
(2) adjusting the income and asset thresholds in the definition of accredited investor,
(3) using alternative qualification criteria for individuals,
(4) limiting the exemption to certain investors, such as institutional investors and not individuals, and
(5) imposing other investment limitations.

Consultation questions

(a) Maintain the status quo

19. Do you agree with retaining the AI exemption and the definition of "accredited investor" in their current form?

(b) Adjust income and asset thresholds in the definition of accredited investor

20. What should the income and asset thresholds be? Would your answer to this question change depending on whether:
    - any disclosure is provided to investors, including risk factor disclosure?
    - the security is novel or complex?
    - the issuer of the security is a reporting issuer?
    - a registrant is involved in the distribution who has an obligation to recommend only suitable investments to the purchaser?

21. Should the income and asset thresholds be periodically indexed to inflation?

22. If we changed the income and asset thresholds, what would the impact be on capital raising?

(c) Use alternative qualification criteria for individuals

Alternative qualification criteria for individual investors could be required such as:
- *investment experience* (for example, the investor has carried out transactions of a significant size in securities markets at a given frequency),
- *investment portfolio size* (for example, the investor's securities portfolio must exceed a specified amount),
- *work experience* (for example, the investor works or has worked in the financial sector in a professional position which requires knowledge of securities investment), and / or
- *education* (such as the investor has completed the Canadian Securities Course, achieved a CFA designation or has received an advanced degree in business or finance).

23. What qualification criteria should be used in the AI exemption for individual investors? Would your answer to this question change depending on whether:
    - any disclosure is provided to investors, including risk factor disclosure?
    - the security is novel or complex?
    - the issuer of the security is a reporting issuer?
    - a registrant is involved in the distribution who has an obligation to recommend only suitable investments to the purchaser?

24. If we changed the qualification criteria, what would the impact be on capital raising?

(d) Limit the use of the exemption by individuals

25. Should individuals be able to acquire securities under the AI exemption? Would your answer to this question change depending on whether:
    - any disclosure is provided to investors, including risk factor disclosure?
    - the security is novel or complex?
    - the issuer of the security is a reporting issuer?
    - a registrant is involved in the distribution who has an obligation to recommend only suitable investments to the purchaser?

(e) Impose other investment limitations

26. Should an investment limit be imposed on accredited investors who are individuals? If a limit is appropriate, what should the limit be? Would your answer to these questions change depending on whether:
    - any disclosure is provided to investors, including risk factor disclosure?
    - the security is novel or complex?
    - the issuer of the security is a reporting issuer?
    - a registrant is involved in the distribution who has an obligation to recommend only suitable investments to the purchaser?

27. If investment limitations for individuals were imposed, what would the impact be on capital raising?

(f) Compliance with qualification criteria

An issue with the AI exemption is ensuring compliance with the qualification criteria. One way to improve compliance with the AI exemption would be to require an investor's accredited investor status to be certified by an independent third party, such as a lawyer or qualified accountant.

28. Should this be considered in a review of the AI exemption?

29. Do you agree with imposing such a requirement?

30. Are there alternatives that we should consider?

(g) Other options

31. Are there other options we should consider for revising the AI exemption or for substituting an alternative exemption?

Appendix A
Information on the minimum amount exemption

Current form of the minimum amount exemption

The minimum amount exemption in section 2.10 of NI 45-106 currently reads:

(1) The prospectus requirement does not apply to a distribution of a security to a person if
  (a) that person purchases as principal,
  (b) the security has an acquisition cost to the purchaser of not less than $150,000 paid in cash at the time of the distribution, and
  (c) the distribution is of a security of a single issuer.

(2) Subsection (1) does not apply to a distribution of a security to a person if the person was created, or is used, solely to purchase or hold securities in reliance on this exemption from the prospectus requirement set out in subsection (1).

There are no limitations on the type of securities sold under the exemption, the number of solicitations, the number of purchasers, or on the number of times the exemption may be relied on. No disclosure materials are required to be provided to investors.

Background on the minimum amount exemption

The minimum amount exemption was originally created in 1966 by the Ontario Securities Commission and set at $97,000 (a figure of $100,000 less a commission or discount of three percent) and was not available to individuals. Over time:

- other CSA jurisdictions adopted a similar exemption,
- the exemption was expanded to individuals, and
- the threshold was raised to $150,000 in some jurisdictions.

For a period from 2001 to 2005, the Ontario Securities Commission eliminated the minimum amount exemption and replaced it with the AI exemption, believing that the minimum amount threshold was not as good a proxy for sophistication as the new accredited investor exemption. With the adoption of NI 45-106 in 2005, the CSA jurisdictions all adopted (or re-adopted) the $150,000 minimum amount exemption in section 2.10.

Exempt market regimes in foreign jurisdictions

The following summarizes the approach taken to an exemption based on a minimum investment amount in certain foreign jurisdictions.

Jurisdiction	Approach
Australia	Australia has had a minimum amount exemption of A$500,000 since 1989.[3]
United Kingdom	The United Kingdom has had the following minimum amount exemption limits: 40,000 euros (1995), 50,000 euros (2005), and 100,000 euros (since 2010).[4]

[3] A$500,000 was equivalent to approximately C$509,000 on September 15, 2011 according to the Bank of Canada daily currency converter (http://www.bankofcanada.ca/rates/exchange/daily-converter).

Jurisdiction	Approach
United States of America	The United States Securities and Exchange Commission (SEC) adopted a minimum amount exemption of US$100,000 in 1979. In 1982, this limit was raised to US$150,000, so long as the amount was at most 20% of the investor's net worth. With the introduction of the accredited investor exemption in 1988, the minimum amount exemption was rescinded. According to the SEC, it had concerns: …that size of purchase alone, particularly at the $150,000 level, does not assure sophistication or access to information. While some persons previously accredited would no longer be accredited (i.e., individuals with net worths of $750,000 but less than $1 million). . . , many of the persons who used the $150,000 purchaser item will now become accredited investors by virtue of [the accredited investor exemption].

[4] 100,000 euros was equivalent to approximately C$137,000 on September 15, 2011 according to the Bank of Canada daily currency converter (http://www.bankofcanada.ca/rates/exchange/daily-converter).

Appendix B
Information on the AI exemption

Current form of the AI exemption

The AI exemption set out in section 2.3 of NI 45-106 currently reads:

(1) The prospectus requirement does not apply to a distribution of a security if the purchaser purchases the security as principal and is an accredited investor.

There are no limitations on the type of securities sold under the exemption, the number of solicitations, the number of purchasers, or on the number of times the exemption may be relied on. No disclosure materials are required to be provided to investors.

The definition of "accredited investor" as set out in section 1.1 of NI 45-106 includes, among others:

(j) an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000,

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

(l) an individual who, either alone or with a spouse, has net assets of at least $5,000,000.

Background on the AI exemption

The AI exemption was first enacted by the Ontario Securities Commission in 2001 and replaced the minimum amount exemption. It was enacted with the same thresholds as the current exemption in NI 45-106. A similar exemption was subsequently also enacted in 2002 by the British Columbia Securities Commission and Alberta Securities Commission under Multilateral Instrument 45-103 *Capital Raising Exemptions* (MI 45-103), although MI 45-103 retained the minimum amount exemption of $97,000. When NI 45-106 came into force in 2005, all CSA jurisdictions adopted the current version of the exemption.

Exempt market regimes in foreign jurisdictions

The following summarizes the approach taken to an exemption based on the nature of the purchaser in certain foreign jurisdictions.

Jurisdiction	Approach
Australia	In 1997, the Australian Parliament's Corporate Law Economic Reform Program (CLERP) looked at the securities regulatory regime in the United States of America and in Ontario when crafting their "sophisticated investor" definition. In their paper, *Fundraising: Capital raising initiatives to build enterprise and employment, Proposals for Reform: Paper No. 2*, they considered the following: Certain investors are seen to be financially sophisticated and able to protect their investment interests in an optimal fashion without regulatory interference. These investors do not require the disclosure protection offered by the Corporations Law. They can secure their own cost-effective protection in negotiations with the issuer. Issuers making offers to such persons should not need to incur costs beyond those negotiated between the parties. Sophisticated investors should not be burdened by unwanted costs being incorporated in the price of the securities on offer. The current *sophisticated investor* exemption applies only to a person who invests over $500,000 in the securities in question. Such a person is thought not to need the protection of mandatory prospectus disclosures under the Corporations Law, based on their ability to obtain pertinent information from the issuer because of their bargaining power and proximity. However, the need to invest so large an amount in an individual enterprise for which there is not a prospectus may of itself be a deterrent to investing, given the potential risks and the difficulty this causes for investors in diversifying their portfolio (unless they have very significant resources). From an issuer's perspective, the $500,000 threshold may therefore be too high because of the difficulty of finding investors willing to invest such large sums. Many SMEs would in any event be seeking less than $500,000 in total. CLERP suggested that offers of securities in any amounts should be permitted without a prospectus if they are made to persons: • with gross income over each of the previous two financial years of at least A$250,000, or • with net assets of A$2.5 million.[5] The purchaser must have a current certificate from a qualified accountant certifying that they have the prescribed net asset or

[5] Equivalent to gross income of C$254,000 or net assets of C$2,544,000 on September 15, 2011 according to the Bank of Canada daily currency converter (http://www.bankofcanada.ca/rates/exchange/daily-converter).

Jurisdiction	Approach
	gross income level. These proposals were passed into law by the *Corporate Law Economic Reform Program Act 1999*, and are now in the *Corporations Act 2001*.
United Kingdom	Under the European Union's *Prospectus Directive* of May 30, 2001, which came into force in the UK on July 1, 2005, distributions to "qualified investors" are exempt from the prospectus requirements. The *Directive* allows Member States to choose to authorize resident individuals as qualified investors when they expressly ask to be so considered. These individuals must meet at least two of the following criteria: • the investor has carried out transactions of a significant size (at least 1,000 euros) on securities markets at an average frequency of, at least, ten per quarter over the previous four quarters • the size of the investor's securities portfolio exceeds 0.5 million euros, or • the investor works or has worked for at least one year in the financial sector in a professional position which requires knowledge of securities investment.[6] Qualified Investors are listed in the Qualified Investor Register, which is publicly available, although information contained in the register may be delivered electronically only to issuers and other offerers of securities.
United States of America	In 1982, the SEC created the accredited investor exemption in Regulation D (Reg D) for individuals that: • have, alone or with their spouse, net worth at the time of purchase of US$1,000,000, or • had an income in excess of US$200,000 in each of the last two years and reasonably expects such income in the current year. The SEC explained that the purpose of this exemption was to include persons with financial experience and sophistication who wish to invest less than US$100,000. In 1988, the SEC amended Reg D to include a spousal joint income test of US$300,000 or joint net worth of US$1,000,000. The minimum amount exemption was revoked. The *Dodd-Frank Wall Street Reform and Consumer Protection Act*, signed into law on July 21, 2010, changes the definition of an accredited investor to exclude the value of a primary residence

[6] 1,000 euros was equivalent to C$1,368 and 0.5 million euros is equivalent to C$683,800 on September 15, 2011, according to the Bank of Canada daily currency converter (http://www.bankofcanada.ca/rates/exchange/daily-converter).

Jurisdiction	Approach
	from the US$1,000,000 wealth test. The SEC will also review the definition every four years.