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Good news to report about Canadian trade reports – Private placement trade reporting becomes easier in October

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In June 2016, the Canadian Securities Administrators (CSA) introduced new rules for reporting sales of securities in Canada under private placement prospectus exemptions. These new rules introduced additional complexity to the reporting process, especially for foreign dealers extending U.S. and other non-Canadian securities offerings to institutional investors in Canada. While the CSA has already implemented a number of helpful changes to address unintended consequences of the June 2016 rules, further amendments to the rules and guidance (the Amendments), which will be even more helpful, are now scheduled to come into effect on October 5, 2018.

Here are the most significant and helpful changes to the Canadian private placement trade reporting process that will be made by the Amendments:

Achieving certification gratification

The problem: One of the major concerns about the June 2016 rules was the introduction of a requirement that an officer or director of the issuer, or the securities dealer acting as underwriter or initial purchaser, personally certify the contents of the report, including making a statement that he or she had read and understood the report, and that all of the information in the report was true. The trade report instructions expressly stated that the certification function could not be delegated to anyone other than an officer or director of the issuer or underwriter. Further, the form suggested that the individual was making the required certification in his or her personal capacity, and not on behalf of the issuer or dealer, and stated that it was an offence to make any misrepresentation in the report. This certification requirement caused serious concerns about the risk of personal liability to the individual directors and officers involved. In addition, the report also required officers of multinational securities dealers to take time out of their day to become personally involved with the trade reporting process, something that had previously been considered a more administrative function.

The solution: The Amendments will allow the certification function to be delegated to an agent, such as a law firm. Further, the certification form now clearly states that the person signing the certification is doing so on behalf of the issuer or securities dealer filing the report (and by implication, not in a personal capacity). The certification wording has been revised to state that the person signing the report has reviewed it and that, to his or her knowledge, having exercised reasonable diligence, the information provided is true and, to the extent required, complete. As a result of the Amendments, officers of U.S. and other non-Canadian securities dealers will no longer need to be personally involved in the Canadian private placement trade reporting process.

Ending the accreditation investigation

The problem: For sales of securities made in Canada under the "accredited investor" prospectus exemption, which is the one most commonly relied on for Canadian institutional private placement sales, the June 2016 rules required that the trade report identify the specific subparagraph of the "accredited investor" definition applicable to the purchaser. This requirement introduced the need for securities dealers acting as underwriters or initial purchasers, and their advisors, to develop systems to identify and keep track of which subparagraph of the accredited investor definition applied to which Canadian investor. Institutions purchasing securities from a particular dealer for the first time would typically have to complete an accredited investor questionnaire for the dealer, so that it could correctly report the basis on which the purchaser qualified for status as an accredited investor.

The solution: The Amendments will permit sales to institutional accredited investors that also qualify as "permitted clients" of an international dealer to be reported simply as sales to a permitted client, without the need to identify specifically which subparagraph of the accredited investor definition applies to that institutional purchaser. As U.S. and other non-Canadian dealers operating under the "international dealer" exemption from dealer registration requirements are only permitted to trade in securities with permitted clients, those international dealers will no longer have to maintain detailed records regarding how their Canadian institutional purchasers specifically qualify as accredited investors, and will need only follow the procedures they otherwise would follow to ensure that the purchaser does in fact qualify as both an accredited investor and permitted client.

Resolving the co-issuer conundrum

The problem: The June 2016 rules imposed requirements to disclose fairly specific details regarding the issuer of the security. If there were two or more co-issuers of the security, information about each issuer simply didn't fit on the form. This created a requirement to file multiple reports, one for each co-issuer, adding significant additional time and expense to the reporting process – including, in some provinces, the need to pay potentially significant duplicate filing fees.

The solution: For a security with more than one issuer, the Amendments will allow any of the co-issuers to file a single report, including only the information applicable to the issuer making the filing, and simply include the name of any other co-issuer in the report, without any additional information about it.

Ending industry code anxiety

The problem: The June 2016 rules required identifying the six-digit NAICS industry code applicable to the issuer of the securities. This was a problematic requirement as the characterization of an issuer into a particular industry code requires fairly specific knowledge of the issuer's business, as well as often requiring the application of subjective judgment. The difficulty of selecting the appropriate NAICS industry code was compounded by the fact that an officer or director of the issuer or underwriter had to certify that the NAICS code was correct, along with all of the other information in the report.

The solution: The Amendments will allow filers to provide the NAICS code that in their reasonable judgment most closely corresponds to the issuer's primary business activity.

Alleviating duplicative due diligence

The problem: The June 2016 rules required information about the issuer's directors, executive officers and promoters to be disclosed in the report unless an exemption from that requirement was available. Virtually all U.S. and other non-Canadian private placements to Canadian institutional investors were exempt from this requirement for one or more reasons. The June 2016 rules required the filer to check a box for every exemption that actually applied, rather than just picking one that clearly applied, meaning that it was necessary to determine whether or not each of the possible exemptions was available.

The solution: The Amendments will allow the filer to check any one of the boxes that is applicable to indicate that an exemption from this disclosure requirement is available, rather than requiring that all applicable boxes be checked, making it faster and easier to complete the report.

Shortening the listings list

The problem: The June 2016 rules required the report to identify the names of all securities exchanges on which the issuer's securities trade. For some issuers, especially those with debt securities listed on many exchanges around the world, producing the list of listings could be a daunting task.

The solution: The Amendments will only require identifying the name of the exchange on which the issuer's equity securities primarily trade, without having to name all the exchanges on which equity securities trade, or any exchanges on which the issuer's debt securities trade.

There are also a number of other changes introduced by the Amendments, including new securities designations for reporting sales of digital coins and tokens as well as other specific types of securities, and new requirements to identify whether or not an issuer's primary business or investments involve cryptoassets. The Amendments also codify guidance provided by the CSA since June 2016 regarding the reporting requirements, and make a number of other technical changes.

The Amendments coming into effect on October 5, 2018 to address a number of remaining difficulties with the Canadian private placement trade reporting requirements introduced in June 2016 will be a welcome improvement to the Canadian reporting process, and should be especially helpful for the U.S. and other foreign dealers who routinely extend securities offerings into Canada on a private placement basis.