

Multilateral CSA Notice 45-311***Exemptions from Certain Financial Statement-Related Requirements
in the Offering Memorandum Exemption to Facilitate Access to
Capital by Small Businesses*****December 20, 2012****Introduction**

The securities regulatory authorities in Yukon, Alberta, Saskatchewan, Northwest Territories, Nunavut, Manitoba, Québec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador (the “participating jurisdictions” or “we”) are each publishing a harmonized interim local order (OM-form exemption order) that provides exemptions from certain requirements of Form 45-106F2 *Offering memorandum for non-qualifying issuers* (Form 45-106F2). Form 45-106F2 is the required form under the offering memorandum prospectus exemption (OM exemption) in section 2.9 of National Instrument 45-106 *Prospectus and Registration Exemptions*. The OM exemption is available in all jurisdictions other than Ontario.

The objective in issuing the OM-form exemption orders is to facilitate capital raising for early stage businesses and other small and medium sized enterprises (SMEs) while maintaining appropriate investor protection. The OM-form exemption orders will be issued concurrently with this notice or as soon as possible following the notice. The OM-form exemption orders will be effective immediately upon being issued. Each OM-form exemption order will be available on the website of the securities regulatory authority issuing it.

This notice summarizes the OM-form exemption orders and includes a request for comments.

Background

Securities legislation requires that purchasers of securities be provided with a prospectus that contains full, true and plain disclosure of all material facts relating to the securities being offered. However, securities legislation has always provided exemptions from the prospectus requirement in situations where purchasers do not need the protections of the prospectus requirement or alternative protections are available.

The OM exemption was intended to provide a variety of issuers, including early stage businesses and other SMEs, with a cost-effective capital-raising option. We have heard from some early stage businesses and SMEs that the OM exemption is too costly to use. The main concern they raise is the cost of preparing audited financial statements. Based on this feedback we have considered whether it is appropriate to provide exemptions from certain financial statement-related and audit requirements in Form 45-106F2 for early stage businesses and SMEs.

Substance of OM-form exemption orders

The OM-form exemption orders provide a harmonized alternative for financings below a certain threshold. Under this alternative regime, certain issuers relying on the OM exemption are exempt from:

- the requirement to obtain an audit on financial statements or other financial information, and
- the requirement for financial statements to be prepared using Canadian GAAP applicable to publicly accountable enterprises (IFRS).

An issuer can rely on the OM-form exemption orders subject to certain conditions, including the following:

- the issuer is not a reporting issuer, investment fund, mortgage investment entity or an issuer engaged in the real estate business;
- the issuer is not distributing complex securities;
- the amount raised by an issuer group (the issuer and certain related issuers) under the OM-form exemption orders must never exceed \$500,000; and
- the aggregate acquisition cost of all securities distributed under the OM-form exemption orders by an issuer group to a purchaser in a distribution and in the 12 months preceding the date of such distribution, must not exceed \$2,000.

The OM exemption includes a number of other conditions. They continue to apply to issuers relying on the OM-form exemption orders. They include the resale restrictions, the risk acknowledgment form requirement, the obligation to file reports of exempt distribution, the payment of applicable fees and language requirements. Nothing in the OM-form exemption orders modify any rights, recourses or rights of action that an investor may have under securities legislation.

The OM-form exemption orders do not include any exemption from dealer or adviser registration requirements.

An issuer group that wishes to go beyond any of the maximum thresholds under the alternative regime provided by the OM-form exemption orders can do so if it complies with the standard terms of the OM exemption or relies on one of the other capital raising prospectus exemptions.

The OM-form exemption orders continue until December 20, 2014. During this time, we will review the comments received from market participants and monitor the use of the OM-form exemption orders to determine whether to pursue further regulatory amendments and, if so, the nature and extent of any such amendments.

Crowdfunding and other SME initiatives

We have been and will continue to monitor initiatives that develop in other jurisdictions related to financing of early stage businesses and SMEs.

Securities-based crowdfunding is one area that has received media attention. This type of capital raising is currently permitted in a few international jurisdictions. It involves raising small

amounts of money from a large number of investors over the Internet via a website, generally referred to as a funding portal. While it is contemplated by the U.S. *Jumpstart our Business Startups Act* (JOBS Act), it is not yet permitted in the U.S. and will not be until the Securities and Exchange Commission (SEC) and others make the necessary rules to provide a regulatory framework.

The OM-form exemption orders are not intended to address, nor be our response to, securities-based crowdfunding. Nevertheless, we have compared the existing securities regulatory regime in Canada (in all jurisdictions other than Ontario) and, in particular, the OM exemption with the crowdfunding provisions of the JOBS Act. Although the SEC has not yet provided the details, the contemplated disclosure requirements for issuers using the JOBS Act crowdfunding exemption seem similar to those under the OM exemption.

The availability of a prospectus exemption is only one aspect of securities-based crowdfunding. Another important consideration is the regulation applicable to the funding portals (the entities proposing to operate websites through which issuers may offer their securities to potential purchasers). Staff think that operating a funding portal that intermediates trades would trigger the dealer registration requirement under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*.

We note that the regulation of funding portals is developing in various ways in different international jurisdictions. At this time, we are not proposing a particular regulatory model for funding portals. CSA staff are prepared to consider applications for registration by funding portals on a case-by-case basis.

Comments

We invite market participants to comment on whether the conditions in the OM-form exemption orders sufficiently address the financing needs of early stage businesses and SMEs while still providing appropriate investor protection and whether we should consider other modifications to the OM exemption.

In addition, the Ontario Securities Commission (OSC) has recently published OSC Staff Consultation Paper 45-710 *Considerations For New Capital Raising Prospectus Exemptions*. Although we did not participate in the development of the OSC consultation paper, we encourage our market participants to review and comment on the questions raised in it and to share their comments with us as well.

We are inviting comments until **February 20, 2013**.

Please submit your comments in writing. If you are sending your comments by email, please also send an electronic file containing the submissions in Microsoft Word.

Please address your comments to the following participating jurisdictions:

Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission

Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Newfoundland Securities Commission
Prince Edward Island Securities Office
Department of Community Services, Government of Yukon
Office of the Superintendent of Securities, Government of the Northwest Territories
Legal Registries Division, Department of Justice, Government of Nunavut

Please send your comments only to the addresses below. Your comments will be forwarded to the other participating jurisdictions.

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Please note that comments received will be made publicly available and may be posted on the websites of certain of the participating jurisdictions. We cannot keep submissions confidential.

Questions

Please direct your questions to any of the following:

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LIST OF COMMENTERS**Multilateral CSA Notice 45-311*****Exemptions from Certain Financial Statement-Related Requirements in the Offering
Memorandum Exemption to Facilitate Access
to Capital by Small Businesses***

Request for Comment December 20, 2012

	COMMENTS	NAME	DATE
1.	Wolverton Securities Ltd.	Brent Wolverton	January 7, 2013
2.	Canadian Foundation for Advancement of Investor Rights (FAIR)	Lindsay Speed	February 20, 2013
3.	Investment Industry Association of Canada (IIAC)	Barbara J. Amsden	February 20, 2013
4.	Invest Crowdfund Canada	Sandi Gilbert and Michael Ede	February 20, 2013
5.	National Exempt Market Association (NEMA)	Craig Skauge	February 20, 2013
6.	S. Mark Francis Business and Finance Consultant	S. Mark Francis	February 20, 2013



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January 7, 2013

Ontario Securities Commission
 20 Queen Street West
 19th Floor, Box 55
 Toronto, Ontario M5H 3S8

Attention: John Stevenson, Secretary to the Commission

Dear Sirs,

Please find enclosed comments with regard to crowd funding and possible changes to Canada's exempt markets.

Current Landscape

The current capital markets model has resulted in Public companies raising funds in one of two ways: either through a Registrant or through an exempt offering directly to the public. More and more, Public companies are choosing the second path (as shown by statistics) for two reasons, speed and cost.

Why? Over the past number of years regulators have worked hard to put in place rules and practices to protect the average investor and to make sure investors have access to proper advice and information around investments. In fact, with the current implementation of the new CRM (Client Relationship Model) rules, we are taking yet another step.

This, however, has resulted in an unexpected side effect – Cost. To implement and run the more robust systems has raised the cost of channeling underwriting through Registrants to the point where Public companies are actively arranging their affairs to avoid these new rules and regulations.

This additional cost has also affected investors such that sophisticated investors are also arranging their investments to avoid the new rules and regulations.

Overriding Goal

The overriding goal for regulators should be to find a balance between protecting the public and the cost of regulations (or that protection). A secondary goal should be to foster the health of the capital markets.

Vancouver

Victoria

Kelowna

Edmonton

Calgary

The Problem – Responsibility

Unfortunately, instead of a balance, the current system has resulted in a “have your cake and eat it too” paradigm. While regulators are continuing to perfect the registrant model for distribution of securities to the public (and take comfort in the idea that this should protect the public), they are enabling the exempt markets which are almost completely replacing the registrant system. How much protection is being afforded the investing public when for some number of years the exempt system has been responsible for 90+% of capital raised by SME’s? The current system has also resulted in quiet “finger pointing” which no one so far has called out. The question which needs to be asked is “Who is responsible for looking after investors in the exempt markets?”

Current Players

- *Stock Exchanges*

With the Maple Deal, stock exchanges in Canada took yet another step towards independence and their status as “for profit” organizations and away from the role of an institution serving the greater good. In addition, they are not governed by IIROC and so are not included in the scope of new distribution rules. Let’s simplify their business for clarity. Exchanges earn a majority of their revenues from listing fees which they collect from their customers, the listed companies. As long as those companies have money in their treasuries the Exchanges are happy and if asked they would perhaps admit that they are far more concerned about preserving and enhancing the ability of their customers to raise funds than they are about caring for the investing public. In fact, I think they would suggest it is regulators who are responsible for the investing public and not companies. A good example of this is the lack of exchange rules around “fair” distribution of securities. Exchanges have no investor priority rules or rules around conflict of interest with regard to allocating share distributions.

- *Public Companies*

Public companies are focused on driving the success of their business. They see the Capital markets as a key resource in that effort. They do not see themselves in the role of advising the public and if asked they would also suggest that role falls to the regulators. Their interaction with the markets is very mechanical. Ask the investor for money, get him to check the right boxes on the form, don’t ask any questions and cash the cheque. Make the whole exercise as cheap and as fast as possible. They do not treat their interaction with investors as a relationship and take no responsibility for investor outcomes.

- *Exempt Dealers*

I mention Exempt Dealers solely because they are a good example of the two paths the markets are headed down. Exempt dealers could easily exist inside the current IIROC

system except that it would cost more to meet the rules and regulations. Why are we building a system to protect the public and then a second system to bypass it?

- *Finders*

Of all the players in the system, finders are by far the most challenging. They are the unregistered registrants of the exempt markets. Finders are individuals or organizations who “steer” investors to public companies for a commission. They follow none of the rules because they are either not subject to them or because the risk of being caught is so small compared to the reward. They openly “coach” investors on how to qualify for offerings and provide “additional” sales information since their only consideration is getting paid and they will probably never speak to most investors again. Public companies claim they act independent of the company allowing the company to disavow any responsibility for any “sale materials or advice”. They are paid commission and agent’s warrants in the same amount and form as a registrant.

When I mention their existence to experts south of the border, I get stares of disbelief, after all I am told, anyone who acts in furtherance of a trade has to be registered. Not in Canada I tell them, where “soliciting” and “recommending” have been carefully pulled apart so that it is not “advising” with regard to an investment to simply “point out” the amazing opportunity.

Finders are the grease that makes the exempt market work. They keep the hands of the public companies and the exchanges clean by allowing them to claim that investors just stumbled upon the company, that the only information that they provided was access to news and SEDAR filings, that they did not make any promises to investors or coach investors on how to qualify and that their only responsibility is to check that the subscription form is filled out correctly.

- *Registrants*

Registrants are unfortunately left to clean up the mess. CSA (Canadian Securities Administrators) and IIROC (Investment Industry Regulatory Organization of Canada) have recently introduced “enhanced suitability” rules which include the requirement for dealers to advise their clients as to the suitability of exempt investments at the time they are deposited into the client’s account. I say unfortunately because the horse has already left the barn. The investor has already been sold the securities and it is too little a lot too late to suggest that investors are somehow served by advice after the fact.

Regulators need to decide whether the cost of regulation is worth it or not. If it is then we need to make sure those selling investments are subject to supervision by a regulator or self-regulator organization who has the time and resources to supervise and make sure the investments being sold aren’t given an alternate path.

- *Public*

The public unfortunately are often the greatest losers in this confusing landscape. They don't really know who to believe, they feel if they don't "play ball" they will miss out and when something goes wrong they find everyone "points the finger".

Tackling the Issue (Request for Comments Section 3, 4, 5.3, 6, 8)

How do we make sure the public get access to investments AND good advice?

This is by far the most difficult issue to deal with.

This conundrum really arose out of the Tech boom when regulators discovered that companies were using exempt issuances to allow high net worth investors and insiders to buy up the best underwritings without the general public ever getting a chance to participate. Regulators tried to address this inequity by lowering standards for individual investors and giving them better access.

Unfortunately this approach has not worked as:

- Investors now get less advice than they ever have around what are often sophisticated, high risk investments;
- Companies, who have no obligation to clients, now place their stock wherever they please, often to insiders with no regard to client priority and;
- A whole industry of non-licensed "middle men" and discount dealers has emerged to enable the exempt market which now represents more than 90+% of underwritings

So how do we fix things?

I think the OSC's comment paper asks a number of good questions which help if we answer them, along with a careful focus on investors and a look at what other countries are doing.

Redefine the Exempt Market

A number of countries have found the answer to exempt markets is to raise the standard not lower it. The answer to putting high net worth individuals on an even footing with investors is to force them down into the retail channel the regulators have carefully built to protect the public and out of the exempt channel. This retail channel is not unlike an insurance pool where unless a majority of people participate to diversify costs, the system doesn't work. I know sophisticated investors often don't need the protection but if they are allowed to bypass it then the cost of providing it for the average investor rises to the point of making it intolerable for public companies especially when they can access large investors and insiders independent of it.

In addition, when these investors exist in a separate pool devoid of client priority or conflict of interest rules, it is inevitable that they will put sufficient pressure on the process to turn it to

their advantage. If you want the average investor to have a chance, you have to level the playing field and introduce an independent arbiter.

The institutional market would continue to exist but with a standard perhaps defined as "distributions of more than \$250,000 each to less than 25 corporations with net assets of greater than \$10 million". The oversight required by commissions would shrink measurably and players would be far enough beyond any means test that they would be clearly capable of looking after themselves. This mimics what many other countries have done including the US where a QIB (Qualified Institutional Buyer) is a corporation (not an individual) with net assets between \$25 and \$100 million depending on the type of entity.

Stop Public companies from paying non-registrants for capital raising activities

I cannot stress this point enough. It is completely absurd to allow public companies to pay non-registered entities (finders) commissions and agent's warrants for help with capital raising activities. The greatest encouragement you can offer participants in the system to follow the rules and foster trust in the capital markets is to only allow them to be paid if they do so. If you allow people to access the rewards of the business without taking an equal dose of responsibility you compromise everything we are all working towards. Many investors would not be lead astray in the exempt markets if it were not for Finders and public companies need to bear responsibility for not using them. Remember, payroll taxes are not consistently remitted because every employee makes it a priority; they are consistently remitted because, if not, CRA looks to the company and its directors for the money!

Solicitation is Recommending!

It is also absurd to suggest that "pointing out" investments can be separated from recommending. In the US the logic is simple, if you weren't trying to get the investor to buy the investment you would not point it out. Financings are by their very nature a solicitation and a recommendation. Regulators and SRO's need to treat them as such and make sure investors have access to proper advice around them through full service advisors. Second, unlike trading the public markets where you have access to all available choices, if you are a dealer only providing underwritings someone has chosen (a limited selection) then the client's assumption that you like (recommend) the investments being offered is correct (after all why did you recommend some and not others). Let's stop being cute - trading services can be independent of advice; distributions cannot. Public companies and registrants who do not provide advice need to stop soliciting (recommending) underwriting OR they need to acknowledge the assumed recommendation and do the proper KYC and suitability work.

Require distributors to be registered and take responsibility

Some would argue that the former points are self-serving and are designed to create an oligopoly for investment firms. They are to some degree. But that is not to say I am not willing to share the playing field.

The key point I am trying to make is that everyone who distributes securities to the public needs to be responsible to the investor. If the exempt market were realigned as above then public companies would be in most cases distributing exempt product to registered (institutional) entities for which there is a separate exemption.

For the rest of the distributions, if public companies want to distribute themselves, then I would be open to it as long as they register with IIROC as dealers and take the same responsibility for investors as the rest of the players on the field - the same responsibility for qualifying investors, the same responsibility for suitability, and the same responsibility for the process and materials used in the distribution.

Public companies will argue that if the measures I am suggesting were implemented they would lose access to an important source of capital. This is a shallow and misleading argument. The capital is still available. What they are really arguing is that they would lose the ability to distribute to the public with no consequences or responsibility and they would lose the cost savings that are driven by end running the carefully designed checks and balances which exist as part of the dealer system.

Often regulators think about the role of an agent as simply a source of advice

IIROC members are valued by regulators as a source of client advice. This sometimes results though in other key benefits being ignored. In a brokered exempt placement, the dealer has a say in the format and terms of the subscription agreement, a key element in representing and protecting the client. Also, the dealer has the right to ask questions of the company and receive information to use in its advice to the client, another key element of being in a position to counsel the client if asked. These are only two of the many advantages to the client which flow out of a dealer's involvement.

Most clients would not attempt to close a real estate transaction without a lawyer or purchase a business without an accountant's help. Regulators need to take stock of the fact that most clients need representation with regard to the process (outside of advice) of purchasing a placement and that public companies are NOT currently required to make any efforts to act in a fair and reasonable manner towards the clients.

As a dealer we are routinely told by companies that, in a non-brokered deal, we have no right to make demands on behalf of our clients. In fact, on rare occasions, I have been asked by a company for the identity of our client and then been told that our client will not be able to purchase any of the placement because they are not liked by management (something that could not happen in a brokered placement).

Expansion of the Exempt Market

If the exempt market is to be expanded and current types of disclosure are going to be waived to "Democratize" the system then surely the safest way to do this is inside the IIROC full service forum which contains numerous other investor support mechanisms. Full service IIROC dealers

are required to give advice around every investment. They are in a position to help investors conduct the correct research before making a decision. They have access to SEDAR and can answer questions around company disclosure and information.

This forum could include other players, as has been previously suggested (although they will probably cry foul when asked to step up to the plate of responsibility like everyone else). We would be in favour of increasing the access by the general public to exempt products, but suggest the only responsible way to do this is inside the protected full service dealer based channel and not in the “free for all” non-registrant channel.

Align Regulators

One of the other critical issues facing regulators is alignment. Regulators work well together when there is a direct line of delegation. As an example, when CSA is coaching IIROC on what their expectations are around new dealer regulations. Where the system does not work is when the regulators and SRO’s are trying to manage their own direct reports. In this area resources are different, expectations are misaligned, and outcomes vary widely.

I think this stems from two issues:

The first is based on the fact that it is easier to tell someone to do something than it is to do it yourself. IIROC has been told by securities commissions to audit all of its members on a certain schedule. IIROC works very hard to maintain this schedule. The securities commissions also have direct reports and audit staff. If one were to look at provincial securities commission’s record of maintaining a similar schedule (or any schedule) the record would be poor at best.

The OSC and the CSA need to include, as a primary goal, the idea that all capital markets need to be a level playing field. Not just with regard to desired outcomes, which leave far too much room for “tried hard”, but with regard to day to day reality. At this point in time, as pointed out earlier, there is a huge difference in the responsibility and standards market participants are held too and it is creating significant disruption in the economy and in the functionality of the Capital Markets. The OSC and the CSA need to find a way to treat everyone with an even hand and eliminate the regulator “dodges” which exist due to time and resource constraints.

Perhaps the idea, that the OSC and CSA should regulate market participants and trading platforms solely through SRO’s, needs to be reconsidered. With no direct reports, resources could be focused and regulators might avoid a large part of the conflict which is causing the huge inequities which currently exist.

Secondly, regulators need to work harder at not allowing various special interest groups to “end run” the carefully crafted channels that have been put in place over many decades or if they feel those channels are not working, then we need to fix them.

Of course, it is cheaper and faster to close underwritings with no due diligence or inquiries. Public companies and exchanges complain that they need better access to the public through the exempt market. What they are really saying is "it is cheaper and faster to raise money when we don't have to write any disclosure, when nobody reviews the project, when no one reviews or takes responsibility for the suitability of the investment for the investor and his/her circumstances" AND THEY ARE RIGHT! If you tell IIROC dealers that we can run the system as "buyers beware" then we can do it really fast and cheap too!

The exempt market needs to be viewed as a channel which bypasses all the normal and reasonable protections put in place for most investors. This special market needs to exist only for participants who are registered in their own rights and where their own governance standards serve to enforce fair and conflict free behaviour.

If regulators want faster, cheaper and more available then let's build that option inside the current dealer system. It is a dangerous (and unfair) cheat to suggest that the public is being protected by the current full service dealer system and those registrants diligently working inside it, while at the same time expanding an alternate channel with none of the same protections in the name of "faster and cheaper" for the benefit of market participants who if asked would deny any responsibility for the investing public.

Crowd Funding (Request for Comments Section 5)

Crowd funding is a passing fad which has no place in the markets. It has the potential to cause the same headaches for the OSC that small charities cause for CRA. When small amounts of money are raised by small, badly organized corporations, problems arise:

- First, by the time the costs of raising capital (including organizers costs) are accounted for there is a real danger there will be nothing left (charity collection agents sometimes take as much as 50%)
- Second, because the amounts are so small, investors rarely complain and complaints are difficult to manage
- Third, infrastructure costs will quickly bury investors (because no CDS members would be involved), investments would have to be evidenced by physical certificates at a cost of \$40-110 per cert, transfer agents will insist on medallion guarantees for transfers which no one will provide, etc.

In addition:

- How will authorities manage the advisors involved in soliciting the clients? (because there are always advisors involved!)
- Who will manage which clients should and should not be involved?
- Who will ultimately hold, negotiate and sell the investment?

In the mid 80's stock exchanges went through a fairly drawn out process to weed out those issuers who were raising money for projects which were not commercially viable. This effort has improved things but not to the point where it would be hard to point out issuers who have raised money to pay themselves a salary. At least with investment dealers taking some responsibility for underwritings this has been minimized.

Crowd funding would throw the doors open again. Perpetual Energy machines would quickly pop up and the unsophisticated would soon be parted from their money through portals making outrageous claims.

Who will be the control on this new arena? Can this realistically be managed? Securities regulators are already spread thin with most provincial registrants only reviewed periodically (many registrants have never seen a regulatory audit in spite of years of business).

Lastly, industry has spent many hours deciding who should have access to the greater public and who should be confined to their circle of friends and family. Being a public issuer has become very inexpensive through efforts around capital pools and opportunities to RTO. SME's need to avail themselves of these existing facilities instead of inventing new forums outside of the well thought out current models.

With the other far larger issues in the markets, I would suggest this will quickly become a headache for regulators and a distraction from more pressing issues.

Need for Exempt Market Data (Request for Comments Section 7)

Data is clearly a necessity when it comes to making good decisions. It also serves a secondary key purpose. It forces industry participants to be "on the record". We think it is entirely reasonable to ask public companies to file ELECTRONIC information on each placement or capital raising activity they undertake. We also think it is reasonable to ask the exchanges to do the same and by doing so make them responsible for the degree to which their members comply.

We would suggest this information should include:

- The number of "placees", their names and the amounts purchased
- The materials each investor received and the time and place the materials were available
- The exemption used by each investor and any efforts to confirm their compliance with the terms of the exemption
- Whether any external agents were involved in either making "placees" aware of the placement or in soliciting (finding) investors
- Any relationship the agents have to the company or its management
- The details of any work the agents have done previously for the company

- The details of any work the agents have done for related companies
- The details of any fees that were paid for advice around the distribution or finding investors
- The details of any fees paid to the agents for other services to the company
- The total amount of fees earned by the agent for similar work in the preceding 12 months

Due to the arms-length nature of the relationship and the fact that IIROC members are reviewed independently, we would suggest this information only be collected from companies and exchanges.

A Warning

There is a tipping point, past which, so much business will have gravitated to the channels outside the dealers that there is not enough business to sustain the dealer channel. In these markets, I would submit we have already passed this point (supported by the current round of consolidation we are experiencing). Clearly, the future landscape will be a result of choices the regulators make going forward. Commissions need to understand however, that once the damage to the channel reaches a certain point, their opportunity to use it as part of a client solution will have passed and they will have lost the ability to re-level the playing field.

I hope my comments cause the OSC to pause and consider how the markets work as a whole. I would be happy to provide further feedback on any of the issues I have raised. Please do not hesitate to follow up at your convenience.



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British Columbia Securities Commission

Mark Wang, Manager, Legal Services - Capital Markets Regulation
British Columbia Securities Commission

Susan Copland, Director
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(via email)



Canadian Foundation *for*
Advancement *of* Investor Rights

February 20, 2013

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RE: Multilateral CSA Notice 45-311 *Exemptions from Certain Financial Statement-Related Requirements in the Offering Memorandum Exemption to Facilitate Access to Capital by Small Businesses*

FAIR Canada is pleased to offer comments on Multilateral CSA Notice 45-311 (the “**Notice**”) issued by the securities regulatory authorities in Yukon, Alberta, Saskatchewan, Northwest Territories, Nunavut, Manitoba, Québec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador (the “**Participating Jurisdictions**”) regarding the publication of harmonized interim local orders that provide exemptions from certain requirements of Form 45-106F2 *Offering memorandum for non-qualifying issuers*.

FAIR Canada is a national, non-profit organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

Executive Summary

1. FAIR Canada is concerned that the offering memorandum- (“**OM**”) form exemption orders issued, and to be issued, in conjunction with the Notice further impair investor protection in the exempt market in the Participating Jurisdictions.

2. FAIR Canada does not believe that, absent the provision of audited financial statements, investors would have the requisite information to make an informed investment decision.
3. We recommend that the OM-form exemption orders be revoked and that a more critical review be undertaken by the Participating Jurisdictions (and British Columbia) regarding the level of investor protection afforded under the OM exemption, particularly in light of the serious compliance issues observed.
4. The Notice does not appear to contemplate any need to draw the absence of these protections to investors' attention where the OM-form exemption is relied upon. At an absolute minimum, the absence of audited financial statements and preparation without use of Canadian GAAP/IFRS should be drawn to the attention of potential investors.
5. FAIR Canada questions assertions by early stage businesses and SMEs that the cost of preparing audited financial statements is prohibitively expensive for capital-raising. The Notice does not provide any dollar figures with respect to the average or mean cost of obtaining an audit on financial statements or other financial information for early stage businesses and SMEs, nor does it compare this with the overall cost of raising capital through an otherwise-compliant OM exemption-reliant distribution.
6. Numerous CSA-member notices and reviews indicate a high level of non-compliance with the OM exemption. In light of the volume and seriousness of compliance issues related to the OM exemption, FAIR Canada questions why members of the CSA would prioritize an initiative to lessen disclosure to investors.
7. FAIR Canada recommends that the CSA prioritize the undertaking of empirical research to determine the incidence of fraud, misrepresentation and resulting losses suffered by investors as a result of investing in securities through purported reliance upon the OM exemption.

FAIR Canada Comments

OM-Form Exemption Orders

- 1.1. FAIR Canada is concerned that the offering memorandum- ("OM") form exemption orders issued, and to be issued, in conjunction with the Notice further impair investor protection in the exempt market in the Participating Jurisdictions.
- 1.2. The Participating Jurisdictions have issued, or intend to issue, OM-form exemption orders that will permit certain issuers relying on the OM exemption further exemption from:
 - (i) the requirement to obtain an audit on financial statements or other financial information, and
 - (ii) the requirement for financial statements to be prepared using Canadian GAAP applicable to publically accountable enterprises (IFRS).

- 1.3. In the Participating Jurisdictions, issuers can rely on the OM-form exemption orders subject to certain conditions, including the following:
- (i) the issuer is not a reporting issuer, investment fund, mortgage investment entity or an issuer engaged in the real estate business;
 - (ii) the issuer is not distributing complex securities;
 - (iii) the amount raised by an issuer group (the issuer and certain related issuers) under the OM-form exemption orders must never exceed \$500,000; and
 - (iv) the aggregate acquisition cost of all securities distributed under the OM-form exemption orders by an issuer group to a purchaser in a distribution and in the 12 months preceding the date of such a distribution, must not exceed \$2,000.

Reduced Investor Protection

- 1.4. Investors use audited financial statement disclosure to decide whether or not to invest in particular securities. Financial statement disclosure is intended to encourage more efficient management and to discourage fraud. Financial statement disclosure theoretically works by creating a “level playing field”, where all investors have access to the same information. Auditors serve a fundamental purpose and fill an important role in promoting confidence and trust in certain financial information in financial statements. Auditors are intended to ensure independence, impartiality and expertise; audits enable shareholders to oversee management.
- 1.5. As noted in Canadian Securities Administrators- (“CSA”) issued guidance for preparing and filing an OM, “[w]hile an OM is generally not required to contain the level of detail and extent of disclosure required by a prospectus, it must provide a prospective purchaser with sufficient information to make an informed investment decision”¹.
- 1.6. FAIR Canada does not believe that, absent the provision of audited financial statements, investors would have the requisite information to make an informed investment decision, regardless of the additional conditions imposed under the OM-form exemption orders (as outlined in section 1.3).
- 1.7. We recommend that the OM-form exemption orders be revoked and that a more critical review be undertaken by the Participating Jurisdictions (and British Columbia) regarding the level of investor protection afforded under the OM exemption, particularly in light of the serious compliance issues observed.
- 1.8. Furthermore, we question the implications of permitting certification of the entire OM without the completion of an audit of financial statements and where financial statements are not prepared in accordance with Canadian GAAP applicable to publicly accountable enterprises

¹ Multilateral CSA Staff Notice 45-309 *Guidance for Preparing and Filing an Offering Memorandum* under National Instrument 45-106 *Prospectus and Registration Exemptions* (April 26, 2012), available online: <http://www.albertasecurities.com/securitiesLaw/Regulatory%20Instruments/4/45-309/4178361-v1-Multilateral_CSA_Staff_Notice_45-309.pdf>, at page 4.

(IFRS). Issuance of the OM-form exemption orders that allow issuers to be exempt from such requirements removes the accepted standards for preparing financial statements. What will signatories be certifying with respect to the financial statements absent these requirements?

- 1.9. Additionally, the Notice does not appear to contemplate any need to draw the absence of these protections to investors' attention where the OM-form exemption is relied upon. While we are sceptical of the efficacy of standard form disclosure, at an absolute minimum the absence of audited financial statements completed in accordance with GAAP/IFRS, which are otherwise required to be provided but have been exempted in the circumstances, should be stressed to potential investors to make them aware of the implications of unaudited, non-GAAP/IFRS conformant financial statements.

No Evidence of Costliness Provided

- 1.10. FAIR Canada questions assertions by early stage businesses and SMEs that the cost of preparing audited financial statements is prohibitively expensive for capital-raising. The implication in the Notice is that this is what makes the OM exemption too costly for early stage businesses and SMEs to use. The Notice does not provide any dollar figures with respect to the average or mean cost of obtaining an audit on financial statements or other financial information for early stage businesses and SMEs, nor does it compare this with the overall cost of raising capital through an otherwise-compliant OM exemption-reliant distribution.
- 1.11. We question whether the preparation of audited financial statements makes up a significant portion of the costs of raising capital through fully compliant reliance upon the OM exemption in the absence of any evidence provided.
- 1.12. Furthermore, requirements under provincial and federal business corporations acts and provincial securities acts require corporations to appoint an auditor to hold office, impose duties upon such auditors, and require the preparation of annual financial statements. FAIR Canada is concerned that the exemptions provided under the OM-form exemption orders may run contrary to these statutory requirements. Further, there is the potential for the OM-form exemption orders to cause confusion about the requirements for early stage businesses and SMEs to prepare the requisite financial statements.

More General Concerns about the OM Exemption

- 1.13. Numerous CSA-member notices and reviews indicate a high level of non-compliance with the OM exemption. For example, Saskatchewan's Financial Services Commission Securities Division's (now the Financial and Consumer Affairs Authority, the "**Saskatchewan Authority**") Staff Notice 45-704 noted that during its detailed review of non-qualifying issuers' OMs, "[s]taff identified **material disclosure deficiencies in all of the OMs reviewed**. In general, **the OMs were poorly prepared and did not provide the disclosure required.**"² [emphasis added]

² Saskatchewan Financial Services Commission Securities Division Staff Notice 45-704 Review of Offering Memorandums under NI 45-106 *Prospectus and Registration Exemptions* (last amended March 7, 2011) at page 2.

- 1.14. The Saskatchewan Authority also found considerable non-compliance with financial statement requirements, including non-provision of financial statements in the OM.³ Further, the Saskatchewan Authority identified significant investors rights issues in its notice.
- 1.15. The CSA has also issued a staff notice outlining common deficiencies, including: failing to file a copy of the OM with the relevant securities regulator or filing late; making distributions using a stale-dated OM; using an incorrect form of update; failing to include sufficient information to enable investors to make an informed investment decision; inadequate disclosure about the issuer's business (particularly new entities); failing to provide balanced disclosure; inadequate disclosure of available funds and use of available funds; inappropriate reallocation of available funds; omission of key terms of material agreements; omission of compensation disclosure; inadequate disclosure of management experience; dissemination of material forward-looking information not included in the OM; omission of required interim financial reports; omission of key elements of financial statements; failure to obtain required audits; omission of required audit reports or including non-compliant audit reports; inappropriate use of a Notice to Reader cautioning that financial statements may not be appropriate for their purposes; failure to prepare financial statements in accordance with appropriate accounting principles; and improper certification of the OM.⁴
- 1.16. In light of the volume and seriousness of compliance issues related to the OM exemption, FAIR Canada questions why members of the CSA would prioritize an initiative to lessen disclosure to investors. In our view, it would be more appropriate to examine whether the current requirements and compliance therewith ensure an acceptable level of protection to investors.
- 1.17. In particular, FAIR Canada recommends that the CSA prioritize the undertaking of empirical research to determine the incidence of fraud, misrepresentation and resulting losses suffered by investors as a result of investing in securities through purported reliance upon the OM exemption. FAIR Canada notes that no such empirical data is currently available despite the serious compliance deficiencies noted above.
- 1.18. In light of the serious deficiencies highlighted with respect to the provision of financial reports, omission of key elements of financial statements, and failure to obtain audits as required, we do not believe that the exemptions proposed in the Notice are an appropriate regulatory response. Such a response could suggest that acts of refusal or ignorance of the current requirements could be persuasive in making a case for regulatory change (in lowering the bar even further). It could be viewed as a reward for non-compliance.
- 1.19. FAIR Canada has concerns regarding the OM exemption more broadly. We intend to outline these concerns in our comments in response to the OSC's Staff Consultation Paper 45-710 *Considerations for New Capital Raising Prospectus Exemptions*.

³ Staff Notice 45-704 at page 5.

⁴ Multilateral CSA Staff Notice 45-309 *Guidance for Preparing and Filing an Offering Memorandum* under National Instrument 45-106 *Prospectus and Registration Exemptions* at pages 2 – 11.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Lindsay Speed at 416-214-3442 (lindsay.speed@faircanada.ca).

Sincerely,



Canadian Foundation for Advancement of Investor Rights

To be forwarded to:

Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Newfoundland Securities Commission
Prince Edward Island Securities Office
Department of Community Services, Government of Yukon
Office of the Superintendent of Securities, Government of the Northwest Territories
Legal Registries Division, Department of Justice, Government of Nunavut

Cc: British Columbia Securities Commission
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February 20, 2013

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Dear Ms. Weeres and Ms. Beaudoin:

Re: Multilateral CSA Notice 45-311, *Exemptions from Certain Financial Statement-Related Requirements in the Offering Memorandum Exemption to Facilitate Access to Capital by Small Businesses*

The Investment Industry Association of Canada (the IIAC) has reviewed Multilateral CSA Notice 45-311, *Exemptions from Certain Financial Statement-Related Requirements in the Offering Memorandum (OM) Exemption to Facilitate Access to Capital by Small Businesses* (the Multilateral OM Notice). The IIAC appreciates the opportunity to comment on the OM-form exemption order as part of the participating jurisdictions' proposals to expedite capital-raising for small and medium-sized enterprises (SMEs), while still meeting their investor protection mandate.

Our comments below focus only on the proposed changes with respect to elimination of the requirements to obtain an audit of financial statements or other financial information and for financial statements to be prepared using Canadian generally accepted accounting principles (GAAP) and international financial reporting standards (IFRS) accounting requirements. We have previously commented on other exemption-related matters, for example, in response to CSA Staff Consultation Note 45-401, *Review of Minimum Amount and Accredited Investor Exemptions*.

1. Alternatives to Audit and GAAP/IFRS Accounting Requirements

While IFRS have been in place in Canada for a number of years, it has been a learning process and, for most, a somewhat costly one as the new standards not only affect how

items are accounted for, but also require more extensive accounting disclosure. Some Canadian GAAP rules did not exist in IFRS and some IFRS requirements did not exist in Canadian GAAP. For start-ups and early-stage entities, the requirement for IFRS and a complete audit can be expensive and the IIAC supports examining alternatives that can be provided at low cost and offer some evidence of professional management. Rather than simply eliminating audit and GAAP/IFRS requirements, the IIAC believes that audited financial statements should be replaced by the following three documents, which should be filed with the regulatory authorities and made available to investors and relevant broker(s):

- Income tax returns filed by the issuer for the most recently completed year (if any), as provided for in the U.S. *Jumpstart Our Business Start-ups (JOBS) Act*
- Financial statements certified by the principal executive officer (or financial/accounting officer) of the issuer to be true and complete in all material respects (also part of the JOBS Act)
- Bank confirmation(s), using the standard Canadian Bankers Association (CBA) and Canadian Institute of Chartered Accountants (CICA) form.

2. Other matters

The Multilateral Notice also asks for comments regarding Ontario Securities Commission (OSC) Staff Consultation Paper 45-710, *Considerations for New Capital-Raising Prospectus Exemptions*. The IIAC will provide participating jurisdictions with its submission on the four concepts discussed in the Consultation Paper, including crowd-funding, as well as related matters (such as reporting) once it is sent on or about March 8, 2013. Key IIAC recommendations with respect to the OSC's OM exemption are that the OM exemption must:

1. Be limited to private companies or, if extended to public companies, require use of an IIROC registered dealer.
2. Be subject to appropriate reporting and monitoring.
3. Be consistent with other jurisdictions (that is, follow the "Alberta" or "B.C." OM exemption model, with the preference being Alberta's). This will help ensure that there is one consistent OM exemption, rather than perpetuating the existing patchwork of such exemptions that complicate and increase the costs of inter-jurisdictional capital-raising.
4. Prohibit commissions or other compensation to be paid to agents or finders that do not have IIROC-dealer equivalent suitability, know-your-client (KYC) and know-your-product (KYP) responsibilities. This is consistent with OM-form exemption orders excluding an exemption from dealer or adviser registration requirements.

The IIAC also strongly urges the participating jurisdictions, with the OSC, to better quantify the level of and challenges with early-stage and SME financing, including as

compared to mid-size and large company financing, with a view to ensuring public policy decision-making that supports the most competitive capital markets that appropriately protect the investing public.

In conclusion, the IIAC supports consistent OM-form exemption orders across all Canadian jurisdictions to support financings below a single threshold. We believe that requiring the three alternatives to audited financial statements as described above will lead to an OM exemption that achieves an optimal balance between issuer and investor needs.

The IIAC would be pleased to elaborate on our views and meet with you at your convenience.

Yours sincerely,



CC: The securities regulatory authorities of Yukon, Alberta, Saskatchewan, Northwest Territories, Nunavut, Manitoba, Québec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador and:

VIA E-MAIL

February 20, 2013

Saskatchewan Financial Services Commission
Manitoba Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Office of the Attorney General, 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

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Re: Multilateral CSA Notice 45-311 – Exemptions from Certain Financial Statement-Related Requirements in the Offering Memorandum Exemption to Facilitate Access to Capital by Small Businesses

This submission is made by Invest Crowdfund Canada – Alberta in response to the request for comments published by the Canadian Securities Administrators (CSA) on December 20, 2012 in connection with the ASC Blanket order 45-512. We will also be submitting comments regarding the OSC Staff Consultation Paper 45-710 *Considerations For New Capital Raising Prospectus Exemptions* due March 3, 2013.

Who is Invest Crowdfund Canada?

Invest Crowdfund Canada (ICC) (www.icanada.nu/governance) is a national group of over 100 industry leaders who, through their volunteer efforts, are bringing stakeholders together to help start-up companies in Canada gain access to investment capital through regulatory changes that will enable equity crowd funding. Our mission: *To help educate Canadians on equity crowdfunding (ECF), influence security regulators across Canada to review our security laws and make the appropriate changes to improve the ease of capitalizing early stage companies.* We are a working committee of the Canadian Advanced Technology Alliance (CATAAlliance), the largest technology association in Canada. The national initiative led by CATAAlliance is promoting the adoption of a workable and efficient equity crowdfunding model across Canada. To access White Papers and other research reports pertaining to equity crowdfunding, please see: <http://icanada.nu/crowdfunding/learning-center>.

The Alberta region committee members include:

- Sandi Gilbert, Alberta VP, Invest Crowdfund Canada
- Michael Ede, Entrepreneur in Residence, CATAAlliance
- J.R. Richardson, CrowdCapital
- Sean Ballard, ATB Financial
- Shelley Kuipers, Chaordix

Our position on this important topic has been crafted through consultation with our peers across the country combined with an evaluation of the experience with crowdfunding models in countries such as the U. K. and Australia. In addition, the Alberta working group hosted a consultation session in Calgary to seek input on the issues raised by ASC Blanket Order 45-512, and those related to crowdfunding in general. The 20 participants in this session included experienced securities lawyers and accountants, angel investors, investment bankers and start-up entrepreneurs who reflected a diverse set of perspectives.

In this response, we will offer specific comments on behalf of our working group that relate to Blanket Order 45-512, and offer additional comments that we believe are fundamental to the framing of a workable equity crowdfunding model.

Question

The CSA has invited comments to the question, *"Do the conditions in the OM-form exemption orders sufficiently address the financing needs of early stage businesses and SMEs while still providing appropriate investor protection?"*

Direct Response

Our succinct answer to this question is that this exemption order is a promising first step, but does not provide a workable or sufficient means to address the financing needs of early stage businesses. First, the offering and investment limits are too low. Second, if securities regulators determine that the operation of a funding portal that intermediates trades triggers dealer registration requirements, this by definition, will inhibit the communication of investment opportunities and limit access to capital for early stage and emerging companies.

A more thorough answer outlines our objectives, the rationale of our position and recommended provisions of a capital raising model we think could provide tangible benefits for both investors and entrepreneurs in Canada.

The Challenge

In our view, Canada's technology ecosystem is broken, partly as a result of the well-publicized shortage of early-stage capital for start-ups. Developing and implementing a cost and time efficient model that can match informed capital with resilient entrepreneurs is a national priority. Despite substantial infrastructure investments in research, education and tax credits/grants by governments, Canada suffers in comparison with leading nations as measured on the grid of innovation accomplishments. Our national economy continues to be dominated by resource industries; in fact, high technology firms now account for a mere 1.6% of the TSX Composite Index. Venture capital investments have been dropping since 2001; Canadian companies typically receive less than half of the funds allocated per deal in comparison with US based companies.

The Opportunity

The objective of Blanket Order 45-512 is to improve the capability of legitimate early stage businesses to raise start-up and growth capital in Canada, while establishing reasonable bounds that suppress criminal activity and protect vulnerable investors. There is a pool of intelligent, savvy individuals, many of whom have deep domain expertise in their chosen fields who could become value-added investors and ardent advocates for companies that produce new products and services that they understand.

We recognize that an over-riding concern of the ASC is to protect investors from fraud, negligence and malfeasance of promoters and unscrupulous or careless business people. We support this vigilance and keep this foremost in our mind as the prospect of toxic investment opportunities contaminates the perception of this capital raising model and undermines confidence in this class of investments. However, we all acknowledge that investments in these early-stage companies can be high-risk and should be avoided entirely by those with no appetite for exposure to tangible risk. We argue that a well-designed capital raising model can harness the acuity of crowds to illuminate quality investment opportunities. Experience demonstrates that the focused intelligence of Web-connected crowds can detect, expose and alert communities to prospective fraud and false claims.

Specific Comments and Recommendations on Blanket Order 45-512

The capital raising opportunity, through the modified offering memorandum format and prospectus exemption facilitated by Blanket Order 45-512, is welcomed as an important first step in opening up the playing field. The exemption from the requirement for audited financial statements makes good sense to us, as many start-up companies have no real business history, have not been operating for a long period of time and have had very few financial transactions.

Specific comments and recommendations are as follows:

1. **Increase the amount of the capital raise to a maximum of \$1.5 million.** In order to address the current gaps, it is necessary to recognize that raising capital to support business development comes in different stages and different sizes. Businesses will want to use this exemption order for many different reasons and we feel the limit of \$500,000 will restrict their ability to raise sufficient capital required for their particular needs. The true funding gap, where businesses can't efficiently access capital, is up to \$1.5 million.

We recognize that this capital raise is intended to address the needs of small businesses in all sectors. Base upon our experience in high tech, a capital raise of \$500,000 will provide sufficient capital for many businesses to develop prototypes, test and validate market acceptance. However, it does not provide sufficient funds to enable a company to initiate any professional quality sales, marketing and business development efforts. This shortfall of funding may become a fatal barrier to the growth of many businesses. There is no point in raising capital if one can foresee that the funds raised will not enable the company to compete in the marketplace, and/or disadvantage them in raising further rounds of capital.

One consideration in allowing a higher threshold of capital raise, could be to require issuers raising \$500,001 to \$1.5 million to provide financial statements reviewed by a chartered accountant. Financial statements prepared as "Notice to Reader – Compilation Engagement"

could provide the level of oversight required for start-up and emerging companies that have limited financial history to review, without the added expense of an “Audited Engagement”.

- 2. Increase the maximum investment limit to \$10,000 per investor.** Blanket Order 45-512 currently limits an investor’s investment to a maximum of \$2,000 per issuer every 12 months. This means that an issuer raising \$500,000 under this exemption would have a minimum of 250 shareholders and most likely more (given that the average investment may be less than the maximum allowed). This may create complicated capital structures for companies.

With the exception of the form of financial statements and the inclusion of some additional risk acknowledgement language, the issuer is required to complete Form 45-106F2 in the same manner and to the same levels of disclosure as those issuers who are preparing an offering memorandum used for capital raises provided by the Offering Memorandum exemption included in NI 45-106. Investors will get full disclosure through the offering memorandum; therefore we do not see why there would be an investment limit that is different to that of the current exemption limit of \$10,000 per investor. Clearly, it is recognized that investors can invest less than \$10,000, and many will, however the maximum of \$10,000 would allow investment from those that wish to invest more.

Feedback received from the CEO of Bixnets Inc., one of the first Alberta companies that has initiated a fund raising effort under Blanket Order 45-512, confirms this point of view. Several prospective investors enquired about the option to invest more than \$2,000. Those that did express interest in the \$2,000 limit appeared inclined to devote the same amount of due diligence to evaluate this investment as they would for a larger investment. Furthermore, although Bixnets is selling/issuing its own shares without an intermediary or third party portal, it is cognizant of the current requirement that, in order to avoid having to register as a dealer, it not be “actively” soliciting investors (Companion Policy to NI31-103, section 1.3). Based on this initial market reaction and our previous comments, we strongly advocate increasing this allowable amount and clarifying which activities would be considered “actively soliciting investors”. Please refer to our comments in “Further Considerations” below.

- 3. Permit all investors to participate in the OM Blanket raise.** The typical capital raise attracts investment from a wide range of investors. Some invest \$50,000 while others invest \$2,000. Multiple exemptions are often used together and should continue to be allowed in a concurrent fashion. As an example, an investor that is eligible to invest through a different eligibility criteria (e.g. accredited, qualified) should be able to concurrently participate in the investment for higher amounts, along with those that invest through the opportunity provided by Blanket Order 45-512.

Further Considerations

While we commend the ASC and its peers for issuing Blanket Order 45-512, we believe the following recommendations deserve serious consideration.

- 1. Give issuers broader access to investors - Crowdfunding.** It is essential to allow for the dissemination of deals via a funding portal. The exemption is for the most part, meaningless, if businesses are not allowed to broadcast the availability of their offering to a broader market. It is unreasonable to expect that businesses looking to raise smaller amounts of capital from a larger

pool of investors would not take advantage of technology platforms and social media to reach potential investors. Other jurisdictions, including the OSC, have introduced the crowdfunding concept, whereby businesses can present their offerings on platforms or “portals” designed to provide transparent access to details about the investment, the company, its stakeholders and its current shareholders.

It is a new and evolving space. Many of these portals do not provide any advice or hold any assets, while others perform traditional registrant functions like providing advice and structuring or sponsoring deals. Flexibility in the “dealer registration” requirement for crowdfunding portals is necessary because one size will unlikely fit all, and irrelevant and costly regulation may make the business model unfeasible. The essence of raising capital under Blanket Order 45-512 lends itself to Crowdfunding. We strongly urge you to enable the evolution of this efficient and effective model of raising capital in Canada.

2. **Act quickly.** The issue of crowdfunding is an area of innovation which is being introduced in other jurisdictions. If Canada does not provide a Canadian solution, Canadian entrepreneurs will likely go abroad to fulfill their funding needs at the expense of opportunities for Canadian investors from both an investment and influence perspective.

In closing, thank you for taking this important step in helping Canadian small businesses gain access to a larger pool of capital and for increasing the investment opportunities for informed.

Members of our team recently met with the OSC to discuss our views on their proposed regulatory changes. We would welcome the opportunity to meet with members of the ASC to expand upon our comments and engage in a dialogue on these important issues.

Thanks for your consideration:

On behalf of Invest Crowdfund Canada – Alberta

Sandi Gilbert
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Michael Ede
ede@pobox.com



February 20, 2013

Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Newfoundland Securities Commission
Prince Edward Island Securities Office
Department of Community Services, Government of Yukon
Office of the Superintendent of Securities, Government of the Northwest Territories
Legal Registries Division, Department of Justice, Government of Nunavut

c/o Denise Weeres
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M^e Anne-Marie Beaudoin
Corporate Secretary
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e-mail: consultation-en-cours@lautorite.qc.ca

Dear Sirs and Madams:

Re: Multilateral CSA Notice 45-311

Thank you for providing us with the opportunity to comment on this notice.

As an organization comprised predominantly of members that participate in the “retail” exempt market, the offering memorandum (OM) exemption is relied upon heavily by our members be they Exempt Market Dealers, Dealing Representatives, or Issuers.

Since the implementation of the audit requirement for all issuers utilizing the OM exemption, be they newly created or with a lengthy history, we have received considerable industry feedback questioning the logic of mandating an audit for issuers that are newly formed. When an issuer is newly incorporated and just commencing operations, there are typically minimal financial transactions that have occurred (generally only related to the OM preparation itself) and typically \$1,000 or less in the bank account. Regardless of the lack of activity, these opening balance audits typically cost issuers between \$3,500 and \$8,000 and provide little to no value to anyone beyond the accounting firms hired to perform the actual audits. Notwithstanding this new source of revenue, these are feelings often expressed by a number of our members who are the very accounting firms profiting from this nonsensical requirement.

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While we applaud you for reducing this requirement for those issuers that meet your proposed criteria, we are of the strong opinion that the same exemption should apply to all newly formed issuers whose financial transactions are limited, as to do so would also not be contrary to the public interest.

An audit is a look at past activities of an issuer so the logic about whether one is required or not should be solely based on an issuers past activities and transactions and not on their intent for the future. Whether an issuer intends to raise \$50,000 , \$500,000, or \$10,000,000 through an OM is irrelevant for audit purposes. If a newly formed issuer hasn't raised any money or completed any transactions beyond incorporating a company and paying for an OM, an audit is an unnecessary cost that inhibits capital raising.

Given the above, we would encourage you to revisit this requirement in its entirety for all newly formed issuers. We are of the opinion that issuers would be better served with fewer costs up front and that investors would be better served by some type of scalable ongoing audit requirement for issuers than an initial one. In fact, a number of Exempt Market Dealers are already imposing this requirement when agreeing to raise funds for a given non-related issuer.

In spite of our above comments, we would like to applaud you for a step in the right direction and encourage you to continue to look for and eliminate other areas where unnecessary costs are being incurred by issuers and ultimately investors.

We would be happy to discuss the contents of this letter at your convenience.

Sincerely,

"signed"

Craig Skauge
President & Chair
National Exempt Market Association
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20th of February, 2013

Alberta Securities Commission
Saskatchewan Financial and Consumer Affairs Authority
Manitoba Securities Commission-
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Newfoundland Securities Commission
Prince Edward Island Securities Office
Department of Community Services, Government of Yukon
Office of the Superintendent of Securities, Government of the Northwest Territories
Legal Registries Division, Department of Justice, Government of Nunavut

c/o

Denise Weeres

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Anne-Marie Beaudoin, Corporate Secretary

Autorité des marchés financiers
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Montréal, Québec H4Z 1G3
Fax: 514-864-6381 consultation-en-cours@lautorite.qc.ca

Dear Securities Commissions:

Re: Multilateral CSA Notice 45-311, Crowdfunding and Accredited Investor Exemption

Capacity:

I am writing to you in my capacity as a former IA, a current small cap and angel investor, a consultant to CNSX, and a principal in several small caps, both public and private.

Emphasis:

Of my comments and recommendations below, I would emphasize the issues of, first, allowing non-accredited to participate in private placements subject to certain constraints, and second, providing exemptive relief quickly, as many public small cap companies are at serious risk.

Background and Context of Comments:**StartUps vs. Existing Reporting Issuers**

It is contradictory to provide this exemption to a startup with no history of accountability or reporting, and no subsequent obligations, but not permit the same for an established company that has audited statements and suffers ramifications if it ceases to continue reporting. There are many decent public companies, which on balance are likely lower risk than startups, but in the current market environment have their backs to the wall and are in need of modest amounts of capital. Why choke them and put minority shareholders at risk? Why punish accountability?

Urgent Need of Existing Small Cap Public Companies:

Many small cap public companies, as per above, are in dire straits, and in many cases need small amounts of capital to help them bridge through these very difficult times. These companies urgently need a special exemption, or their minority shareholders will suffer egregiously.

Investor View on Fairness of Narrow Access to Private Placements

Private placements are popular among accredited investors precisely because they know it is a better deal to get a discount on share price with a 4 month hold than to buy the stock in the market. Essentially the current rules only allow the wealthy to partake in the really good deals. That some investors misrepresent themselves as accredited in order to gain access to these preferential deals can hardly be surprising. The answer surely is not to regulate fraud, but rather on some scale to eliminate the unfair prohibition. Some investors even speak of taking the Commissions to court for abridging their rights under the Charter.

IA view regarding the Accredited Investor Exemption:

In the 1980s, it always struck my fellow IAs and me as inherently prejudicial that regular investors could not buy private placements in public companies; these shares were offered at a discount, subject to a hold period that as IAs we could easily explain to investors, a hold period which was likely intended even if shares were purchased in the open market, but this advantageous offer was only available to the very rich and the Investment Dealers themselves. And we were accountable under "Know Your Client." No wonder investors thought and still think the rules are stacked against them.

4 Month Hold Can Serve to Protect Investors

Ironically, a 4 month hold prevents the really aggressive IAs from churning an account, and may act as a sensible break on clients and brokers that tend to over trade. The 4 months is in practical terms a little more like 5 months, as closing takes a few weeks, and then one rarely sells the instant the hold period is off.

OSC Proposal to Require Fiduciary Duty for non-Accredited Purchase of Private Placements

The suggestion by the OSC to require that a Dealer has “contractually agreed that it has a fiduciary duty . . . to the client” is overkill. “Fiduciary” can imply a responsibility to keep funds and never lose money, which is not possible in small cap investing. KYC covers the IA’s responsibility, and clients often enter unsolicited orders. Other suggestions by the OSC in regards to permitting non-accredited access to private placements threaten to smother what should simply be a right of all individuals to participate in the advantageous terms of private placements.

Unofficial Corporate Finance Advisory/ Capital Raising

Apparently there is a plan to remove the right of companies to pay finders’ fees to non-registrants with regards to private placements. It would be appropriate to block individuals from dodging the requirement to be a registrant while at the same time essentially making the majority of their earnings from finders fees’ in numerous private placements, effectively operating as “underground promoters”.

However, many companies need help, and there just aren’t enough Dealer CF people to help them all, and some of the deals are too small to warrant their attention. In addition, there are often situations where a non-investment industry professional has a unique knowledge or expertise which allows them to better help a company, including raising capital from strategic places or groups. The concept of accredited investor exemption was that they were sophisticated enough to not need regulatory protection including with regards to commissions being paid.

Recommendations / Thoughts

Thought: Requiring Some Governance for Crowdfunding:

The parameters for the interim OM-form exemption order, which approximates crowdfunding, seem reasonable; however, I would make the comment that startup companies will be very hard pressed to handle a large pool of investors, both in terms of accountability and investor communication. In order to ensure that minute books and shareholder ledgers are accurate, perhaps you should require the participation of an independent who is a lawyer, CA, or corporate governance firm. Others have made similar comments regarding the challenges facing small companies.

Recommendation: Crowdfunding Rules should be applicable to Reporting Issuers:

Public Companies should be allowed to raise up to \$200,000 per annum, subject to the same \$2,000 per person maximum.

Recommendations: Expand access to private placements beyond accredited investor, but subject to certain conditions

1. Leave the current accredited investor exemption intact, especially for public companies, and continue to rely on continuous disclosure rather than an O/M type or other document,.
2. Permit non-accredited investors to participate in private placements, provided that the offering is handled by a registrant subject to KYC, and subject to an annual maximum of the greater of \$20,000 or 2% of the portfolio.
3. Do not require, as per the OSC suggestion, that the Dealer has “contractually agreed that it has a fiduciary duty . . . “ Existing rules, policies, KYC are sufficient, and any other additional requirements not currently in place should not be required.

Recommendation: Continue to allow finders’ fees to non-registrants in relation to true accredited investors subject to certain conditions, in those cases where the person is acting in a defined advisory role.

- a) A finders’ fee should only be paid in regards to accredited investors.
- b) If the accredited investor subscriber is not an investment professional or dedicated investment fund, nor is involved in the same industry that the Issuer is, then they must receive advice on the risk from a professional (lawyer, CA, or Registrant)
- c) The person receiving the finders’ fee should have an advisory relationship with the Issuer. This might relate to business operations, structuring strategic relationships or partnerships, or other high level advice.

Recommendation: Provide an Immediate Exemption based on the above recommendations to help Listed Companies with their Back to the Wall

Possible Consideration: Consider allowing immediate liquidity (no hold period) of the private placement if it is completed at a premium instead of a discount. Possibly this might be calculated as a combination of current market and the 30 day moving average, and at a discount to neither.

Thank you

S. Mark Francis
Business Consultant, CNSX Western Canada Advisor, and Investor in Small Caps