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A New Prospectus Exemption Intended for Smaller Issuers – The "Listed Issuer Financing Exemption"

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Introduction

On September 8, 2022, the Canadian Securities Administrators ("**CSA**") announced that they have approved a new prospectus exemption under National Instrument 45-106 *Prospectus Exemptions* for issuers listed on Canadian stock exchanges (the "**Listed Issuer Financing Exemption**").

For background, while the short form prospectus regime was designed to facilitate efficient capital raising for reporting issuers, the CSA was informed by stakeholders that the time and cost for preparing a short form prospectus is an impediment to capital raising, especially for smaller issuers. Accordingly, the substance and purpose of the Listed Issuer Financing Exemption is to provide a more efficient method for conducting smaller capital raises, particularly for junior issuers, by reducing issuers' regulatory burden and costs.

The Listed Issuer Financing Exemption relies on the issuer's continuous disclosure record, as supplemented with a simplified offering document that uses plain language and is in a question-and-answer format. Importantly, listed equity securities distributed by issuers to the public under the exemption will not be subject to a hold period and will be freely tradeable upon issuance. Also, an underwriter would not be required to be involved in the distribution.

Assuming all necessary Ministerial approvals are obtained, the Listed Issuer Financing Exemption will become effective on November 21, 2022.

Qualification Criteria for the Exemption

Generally, to qualify for the Listed Issuer Financing Exemption, an issuer must:

(a) be a reporting issuer and have been a reporting issuer in at least one Canadian jurisdiction for the 12 months before the date the issuer files the news release announcing the distribution;

(b) have listed equity securities on a Canadian stock exchange recognized by a securities regulatory authority in Canada;

(c) have active business operations and its principal asset must not be: (i) cash (or an equivalent); or (ii) its exchange listing (e.g., capital pool company or special purpose acquisition company) and the issuer cannot have completed a restructuring transaction with a person or company that did not have active business operations in the 12 months prior to announcing the distribution;

(d) not be an investment fund;

(e) have filed all periodic and timely disclosure documents required to be filed under applicable Canadian securities laws; and

(f) reasonably expect, at the time of the distribution, that it will have available funds to meet its business objectives and liquidity requirements for a period of 12 months following the distribution.

While there is no strict requirement to have a minimum offering amount under the Listed Issuer Financing Exemption, the issuer must set a minimum offering amount, such that, the issuer will have sufficient funds to meet its business objectives and liquidity requirements for a 12-month period following completion of the distribution. If such minimum amount cannot be set, the issuer cannot rely on the exemption to close the offering and disclosure to this effect must be made on the cover page of the offering document.

Finally, reporting issuers need not have a current annual information form nor have filed any notice of intention to be short from eligible, in order to have recourse to the Listed Issuer Financing Exemption.

Limitations for Using the Exemption

The Listed Issuer Financing Exemption will only be available for offerings that satisfy all of the following:

(i) the total dollar amount of the distribution will not exceed the greater of $5 million or 10% of the issuer's market capitalization, up to a maximum of $10 million in any 12-month period;

(ii) the distribution, combined with all other distributions made under the Listed Issuer Financing Exemption during the previous 12 months, will not result in an increase of more than 50% in the issuer's outstanding listed equity securities as of the date that is 12 months before the date of the news release;

(iii) the security being distributed is a listed equity security or a unit comprising of a listed equity security and a warrant convertible into a listed equity security; and

(iv) the proceeds of funds raised under the Listed Issuer Financing Exemption will not be used for a significant acquisition (as defined in NI 51-102 *Continuous Disclosure Obligations* at Part 8), a restructuring transaction or any other transaction that requires approval of any security holder.

Other Requirements

Before soliciting offers to purchase under the Listed Issuer Financing Exemption, issuers must:

- Issue and file a news release announcing the offering, with prescribed language; and
- Issue and file a completed Form 45-106F19 *Listed Issuer Financing Document* ("**Form 45-106F19**") which functions as the offering document. It includes information relating to: (i) the securities offered; (ii) the conditions of the offering; (iii) a summary description of the issuer's business; (iv) the use of the available funds after the offering; (v) involvement of dealers or finders and their fees (if applicable); and (vi) a description of statutory rights available to purchasers. Form 45-106F19 also includes certifications that it and the 12-month continuous disclosure record contain no misrepresentations.

Issuers must also ensure that the offering closes within 45 days of the news release and file Form 45-106F1 *Report of Exempt Distribution* (including a completed Schedule 1 with purchaser information) in every jurisdiction where the distribution has been made within 10 days of the distribution.

Issuer Liability

If the offering document contains a misrepresentation, purchasers of securities issued pursuant to the Listed Issuer Financing Exemption will have a right to rescind their purchase of securities (for a period of 180 days following the distribution) or a right to damages against the issuer, and in some jurisdictions against other persons signing the offering document (e.g., executives). Purchasers under the exemption would also have such rights of rescission or for damages, if any document filed by the issuer under Canadian securities legislation on or after the date which is the earlier of (i) the date that is 12 months prior to the date of the issuer's completed offering document and (ii) the date that the issuer's most recent audited annual financial statements were filed contains a misrepresentation or does not disclose all material facts. These rights are available to purchasers regardless of whether they relied on the misrepresentation. However, certain circumstances may limit such rights, including if the purchaser had knowledge of the misrepresentation when purchasing the securities.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek the professional advice of one of our lawyers in the Securities Practice Group.

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