

## **CSA CHANGES ACCREDITED INVESTOR, MINIMUM AMOUNT INVESTMENT AND SHORT-TERM DEBT PROSPECTUS EXEMPTIONS**

On February 19, 2015, the Canadian Securities Administrators (CSA) announced amendments to National Instrument 45-106 *Prospectus and Registration Exemptions (NI 45-106)* which will come into effect on May 5, 2015 and will now be known as *Prospectus Exemptions*. According to the CSA, "The amendments are intended to address investor protection concerns".

Included in these amendments is a new acknowledgement form (Form 45-106F9) for individual accredited investors. The new form includes the below **Warning!** and outlines certain risks involved each of which must be acknowledged and initialed by the purchaser. The new form also identifies the person who provided the information with respect to making the investment – the sales person. Completed forms must be kept by the issuer, or the sales person, for 8 years. The new form may be viewed at [https://www.bsc.bc.ca/Securities\\_Law/Forms/](https://www.bsc.bc.ca/Securities_Law/Forms/).

**WARNING!**  
This investment is risky.  
Don't invest unless you can afford to lose all the money  
you pay for this investment.

The amendments also provide expanded guidance on the steps that should be taken by an issuer to verify the status of purchasers and restricts the minimum amount investment exemption to distributions of non-individual purchasers. The amendments also address certain modifications to the short-term debt prospectus exemption including a new exemption for the distribution of short-term securitized products.

## **IIROC PUBLISHES GUIDE ON UNDERWRITING DUE DILIGENCE**

Recently, the Investment Industry Regulatory Organization of Canada ("IIROC") published Notice 14-0299 – Guidance Respecting Underwriting Due Diligence (the "Guidelines"). The Guidelines provide a clear framework of what IIROC expects to take place during the underwriting due diligence of a public offering. IIROC has stated that investigations should not only satisfy statutory requirements, but should focus on protecting investors, creating and maintaining confidence in capital markets and that the execution of the prospectus certificate should signify that the underwriter has participated in the due diligence process through appropriate personnel and internal processes.

An underwriter's set of policies and procedures should include reasonable steps that will ensure:

- that all prescribed information is included in the prospectus;
- investigates the information provided by the issuer for inclusion in the prospectus; and
- verifies key material facts to ensure that the prospectus contains full, true and plain disclosure of all material facts relating to the offering.

Procedures must reflect the context of the offering and therefore the level of due diligence should be tailored to each specific set of circumstances.

IIROC further recommends that prescriptive checklists are inadequate since such an approach would necessarily be superficial and often incomplete. However, each due diligence document required for review must be described in the written procedures and if one is absent a reason should be given. The Guidelines also provide for "Q&A" sessions, noting that these should be held at appropriate times during the offering process giving the lead underwriters, their counsel and all syndicate members the opportunity to ask detailed questions of the issuer's management, auditors and counsel.

Business Due Diligence and Legal Due Diligence are defined recommending that underwriters understand the difference and that procedures clearly delineate the respective roles of the underwriter and their counsel. In respect of business due diligence, the underwriter should interview the issuer's customers, suppliers and/or counterparties to material contracts, visit the head office of the issuer and principal operations, review all data and conduct in-depth discussion with management and experts

including retaining local agents to assess directors outside of Canada. Underwriters should also consider qualifications and expertise, independence and reputation of experts where information is relied upon and should obtain evidence of consent. Further requirements include the need for established procedures where investigations reveal "red flags" such as inconsistent disclosure, changes in business, reliance on individuals or relationships or any controversy surrounding the issuer or its directors or senior officers.

During the legal due diligence, counsel should be prepared to communicate the results of their investigation to the entire syndicate prior to a Q&A session. Each syndicate member should satisfy itself that the lead underwriter performed the kind of due diligence investigation that the syndicate member would have performed on its own behalf as lead underwriter.





## PREPARATION IS THE KEY TO DUE DILIGENCE

Of course due diligence is not limited to a prospectus offering. Many financial arrangements, acquisitions, dispositions, brokered private placements or joint ventures will require a due diligence review. It is incumbent upon every company to establish its readiness to enter in to an agreement.

While the level of due diligence is up to the party or parties with whom a company is negotiating, regardless, it will focus on the strength of a company's business, past present and future, regulatory compliance, financial reporting and corporate governance. Corporate governance plays a key role in any review and regulators have issued guidelines which, while not mandatory, include a requirement to "disclose and justify".

Organized and accessible record keeping is key to a successful, painless, due diligence review. Most likely any level of due diligence will involve a detailed minute book review. If a company has not already done so, an electronic minute book allows for quick and efficient access to the information and allows that information to be easily shared. Additionally, material contracts, all of the corporate governance documentation, financial statements, share capital information, geological reports, insurance policies and any other document relating to the company can be easily organized into a secure electronic filing system that is accessible by anyone from anywhere provided, of course, they have the necessary access.

The benefits mean the elimination of cumbersome paper files and binders that take up a lot of valuable space and offers 24/7 access to company documentation. It also eliminates the need to scan and email documents. Not only is it convenient and efficient but it ensures the right versions are uploaded and therefore eliminates any room for error that can occur from multiple emailed versions. Our board portal services will get you where your company needs to be in 2015 from initiation to set-up to maintenance. It's economical, secure and easy to use. If you would like more information on this valuable service, please email us at [info@wiklow.com](mailto:info@wiklow.com).

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