Bulletin

Spring Into Action

"April is a promise that May is bound to keep…," said author Hal Borland.

We once again keep our promise of bringing you recent regulatory developments, as we continue to make our way through this season of renewal and change.

In this bulletin

1. New Private Placement Forms

The Canadian Securities Administrators (CSA) recently released Staff Notice 45-308 (Revised) – *Guidance for Preparing and Filing Reports of Exempt Distribution under National Instrument 45-106 Prospectus Exemptions*. It provides guidance, answers to frequently asked questions and instructions for completing the new form of exempt distribution report. Recent amendments to National Instrument 45-106 – *Prospectus Exemptions* (NI 45-106) and its companion policy introduced a harmonized report of exempt distribution that will be required for distributions made for most issuers after June 30, 2016.

The new report will replace the current form of report for both investment fund issuers and non-investment fund issuers that distribute securities under certain prospectus exemptions. The new form requires additional disclosure about the issuer and its insiders, securities distributed, prospectus exemptions relied on and persons compensated for the distribution.

Investment fund issuers can rely on a transition period, such that they can choose to file either the current form of report, or the new report, for distributions that occur before January 1, 2017.

New information required for all issuers includes:

- A list of offering materials required to be filed or delivered to the specified regulators

In Brief

Yesterday, the CSA released its latest installment in a series of publications proposing enhancements to the registrant-client relationship. In addition to targeted reforms to National Instrument 31-103, this latest consultation paper proposes an **over-arching best interest standard** against which all other client obligations would be measured. While Ontario and New Brunswick's regulators appear fully on board, the British Columbia Securities Commission has come out in strong opposition to the best interest standard. Comments on the consultation paper will be accepted until late August.

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As we discussed in our February bulletin, issuers will be subject to **new exempt market filing requirements** beginning May 24, 2016, meant to streamline the filing process in provinces and territories that do not

- The relationship of the person compensated for the distribution to the issuer or investment fund manager
- Whether the compensated person facilitated the distribution through an internet based portal

Regarding information about purchasers, the form now requires the issuer to identify whether the purchaser is a registrant or an insider. Non-investment fund issuers will have to include information such as the number of employees of the issuer (within a range), date of formation, year end, and size of assets. Investment fund issuers will now need to disclose their date of formation, year end, net asset value (within a range) and net proceeds of the distribution by jurisdiction.

As a result of the new disclosure requirements, AUM Law would be happy to assist funds and other issuers to review their subscription agreements to help ensure that all the necessary information about the purchasers is obtained. Because we expect it will take longer to complete the private placement forms, (particularly for the first few distributions reported on the new form), the information gathering and compilation process should be started as soon as possible subsequent to a distribution (or close to the calendar year end for investment funds reporting on an annual basis).

currently utilize electronic filing portals (all except Ontario and BC). Certain regulatory filings relating to exempt market activities will now need to be filed through SEDAR, including, among others, Form 45-106F1 *Report of Exempt Distribution,* and an offering memorandum under the offering memorandum exemption.

Oh, and don't forget that the reports must be filed electronically. In BC, issuers must utilize the eServices system set up by the British Columbia Securities Commission, while in Ontario, filings will be made through the Ontario Securities Commission's (OSC) Electronic Filing Portal. In other jurisdictions, the report must be filed on SEDAR and will be made publicly available (other than the scheduled with the personal information relating to purchasers).

A few tips (and reminders) regarding the new report are as follows:

- The report is generally due 10 days after a distribution, however, investment fund issuers relying on certain prospectus exemptions (including the accredited investor exemption) have the option of filing the report on an annual basis. The deadline for filing such report is now within 30 days of the end of the calendar year.
- Issuers must pay the applicable fee in each jurisdiction in which the report is filed.
- All purchasers that participated in the distribution must be listed in the report.
- It is the issuer's responsibility to ensure that a valid prospectus exemption is available for distributions. An issuer may be required to report multiple prospectus exemptions in one report, in circumstances where the distribution occurred in more than one jurisdiction and the same prospectus exemption may not available in each of those jurisdictions.
- All compensation paid in connection with the distribution must be disclosed, including cash commissions, securities-based compensation, gifts, discounts or other compensation of a similar nature.

The report must be certified by a director or officer of the issuer or underwriter, or a director or officer of the investment fund manager if authorized to do so by the fund.

Please contact a member of our Investment Funds Group or our Regulatory Compliance Group.

2. Next Steps on Implementation of Plan to Enhance Regulation of the Fixed Income Market

In September 2015, the CSA announced a plan to enhance fixed income regulation in Canada with the aim of improving market integrity, facilitating more informed decision making among all market participants, and evaluating whether access to the fixed income market is fair and equitable for all investors. The CSA and the Investment Industry Regulatory Organization of Canada (IIROC) are planning to review fixed income trading activity, as well as the appropriateness of the initial dissemination delay (T+2), and the volume caps to determine whether they continue to be appropriate. CSA staff also plan to review dealers' practices regarding new issue allocations, in order to determine if regulatory intervention is necessary in light of concerns from industry participants about their ability to participate in debt

offerings. CSA staff have identified the following benefits of moving forward with implementation of the proposed fixed income regulation:

- Facilitating the public availability of web-accessible data, free of charge, that is meaningful and relevant for the different types of investors and market participants and enables them to make more informed decisions.
- Increasing transparency in a way that does not negatively impact market liquidity.

The CSA found no clear consensus from the commenters on various aspects of the proposal to increase corporate debt transparency. However, CSA staff remains of the view that the transparency proposal constitutes a balanced approach to increase transparency while mitigating any potential related negative impacts. Provided the necessary approvals are obtained, IIROC will disseminate post-trade information for corporate debt trades as follows:

- Before the end of 2016, post-trade information for all trades in Designated Debt Securities and for retail trades in all other corporate debt securities reporting to IIROC, on a T+2 basis and subject to the existing volume caps described above.
- In 2017, post-trade information for all trades in all corporate debt securities reporting to IIROC, on a T+2 basis, subject to volume gaps.

The CSA and IIROC will review fixed income trading activity as well as the appropriateness of any dissemination delay, and volume caps over time, with a view to decreasing dissemination delay from T+2 where appropriate (all subject to public consultation).

Please contact a member of our Regulatory Compliance Group if you would like to discuss this initiative.

3. Offering Memorandum Exemption Raises Questions?

The offering memorandum prospectus exemption (OM exemption) came into effect on January 13, 2016 with much ballyhooed promise of facilitating capital raising by allowing issuers and dealers to solicit investments from a deeper pool of potential investors.

However, some users of the new exemption have voiced concerns about its utility. For example, tying a specific dollar amount to a particular “use of proceeds” over the course of a year has proven difficult and impractical, and now that the rubber has hit the road with this exemption some users are suggesting that a cash flow statement from audited financials may be a more practical approach to the current Form 45-106F16 - *Notice of Use of Proceeds*. Another concern relates to ambiguity surrounding the definition of a “structured finance product”. We understand the policy rationale for the exemption not being available for structured finance products, but believe that additional guidance on what is “in and out” of the definition is critical. The new exemption does not apply to offering of investment funds, the policy rationale for which is still unclear to us.

Please speak with us if you are planning to use the OM exemption.

4. CSA Request for Comments on Proposed Meeting Vote Reconciliation Protocols

The CSA has published a report on the proxy voting infrastructure that issues “Protocols“ for public comment aiming to address the (now historically well-documented) information and communication gaps in meeting vote reconciliation. These Protocols are intended to enhance accuracy, reliability and accountability of meeting vote reconciliation by:

- Delineating clear roles and responsibilities for CDS, intermediaries, Broadridge and the meeting tabulator at each stage of meeting vote reconciliation.
- Outlining the operational processes that each of these key entities should implement to fulfil their roles and responsibilities.

The Protocols contain CSA staff expectations on the roles and responsibilities of the key entities and guidance on the kinds of operational processes that they should complement to support accurate, reliable and accountable meeting vote reconciliation.

The Protocols are grouped into the following four divisions:

- Generating and sending accurate and complete vote entitlement information for each intermediary that will solicit voting instructions from beneficial owners and submit proxy votes.
- Setting up vote entitlement accounts (official vote entitlements) in a consistent manner.
- Sending accurate and complete proxy vote information and tabulating and recording proxy votes in a consistent manner.
- Informing beneficial owners of rejected/pro-rated votes.

Examples of the guidance contained in the Protocols include:

- Guidance on how the tabulator can match proxy votes to vote entitlement positions.
- Guidance on how parties should communicate with each other where proxy votes from an intermediary were rejected, uncounted or pro-rated to enable beneficial owners to know if proxy votes submitted in respect of their shares were not accepted at a meeting and the reason why.

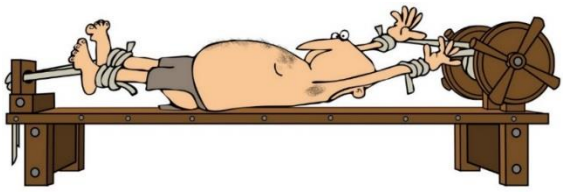
As next steps, the CSA intends to establish a technical committee to support the implementation of improvements to meeting vote reconciliation, hold more roundtables, publish the final protocols as a Staff Notice later this year, monitor voluntary implementation of the protocols for the 2017 proxy voting season and consider new rules and guidance.

As usual, we invite you to contact us if you would like to discuss this topic (but full disclosure – this is a very specialized field that very few people truly understand, and we certainly do not hold ourselves as experts in "proxy plumbing").

5. Are You on the RAQ?

We recently sent you a communication about the upcoming OSC Risk Assessment Questionnaire (RAQ). As you know, firms can expect to receive the questionnaire in late May, and will need to file it electronically by **June 29, 2016**. The OSC uses this risk ranking as one of its main tools when determining which firms to audit.

If you would like our assistance with completing your RAQ, speak to us as soon as possible so that we are able to work with you well in advance of the filing deadline. Contact your usual lawyer, or a member of our Regulatory Compliance Group. By the way, this exercise is not so painful, and at worst, you will be a little taller…



Frequently Asked Questions

We are pleased to introduce this new segment to our monthly bulletin, where we will share questions frequently asked to our lawyers.

> Why is it acceptable for an accredited investor certificate in a subscription agreement to deviate from the NI 45-106 definition of accredited investor that includes "except in Ontario" before various categories?

The definition of accredited investor in NI 45-106 includes the words "except in Ontario" before several categories. For example, one prong of the definition states "except in Ontario, a Canadian financial institution, or a Schedule III bank". This language is due to historic debates between OSC staff and the Ministry of Finance over the appropriate "geography" of certain key prospectus exemptions, with the Ministry of Finance preferring they be in the Act, not in a rule. Subscription agreements often deviate from that form of definition and delete the "except in Ontario" language. This is perfectly permissible and practical in our view as the subscription agreement still achieves the aim of identifying the nature of the investor.

> What is the procedure to be followed in managing unclaimed property?

Unclaimed property legislation generally requires holders of unclaimed property to make reasonable efforts to locate the owners of the unclaimed property so that it can be returned to them. Additional requirements, such as maintenance of a database or record and reporting to government bodies, may apply depending on the type of property (such as cash or securities) and the jurisdiction where the owner/account holder last resided.

> What materials are required by regulation to appear on a fund company's website?

- Fund Facts
- Annual and interim financial statements
- Annual and interim Management Reports of Fund Performance (MRFPs)
- Quarterly Portfolio Disclosure
- Proxy voting record
- News / Media releases disclosing any material changes to the affairs of the Fund
- Independent Review Committee (IRC) Annual Report (which is supposed to be "prominently displayed")

Many fund managers choose to put other material on the site, and that is actively encouraged by the regulators. For example, fund companies are supposed to make a toll-free telephone number available for people to request a free copy of the prospectus and AIF. But if it is not on the website, then presumably the fund company will not get very many calls to that line.

References to relevant legislation:

- NI 81-101: section 2.3.1(1-3) (FF), CP 81-101 sections 2.8, 4.1.3(3), 3.4(3) (toll-free telephone #).
- NI 81-106: section 5.1(2)(a-d) (statements, reports), 5.5, 6.2(2) (quarterly report), 10.4(1-2) (proxy voting record), 4.5
- NI 81-107: section 2(b)

AUM Law(yer) Spotlight

Pierre-Yves Châtillon – Senior Legal Counsel

Pierre-Yves heads up AUM Law's Montreal office. His extensive expertise has gained him accolades across the legal industry, including being named one of Canada's best mutual fund lawyers in multiple editions of *The Best Lawyers in Canada*, and ranked as a top recommended investment funds and asset management lawyer by the *Canadian Legal Lexpert Directory*.

Pierre's practice involves advising and monitoring public and private investment funds, hedge funds and venture capital funds. He also advises on compliance and registration matters and regularly dialogues with the Autorité des marchés financiers (AMF).

Pierre-Yves is a sought-out speaker at industry events. He will be presenting at this year's Portfolio Management Association of Canada's Montreal Compliance Forum on Wednesday, June 8.

Our Services

Personal Trading Reviews

Adhering to your firm's personal trading policy can be time consuming, and often raises issues of confidentiality when employee account statements are reviewed internally.

In hopes of easing the burden of this exercise, AUM Law offers its clients third-party personal trading review services.

Please contact Rose Haggarty, Senior Regulatory Compliance Legal Clerk, for more information!