

Summer Jazz Edition

July is jazz festival month and here at AUM Law, our toes are tapping as we put the finishing touches on this month's bulletin.



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1. OSC's Whistleblower Program Toots Its Own Horn on Its Second Anniversary

On June 29, the Ontario Securities Commission (OSC) celebrated the second anniversary of its Whistleblower Program (Program) by sharing some [highlights](#), including the following:

- The Program has generated 200 tips since its launch in July 2016.
- All tips are reviewed to determine the appropriate course of action. 19 tips (almost 10%) warranting further action were referred to the Enforcement Branch, of which 15 (7%) are associated with active investigations.
- Sixty-eight tips (35%) were or are in the process of being shared with another OSC branch or another regulator for further action.

In the release, the OSC also encouraged market participants to blow the whistle on themselves by discovering and self-reporting compliance issues under its [Credit for Cooperation Program](#).

At AUM Law, we work with clients to prevent compliance problems. But if a compliance issue arises, we can help you assess the situation and your options, develop a remediation plan, handle potential whistleblower matters, and engage with regulators to respond and resolve concerns. Please do not hesitate to [contact us](#) if you need assistance.



In Brief

It Can Happen to Anyone: CSA Discloses Unauthorized NRD Access

Data security breaches can affect anyone, including the regulators charged with overseeing regulated firms' cyber-security controls. On July 27, the Canadian Securities Administrators (CSA) announced that a former contractor (ex-contractor) for the Government of Nunavut had electronically accessed information in the National Registration Database (NRD). The ex-contractor accessed personal information for a single registrant and business information for select registrants at a single, registered firm. The CSA appears to have discovered the breach only after the ex-contractor disclosed their unauthorized access to CSA staff, at which time the CSA terminated the individual's access.

2. For Real, Now: Fine-Tuned Form 45-106F1 Finalized

On July 19, the Canadian Securities Administrators (CSA) [announced](#) that changes to Form 45-106F1 *Report of Exempt Distributions* (Form 45-106F1) are expected to come into effect on October 5, 2018. As we discussed [last year](#), the changes are intended primarily to address concerns that institutional investors are excluded from offerings by foreign dealers because of the headache-inducing nature of the information and certification requirements in Form 45-106F1.

The final amendments to Form 45-106F1 and related provisions in National Instrument 45-106 Prospectus Exemptions and Companion Policy 45-106CP Prospectus Exemptions (Final Amendments) are substantially similar to the changes proposed last year (2017 Proposals). We highlight below key differences between the existing and revised Form 45-106F1:

Item #	Revised Requirement	Additional Comments
3	<p>Co-issuers: NI 45-106 is amended to provide that an issuer or underwriter is not required to file a report for a distribution of a security if a report has been filed by another issuer or underwriter for the distribution of the same security.</p> <p>In such circumstances, Item 3 of Form 45-106F1 will require the filer to identify co-issuers of the security.</p>	<p>These changes were made in response to comments on the 2017 Proposals.</p> <p>There is a corresponding amendment to Section 6.2 of NI 45-106.</p>
5(a)	<p>Industry code: The filer must provide the issuer's North American Industry Classification Standard (NAICS) Code (6 digits only) that in the filer's <u>reasonable judgment most closely</u> corresponds to the issuer's primary business activity.</p>	<p>Commenters on the 2017 Proposals noted that it can be difficult to select the appropriate NAICS Code. The CSA added the underlined words to the Final Amendments to address that concern.</p>
5(g), 6(e)	<p>Exchange-listed securities: For non-investment fund issuers that have publicly listed securities, the filer must disclose the name of the exchange on which the issuer's equity securities primarily trade.</p>	<p>Existing Form 45-106F1 requires disclosure of <u>all</u> exchanges upon which the issuer's securities trade. The Final Amendments drop the requirement to disclose information about exchanges where an issuer's debt securities trade and also clarify that it is unnecessary to disclose the names of trading facilities other than exchanges, such as automated trading systems (ATSS).</p>
5(h)	<p>Size of issuer's assets: The filer must check a box corresponding to the size of the issuer's assets based on its most "recently available financial statements".</p>	<p>Commenters on the 2017 Proposals noted that they do not always have access to an issuer's financial statements for a recently completed year-end.</p> <p>The Final Amendments added the quoted text to address situations where an issuer has completed a</p>

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Although data threats from outsiders (e.g., criminals, state-sponsored attackers and hackers) often attract more media attention, data threats from insiders (e.g., employees, contractors and business partners) have the potential to be equally destructive. Registered firms are expected to have effective cyber-security policies, controls and cyber-incident response plans in place. [AUM Law](#) can assist you in developing, or evaluating your existing, cyber-security policies, controls and plans, provide training to your staff on regulators' expectations regarding cyber-security, and assist you in arranging for third-party vulnerability and security assessments.

OSC Finalizes Its Priorities for 2018-19

In [April](#), we discussed the proposed Statement of Priorities (SoP) issued by the Ontario Securities Commission (OSC) for 2018-19. On July 5, it published the final version of its SoP. As is often the case with regulatory notices, the most interesting section is the regulator's response to comments. For example:

- The OSC added a new priority to review the effectiveness of disclosure requirements for women on boards and executive positions and determine if further action is needed.
- There was strong support for the priority to strengthen the powers of and support for the Ombudsman for Banking Services and Investments (OBSI).
- Embedded commissions and other forms of compensation for mutual funds generated many comments, and the feedback was mixed. The

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		financial year but not made financial statements for that year available yet.
9	Information needed to rely on Item 9 exemption: Item 9 calls for disclosure about directors, executive officers and promoters of an issuer, unless the issuer fits into one of five prescribed categories.	Revised Item 9 clarifies that the filer does not have to complete the analysis for each of the prescribed categories that might apply to the issuer when relying upon the exemption. It is sufficient to select one that applies.
10	Certification by Agents: Agents, including law firms, can certify the prescribed information on their clients' behalf.	
10	Due diligence qualifier: The filer or their agent can certify based on their knowledge, having exercised reasonable diligence, that the information provided is true and, to the extent required, complete.	
10	An individual completing Form 45-106F1 for an organization certifies "on behalf of" of the organization.	The new language clarifies that the individual is not certifying the information in a personal capacity.
Sched 1	The filer no longer has to select the applicable paragraph under Schedule 1 under the definition of "accredited investor" when distributing securities to non-individual permitted clients (NIPCs)	

Please [contact us](#) if you would like assistance with filing Form 45-106F1 or to discuss the Final Amendments.

3. CSA Stresses Connections over Quantities in Its 2017/18 Enforcement Report

On July 10, the Canadian Securities Administrators (CSA) published their annual [report](#) on enforcement activities (Enforcement Report). Perhaps in response to journalists' too-tweetable critiques of certain enforcement statistics, the CSA chose this year to downplay numbers and instead highlighted the theme of connections. In particular, the Enforcement Report focuses on:

- Connecting to the digital economy (*i.e.*, the CSA's evolving response to new challenges)
- How regulators are using technology to share information and for securities enforcement
- Collaboration within Canada and across national borders

The Enforcement Report does include some numbers. Of particular interest to registrants, the CSA reported the following for calendar year 2017 (data for 2015-2016 are from prior years' reports) for the sub-category of "misconduct by registrants":

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OSC "remains committed to achieving a resolution to the use of embedded commissions and compensation arrangements that will better align the interests of registrants with those investors." It also indicated, however, that its policy response will take into account potential adverse consequences for fund industry participants and investors if these arrangements are discontinued.

• OSC Publishes Behavioural Insights Reports Relevant to Investment Industry

Earlier this month, the Ontario Securities Commission published two research reports, [Getting Started: Human-Centred Solutions to Engage Ontario Millennials in Investing](#) (Millenials Report) and [Encouraging Retirement Planning through Behavioural Insights](#) (Retirement Report). The studies aren't ground-breaking, but they may nevertheless be useful to the Canadian investment industry because they discuss behaviorally informed ways that financial institutions, regulators, governments and other stakeholders can facilitate informed investing and retirement planning. The OSC has also indicated that the report findings will influence its policy-making. AUM Law will monitor developments that may flow from studies like these and keep you informed of potential changes that may affect your business.

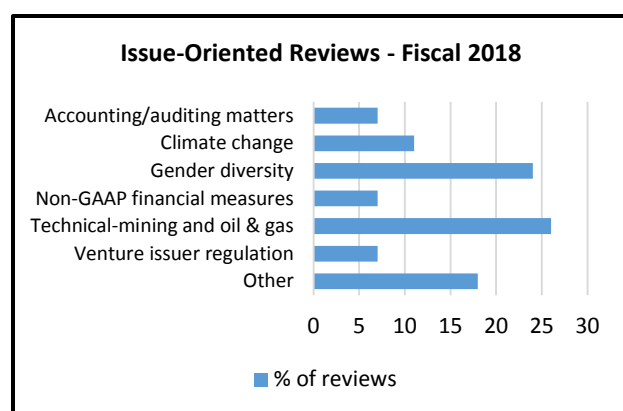
Enforcement Results	2017	2016	2015
Concluded cases	21	8	20
Proceedings commenced	16	4	15
Penalties	\$6,807,786	\$103,854	\$2,485,394
Restitution, compensation and disgorgement	\$2,198,525	-	\$18,928,330

Note: The restitution, compensation and disgorgement figure for 2016 does not include the nearly 300 million that certain registrants agreed to return to investors pursuant to four no-contest settlements with the OSC.

4. Reporting Issuers Face the Music in CSA's CD Review Program Report

On July 19, the Canadian Securities Administrators (CSA) published their biennial [report](#) on their Continuous Disclosure Review Program (CD Review Program) for reporting issuers.

Issue-oriented reviews in fiscal 2018 related to the themes listed in the table at left. The "Other" category comprised emerging industries (including cryptocurrencies and cannabis), certification of disclosure, social media, news releases and public complaints):



This year's report highlighted deficiencies in the following areas:

- **Financial statements:** compliance with recognition, measurement and disclosure requirements in International Financial Reporting Standards (IFRS);
- **Management's Discussion and Analysis (MD&A):** non-GAAP financial measures, discussions of operations including disaggregation of investment portfolios, additional information on concentrated investments, liquidity, related party transactions, and forward-looking information; and
- **Other matters,** including: gender diversity

disclosure, climate change disclosure, executive compensation disclosure, and issues relating to social media disclosures.

News & Events

We are delighted to welcome **Christina Mackinnon** as Legal Counsel and **Rachel Palozzi** as Senior Law Clerk to AUM Law.

Christina is developing her practice focused on investment funds, regulatory compliance, and corporate finance. Before joining AUM Law, she worked for Fidelity Investments Canada, where gained experience on a range of matters relating to retail and institutional investment funds including exchange-traded funds (ETFs). She also worked for the Ontario Securities Commission (OSC) as a summer law student in its Investment Funds and Structured Products Branch. She graduated from the University of Windsor Law School in 2017, where she conducted independent research on blockchain technology and volunteered with Founders Canada to provide legal assistance to tech start-ups.

Rachel has over twenty years' experience handling registration and compliance matters, including nearly seven years as a registration officer in the Compliance and Registrant Regulation Branch at the OSC and over thirteen years as a compliance officer and inspector for the Travel Industry Council of Ontario.

AUM Law primarily serves the asset management sector, with specific expertise in the regulatory and investment fund space. We strive to provide the most practical, forward-thinking advice and services, using a business model geared to efficiency, responsiveness and client service excellence. We are pleased to send you this summary of recent developments that may affect your business.



This bulletin is an overview only and it does not constitute legal advice. It is not intended to be a complete statement of the law or an opinion on any matter. No one should act upon the information in this bulletin without a thorough examination of the law as applied to the facts of a specific situation.