New Canadian reporting requirements for Canadian private placement sales

Authors: Rob Lando, Lori Stein
Posted in Resources > Canadian Legislation & Regulations

NEW TRADE REPORT REQUIREMENTS

The Canadian Securities Administrators (CSA) recently announced amendments to the exempt distribution trade report requirements that are expected to come into force on June 30, 2016 (Amendments).

One benefit of the Amendments is that they will harmonize the trade reporting regime across Canada, as the reporting form (New Form) will replace the reporting form currently in use in all provinces and territories of Canada except British Columbia, as well as the alternate form currently prescribed for use only in the Province of British Columbia.

However, the New Form will be more difficult to complete than the current reporting forms, as the New Form requires additional information about the issuer and the purchasers that may be difficult to obtain. As a result, dealers and issuers will need to allocate more time and effort to the process of gathering the information required for reporting Canadian sales, as will the law firms that provide assistance with these filings. The additional requirements imposed by the New Form are expected to be particularly challenging for U.S. and other foreign dealers who routinely sell securities of non-Canadian issuers to institutional and other sophisticated investors in Canada using a Canadian “wrapper,” or in reliance on the Canadian wrapper exemptions that were introduced in September 2015.

ADDITIONAL INFORMATION REQUIRED ABOUT THE PURCHASER

Specific basis for qualifying as an accredited investor – When reporting sales in Canada under the commonly used “accredited investor” prospectus exemption, the New Form requires the issuer or dealer to identify specifically which of the 25 subparagraphs of the accredited investor definition applies to the purchaser. This level of detail has not historically been required to be reported and, consequently, it has not been necessary for issuers or dealers to
implement systems for gathering, recording and aggregating that information. Further, as cross-border sales into Canada are normally confirmed by a dealer through the issuance of a trade confirmation (rather than the execution of a subscription form or agreement), there is often no opportunity during the dealer’s sales process for a specific offering of securities to obtain written eligibility representations or certifications from investors. Canadian and non-Canadian dealers would typically obtain representations and warranties from their Canadian clients at the “onboarding” stage (when they first become clients) to support their status and eligibility to participate in Canadian private placements, and periodic updates thereafter. The “onboarding” process presents one opportunity for dealers to confirm, record and periodically update the specific subparagraph of accredited investor applicable to the client, but alternative approaches for gathering this information may develop as well, particularly for existing clients. Dealers wishing to sell securities to Canadian clients will need to ensure that they have procedures in place to obtain and maintain this additional information.

**Whether the purchaser is an insider or registrant** – As was previously the case for the trade report form used in British Columbia, the New Form requires disclosure of whether each purchaser is an insider of the issuer, except if the issuer is an investment fund. It also requires disclosure of whether or not each purchaser is a registrant with a Canadian securities regulatory authority. Dealers will have to consider whether they wish to obtain and rely upon representations or certifications from their clients regarding this information, or rely on publicly available information such as the national registration database for information regarding registration status, and SEDI (the Canadian System for Electronic Disclosure by Insiders) regarding insider status. Confirming this information with respect to each purchaser through searches of publicly available information will, of course, add time and cost to the preparation of each trade report. Alternatively, dealers may develop other procedures to obtain and update this information as part of the “onboarding” process, or otherwise.

**ADDITIONAL INFORMATION REQUIRED ABOUT THE ISSUER**

The New Form requires additional information about the issuer, making its completion more onerous. Some of the information may not be included in the offering document used for a particular offering. When dealers making sales into Canada assume responsibility for the preparation of the New Form, the following new, prescribed issuer information may require additional co-ordination between the dealer and the issuer, resulting in increased cost, time and complexity:

- the issuer’s date of incorporation or formation (or, if applicable, the date of its most recent amalgamation or merger)
- the number of employees (unless the issuer is an investment fund), to be disclosed through checking a box indicating the applicable range, rather than a specific number
- the dollar value of the issuer’s assets, also to be disclosed through checking a box indicating the applicable range
- the issuer’s North American Industry Classification Standard (NAICS) six-digit industry code. This requires using a website search tool maintained by Statistics Canada to select the most correct code for the issuer from a comprehensive list of industry codes covering 20 sectors, 102 sub-sectors, 323 industry groups, 711 industries and 922 Canadian industries
if the issuer is in the mining industry, an indication of whether it is in the exploration, development or production stage

where the issuer’s primary business is to invest its assets, an indication of whether it invests in mortgages, real estate, commercial/business debt, consumer debt or private companies

the first six digits of the issuer’s CUSIP number, and a list of all exchanges where the issuer’s securities trade (but only including those on which the issuer has applied for and received a listing)

unless the issuer is a foreign issuer distributing eligible foreign securities only to permitted clients in Canada (which will most often be the case for non-Canadian dealers making Canadian private placement sales), or the issuer is a reporting issuer in Canada, or certain other exemptions apply, it will be necessary to provide a list of the directors, executive officers, promoters and “control persons” (generally meaning holders of 20% or more of the outstanding voting securities) of the issuer, their jurisdiction of residence and their residential addresses. If control persons or promoters are not individuals, the residential addresses of such control person’s or promoter’s directors and executive officers must be provided

AN OFFICER OR DIRECTOR OF THE ISSUER OR THE DEALER MUST CERTIFY THE REPORT

Currently, many law firms that represent an issuer or dealer as its Canadian counsel will act as their client’s agent, or attorney-in-fact, to provide the required signatures and certifications in connection with the trade reports they prepare for their clients, based on information and authorization provided by their client or other parties involved in the offering. The New Form expressly requires that an officer or director of the dealer or issuer submitting the trade report must assume personal responsibility for providing the required certification, and this responsibility may not be delegated to an agent. Like all documents filed with securities regulatory authorities in Canada, it is an offence to make a misrepresentation in the trade report.

This new requirement may present significant challenges for dealers. It is unlikely that an officer or director of the issuer would be willing to provide a certification of Canadian sales information that is typically completely outside the knowledge of the issuer or any individual associated with the issuer. Dealers filing the New Form will have to identify an appropriate officer willing and able to take responsibility for certifying all of the information in the New Form relating to the distribution, including the required information about the issuer. The officer must certify that he or she has “read and understood” the report, and that “all of the information provided... is true.” While there is no express “best of knowledge” qualification in the wording of the certificate, we believe it is reasonable to expect that the certifying officer may appropriately rely on others to collect and verify the accuracy of the information, and should not be exposed to personal liability if the dealer’s policies and procedures are sufficient to provide a reasonable basis for the certifying officer to believe that the information is accurate.
SPECIAL CONSIDERATIONS FOR INVESTMENT FUNDS

Investment funds are generally subject to the same disclosure requirements as other issuers, except that they are not required to disclose: (i) the name and business or residential location of directors, executive officers and promoters; (ii) the primary industry; (iii) the number of their employees; or (iv) whether or not the purchaser is an insider.

However, in addition to the information required by other issuers, investment funds completing the New Form are also required to disclose:

- their date of formation
- their financial year end
- the net asset value (NAV) of the fund, by reference to ranges
- the date of the NAV calculation
- general information about the type of the fund (i.e., money market, equity, fixed income, balanced, alternatives or others)
- whether or not the fund is a “fund of funds” (i.e., a majority of assets are invested in other funds in ordinary market circumstances) or a UCITs fund
- the net proceeds to the fund raised from sales to investors in each province or territory of Canada for the period for which the report is filed, noting that this “net” calculation must be made on the basis of netting subscriptions and redemptions during the period.

As will be the case with private placements of securities of non-fund issuers described above, dealers that distribute third-party funds into Canada will likely have to adopt new processes for gathering this information, including additional communications with fund managers and review of the public disclosure records of funds offered publicly outside of Canada. These processes, as well as the transmission of relevant information to law firms which assist with the preparation of trade reports, will increase the costs and complexity of exempt trade reporting.

Currently, investment funds are only required to file trade reports on an annual basis, and the filing is due within 30 days of the end of the fund’s fiscal year. The New Form transitions the annual filing deadline to 30 days after the calendar year-end, meaning that all funds will be required to file their annual trade reports for a particular calendar year by January 30 of the following year. However, a transition period is being provided, and investment funds may use either the existing form or the New Form for all distributions up until January 1, 2017. For any sales made in Canada after that date, reporting on the New Form will be mandatory.

FILING PROCEDURES STILL NOT HARMONIZED

The benefit of full harmonization will still be somewhat illusory in the short term. Although all provinces and territories will require disclosure of the same information through the New Form, the filing procedures across Canada will still not be harmonized. The Province of Ontario and the Province of British Columbia will each require the New Form to be submitted through their own separate “electronic portals,” while other provinces and territories will require the form to be filed through the Canadian SEDAR system (although most non-Canadian
issuers will be eligible for an exemption from the SEDAR filing requirements and be able to make paper filings instead). Further, certain information required by the New Form must be submitted through separate, accompanying Excel spreadsheets. To report an offering made to purchasers in Ontario, Alberta and British Columbia, the filer will have to: (i) prepare and file the online version of the New Form in British Columbia, including submission of the required supplemental Excel spreadsheets; (ii) prepare and file the online version of the New Form in Ontario, including submission of the required supplemental Excel spreadsheets and any “offering memorandum” required to be delivered to the Ontario Securities Commission under the Ontario rules; and (iii) file a copy of the completed New Form on SEDAR – or on paper if eligible for a SEDAR filing exemption – to satisfy the Alberta filing requirement.

NEW PERSONAL INFORMATION LEGISLATION DISCLOSURE REQUIREMENTS FOR SALES TO INDIVIDUALS

Currently, the trade report form required for use in Ontario includes a certification by the filer that any individual purchasing securities (even if a “permitted client” under Canadian securities laws) has received prescribed disclosure regarding the fact that personal information about that individual is being collected by the Ontario Securities Commission under its legislative authority, and that the individual has consented to the indirect collection of that information by the issuer or underwriter filing the form. The prescribed disclosure included the title, business address and business telephone number of the public official in Ontario who can answer questions about this collection of personal information. The New Form requires a similar certification to be given with respect to individual purchasers in all provinces and territories in Canada. Issuers and dealers making sales to individuals in any province or territory will now have to ensure that the prescribed information, including the title, business address and business telephone number of the appropriate public official in the individual’s province, is communicated to the individual purchaser before the sale is made so that the required certification can be made.

LAST YEAR’S WRAPPER EXEMPTIONS

In September 2015, the CSA adopted a number of new exemptions to Canadian private placement requirements which, subject to limited exceptions, now allow private placements of non-Canadian securities to be made to institutional and other sophisticated investors in Canada without the need for a Canadian “wrapper” (or supplement) to the non-Canadian prospectus or offering memorandum being used in another country. A number of other Canadian requirements continued to apply, however, including the need in most cases to prepare and file a post-closing report of an exempt distribution (or trade report) with the applicable Canadian securities regulators. For more information about the “wrapper exemptions” introduced last September and the Canadian requirements that continue to apply, please see our Osler Update “Farewell, Canadian wrappers (and this time we might really mean it).”

While the wrapper exemptions were considered a step forward in simplifying the requirements for selling securities to institutional investors in Canada as part of a U.S. or global offering by a non-Canadian issuer, the New Form will add complexity to the process.
CONCLUSION

We understand that the Canadian securities regulators view the additional requirements of the New Form as necessary for them to obtain information about Canada’s exempt market and improve their ability to discharge their Canadian investor protection mandate through the review and analysis of that information. Hopefully, the value of this information will justify the added complexity and costs of the New Form, and the new reporting requirements will not be unduly disruptive of existing market practices, particularly for non-Canadian dealers selling foreign securities to Canadian institutional investors.