



THE MANITOBA  
SECURITIES  
COMMISSION

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### MSC NOTICE 2010-9

On September 28, 2009, National Instrument 31-103 Registration Requirements and Exemptions and amendments to related instruments including National Instrument 33-109 Registration Information came into force.

The Manitoba Securities Commission has ordered, effective March 27, 2010 pursuant to Blanket Order 31-505 - Registration Exemption for Trades in Connection with Certain Prospectus Exempt Distributions, that a person is exempt from the registration requirement (subject to meeting the conditions of the order) when trading in securities relying on one or more of the following prospectus exemptions contained in National Instrument 45-106 Prospectus and Registration Exemptions

- accredited investor (section 2.3)
- family, friends, and business associates (section 2.5)
- offering memorandum (section 2.9)
- minimum investment amount (section 2.10).

The purpose of the Guidance to Blanket Order 31-505 - Registration Exemption for Trades in Connection with Certain Prospectus-Exempt Distributions is to guide market participants in understanding when they may rely on Blanket Order 31-505, and providing information on the expectations of Commission Staff for market participants who rely on the terms of the order.

# THE MANITOBA SECURITIES COMMISSION

## MSC NOTICE 2010-9

### Guidance to Commission Order No. 6077

#### **Blanket Order 31-505 - *Registration Exemption for Trades in Connection with Certain Prospectus-Exempt Distributions***

February 26, 2010

The Commission has ordered that a person is exempt from the dealer registration requirement when trading in securities in connection with a distribution made in reliance on one or more of the following prospectus exemptions contained in National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106):

- accredited investor (section 2.3),
- family, friends, and business associates (section 2.5),
- offering memorandum (section 2.9), and
- minimum investment amount (section 2.10).

Commission Order No. 6077 grants a registration exemption only effective March 31, 2010. There must also be compliance with the terms of the prospectus exemptions in National Instrument 45-106 specified out.

The purpose of this Notice is to guide market participants in understanding when they may rely on the blanket registration exemption, including information on the conditions upon which the exemption is granted and the Commission's expectations of market participants who rely on the exemption.

A market participant that is in the business of trading in securities is required to register as a dealer. To decide whether you are in the business of trading in securities, see the discussion in Companion Policy 31-103 *Registration Requirements and Exemptions* on this point.

#### **Exemption not available to registered persons**

The exemption is not available to a person registered in any jurisdiction, including foreign jurisdictions. We feel this restriction is necessary to ensure a registrant has the same obligations to all its clients who purchase, or seek advice on, any type of security.

#### **No suitability advice**

A market participant relying on this exemption must not provide advice to the purchaser, and is restricted to providing factual information about the security and the purchase agreement. For example, a market participant may tell the purchaser about the features of the security, the risks of the investment, how the subscription agreement works, and other items of a general, factual nature.

That same market participant must not give suitability advice to the purchaser. This means the market participant cannot tell the purchaser that the securities are a good investment or that the purchaser should, for whatever reason, enter into the purchase agreement. The market participant must refrain from saying or doing anything that might

lead the purchaser to think that they should buy the security because it somehow meets their investment needs or desires. The market participant must refrain from answering any of the purchaser's questions that are related to the purchaser's

- investment needs and objectives,
- financial circumstances, or
- risk tolerance.

To prevent any misunderstanding, a market participant relying on this exemption should communicate to the purchaser that only a registered dealer or adviser that is permitted to trade in or advise on these securities can tell the purchaser whether the security is suitable for the purchaser. If a purchaser persists in asking questions that relate to suitability, the market participant should reiterate the point.

Market participants relying on this exemption should refrain from using marketing materials that suggest general suitability or suitability for a particular kind or demographic of purchaser. Marketing materials that are at odds with or contradict the information in the risk acknowledgement the purchaser reads and signs create genuine opportunities for confusion. We will take the effect of marketing materials into account when considering whether this condition for using the exemption has been met.

### **Risk acknowledgement**

The risk acknowledgement signed by the purchaser and obtained by the market participant must be in the form specified in the exemption order.

The disclosure in this risk acknowledgment describes risks that are particular to the purchase transaction and the absence of suitability advice, in addition to describing the general risks inherent in prospectus-exempt securities. The disclosure in this risk acknowledgement differs from, and is additional to, the disclosure in the risk acknowledgement required by NI 45-106. When the market participant trading the security to the purchaser is an agent of the issuer, the agent must ensure that the purchaser signs both the NI 45-106 risk acknowledgement, if applicable, and this risk acknowledgement. We note that this risk acknowledgement must be obtained for all trades under this exemption (accredited investor, friends, family, and business associates, and minimum investment amount), even if there are no risk acknowledgement requirements under the related NI 45-106 prospectus exemption.

It is the market participant's responsibility to understand the contents of the risk acknowledgement and to explain the risk acknowledgement in a clear, plain way to the purchaser. The purchaser should clearly understand, by the end of discussions with the market participant, that this purchase transaction offers fewer protections than are available when purchasing other kinds of securities.

### **No financial services (if applicable)**

If a market participant has provided financial services to the purchaser at any time, the market participant cannot rely on this exemption. When a purchaser has previously received financial services from a market participant, we think there is an unacceptably high risk that the purchaser will assume that the market participant is necessarily acting on behalf of the purchaser's best interest in any subsequent transactions. A previous financial relationship thereby induces reliance by the purchaser on the market participant

and it will be difficult to displace that expectation in order to comply with condition 6(c) of the exemption order.

Examples of financial services include, but are not limited to, acting in the role of:

- a financial planner who considers the tax, personal, or financial situation of a person and then provides that person with advice about how to make financial plans;
- an insurance agent who sells an insurance products to a person;
- a mortgage broker who provides mortgage services to a person.

Financial services provided by a market participant to a purchaser in connection with a trade in securities pursuant to this exemption (or the predecessor registration exemptions in NI 45-106) are specifically excepted from this prohibition and thus do not disqualify the market participant from relying on this exemption.

### **No hold or have access to purchaser's assets**

A market participant who holds or has access to a purchaser's assets cannot rely on this exemption. Indicia of holding or having access to a purchaser's assets include, but are not limited to:

- holding a purchaser's securities certificates or cash for any period of time;
- having authority (e.g. power of attorney) to withdraw funds or securities from a purchaser's account;
- accepting funds from a purchaser directly (e.g. a cheque made payable to the market participant) or accepting funds on the purchaser's behalf from a custodian;
- acting in the capacity of a trustee for a purchaser;
- having, in any capacity, legal ownership of, or access to, the purchaser's funds or securities.

For the purposes of this condition, we interpret the phrase "hold or have access" as not including the handling in transit of a purchaser's cheque made payable to a third party. Thus, for example, a market participant can normally handle a purchaser's cheque made payable to the issuer of the securities being traded pursuant to this exemption. This would not be the case, however, if the issuer and the market participant have the same officers in which case we would interpret the market participant as holding or having access to the purchaser's assets.

### **Reporting**

A market participant that relies on this exemption must file an information report with the Commission within 10 days of relying on this exemption. Where a market participant has previously filed an information report pursuant to this exemption and is subsequently relying on this exemption to trade in securities, the market participant is required to update any changes to that previously filed report, within 10 days of relying on this exemption.

This information report is in addition to the reporting requirements in section 6.1 of NI 45-106.

We will use the information collected for research and compliance purposes.

The information on the form can be filed electronically. Go to the Commission's Web site at [www.msc.gov.mb.ca](http://www.msc.gov.mb.ca).

This link will take you to the British Columbia Securities Commission's E-filing system. Follow the instructions for completing the information form electronically. The BCSC is accepting the filing of the information form on our behalf.

### **Recordkeeping**

To demonstrate compliance, market participants will need to keep records demonstrating that they met the conditions of this exemption when they sold a prospectus-exempt security. Evidence of the purchaser's risk acknowledgement should be kept for a reasonable period of time. In NI 45-106, the equivalent prospectus exemption risk acknowledgement condition requires that the risk acknowledgement be kept for 8 years.

The market participant should also retain evidence of communications between the market participant and the purchaser. This will serve the market participant well from a compliance standpoint and if a dispute ever arises between the market participant and the purchaser.