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MUDDLING UP THE MARKET: NEW EXEMPT-MARKET REGULATIONS MAY DO MORE HARM THAN GOOD TO THE INTEGRITY OF MARKETS†

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SUMMARY

From private debt and equity markets to crowd funding, exempt markets have been used to raise more money for Canadian enterprises in recent years than all public offerings put together. Vastly more: Between 2010 and 2012, exempt-market offerings raised four times as much capital as the initial and secondary public offerings during the same period. The precise reasons behind the immense popularity of exempt markets can only be guessed at; it may well be due to the desire, by both issuers and by investors, to avoid the regulatory costs associated with raising capital in public markets. We are left to speculate, however, because the Canadian exempt market remains relatively unstudied, despite its enormous role in funding capital investments in Canada.

The lack of information about exempt markets, however, is not stopping provincial regulators in Canada's largest markets from charging ahead with new proposals for rules that would govern exempt markets. Unfortunately, with so little information available about these markets, whatever the aim of the reforms in pursuing the goals of effective market regulation, they may end up being more harmful than helpful.

Ontario is proposing to broaden the category of investors eligible to participate in these markets under a new exemption. But the category will remain stricter than in many other markets and Ontario proposes to also put very low limits on how much each investor is allowed to put at risk. Quebec, Alberta and Saskatchewan are also proposing the same $30,000 limit for any given 12-month period. And Ontario will prohibit the sale of exempt-market securities by agents that are related to, or affiliated with, the registrant, even if measures are employed that have previously been accepted in managing and mitigating conflicts of interest. This will have a direct and damaging impact on exempt-market dealers, who are only allowed to sell exempt-market securities.

All of these proposals are intended to protect investors from the higher risks that are presumed of exempt markets. However, there is no evidence — given the paucity of information about them — that exempt markets necessarily pose a greater risk of fraud or poorer returns and losses than do heavily regulated public markets. And if risk is indeed higher in the exempt markets, one would expect these proposed regulations to assist high-quality firms from distinguishing themselves in the exempt market from low-quality firms. However, these regulations may actually have the opposite effect, making it harder for better-quality firms to signal their worthiness to investors.

Canadian productivity — which continues to lag relative to other developed economies — relies heavily on businesses being able to acquire capital for investing in new technologies. Canadian companies and investors appear to be voting with their feet for exempt markets in raising that capital, possibly discouraged from public markets by regulatory costs and inefficiencies. For policy-makers to layer additional regulation on top of exempt markets without fully understanding the impact that it will have, could well result in making Canadian markets, and Canada's economy, weaker, rather than stronger.

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INTRODUCTION

Most capital financing is presumed to be public offerings via prospectuses issued by stock-exchange-listed firms. However, in recent years, a significant portion of capital raised by public or private firms has come from private markets,[1] perhaps as a way of avoiding the regulatory costs associated with raising capital in public markets. From 2010 to 2012 close to $400 billion in both equity and debt (gross of redemptions) has been raised in exempt markets whereby securities are issued under different provincial regulations.[2] Yet the Canadian exempt market remains relatively unstudied, despite its enormous role in funding capital investments in Canada. Governments are looking to undertake regulatory reform of exempt markets, yet policy-makers have a paucity of information to ensure that policies appropriately balance different public policy objectives. In other words, regulators are shooting in the dark.

Public securities require the disclosure of detailed information at the time of issue and on an ongoing basis. On the other hand, exempt securities are issued with less information and are generally not subject to ongoing disclosure requirements, thereby reducing both set-up and ongoing costs. Exempt securities can be issued with the use of an offering memorandum based on certain requirements, and generally can be prepared with less information than a prospectus. Nonetheless, certain regulations apply to exempt markets. These rules include minimum investment requirements and asset or income qualifications for “accredited” or “eligible” investors, which vary across the provinces. A new set of regulations is also being developed with respect to “crowd funding,” which pools smaller investments made by investors through informal markets.

Large companies, including financial institutions, also access public markets through the use of exempt markets. Exempt markets also are used by small and medium-sized businesses, some of which also issue securities in public markets. The existing paucity of data makes it difficult to determine the type of firm or investor operating in exempt markets (though currently regulators are looking to improve data collection).

As noted by various analysts in recent years, many companies facing increased regulatory costs in the public market have gone private or have elected to stay private.[3] Smaller and medium-sized businesses, which account for 52 per cent of GDP in Canada,[4] are turning to the exempt market for cheaper sources of funding for capital expenditures. This raises important implications with respect to the role and regulation of the exempt market in providing stable growth capital for businesses in Canada.

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1 A In an earlier study based on the years 1993 to 2003, 4,592 private placements took place with total proceeds of $35.7 billion. Public offerings of 2,862 placements raised $129.1 billion. See C. Carpentier, F. L’Her and J.-M. Suret, “The Return on Private Investment in Public Equity” (CIRANO, 2010), Table 1.

2 Data provided by Vijay Jog with further analysis to be provided, including other exchanges.

3 In the United States, the number of firms listed on public exchanges has declined by 40 per cent between 2001 and 2010. See A. Gill and U. Walz, “Going Public – Going Private – The Case of VC-Backed Firms,” manuscript (Frankfurt: Goethe University, 2011).

4 Danny Leung, Luke Rispoli and Raymond Chan, “Small, Medium-sized, and Large Businesses in the Canadian Economy: Measuring Their Contribution to Gross Domestic Product from 2001 to 2008,” *Economic Analysis Research Papers* (Ottawa: Statistics Canada, 2012).

The Ontario Securities Commission (OSC) has recently proposed some amendments to the regulation of exempt markets. It is expanding the exempt market in Ontario by adopting an offering-memorandum regime similar to that of most other provinces, thereby allowing the sale of exempt-market securities to eligible investors in Ontario. However, Ontario is proposing to impose restrictions on that offering-memorandum exemption that have not been in place in other jurisdictions. In particular, the OSC is proposing for all exempt issuers a $30,000 per investor per year cap on the value of exempt securities that can be sold to the new class of eligible investors, a proposal also being considered by regulators of two other large markets, Quebec and Alberta (as well as regulators in Saskatchewan). As the cap makes it more difficult for larger, better-quality firms to obtain funding from investors, the Ontario proposal could impose significant economic costs for stronger firms issuing securities. As discussed below, the proposed regulation is the wrong regulatory approach to achieve the important objectives of financial regulation: market efficiency, financial stability and investor protection.

The aim of this paper is to lay out issues related to the efficiency and effectiveness of securities regulations pertaining to exempt markets in Canada. The objective is to describe the types of questions that need to be answered to regulate exempt securities. Specifically:

1. Outline in detail the existing state of exempt-market regulations.
2. Define the role of financial intermediation and capital markets in an economy and relate it to optimal regulation of exempt markets.
3. Raise critical issues in terms of information needed to analyze "best-in-class" regulations with respect to exempt markets. These include understanding the characteristics of demand and investors in the exempt markets, the economic impact of different regulatory restrictions on exempt markets, and alternative forms of providing investor protection.

Overall, it is concluded that it would be useful for regulators to develop a coherent set of policies that support market efficiency, financial market stability and investor protection. However, to do so, it is important that the appropriate regulatory framework be developed based on analysis and evidence to support this relatively understudied market. Relying on ad hoc regulatory measures could do more harm than good.

EXISTING REGULATIONS AND EXEMPT MARKETS

Canadian businesses raise capital from domestic and international public and private markets including households and financial intermediaries (such as banks, insurance companies and pension funds). Some parts of capital markets are more heavily regulated, such as the public markets, stock exchanges and financial institutions. Others are less regulated, such as the private debt and equity markets. With respect to funding of Canadian businesses in public and exempt markets, Table 1, which does not include all provincial statistics, provides recent data on securities placements. Even considering the limitations of this data, it is clear that exempt markets provide a substantial share of the funding for business expansion.

TABLE 1: RELATIVE SIZE OF EXEMPT MARKETS ($BILLION) (1)

	Initial Public Offerings (2)	Secondary Public Offerings	Exempt Markets AB,ON,NB (3)	Exempt Markets BC (3)
2010	6.8	24.4	96.1	19.6
2011	2.9	24.1	105.3	17.5
2012	2.2	34.2	118.6	20.3
2013	3.4	26.9	N/A	23.4
Total 2010–12	**12**	**83**	**320**	**57.4**
Share of Aggregate 2010–12	**2.5%**	**17.6%**	**67.7%**	**12.0%**

Notes:

(1) Data compiled by V. Jog from various sources. Exempt-market data missing for other provinces need to be compiled.

(2) Excludes General Motors, at $20 billion.

(3) Includes overnight funds, debt and equity.

Exempt markets are subject to a mix of provincial securities rules in Canada, even though the provinces have been attempting to harmonize legislation in recent years. Unlike public securities, which require the disclosure of detailed information at the time of issue and on a regular ongoing basis, exempt securities can be issued with minimal information and are generally not subject to ongoing disclosure requirements. In some cases, exempt securities can be issued with the use of an offering memorandum based on certain requirements as discussed below, though such offering memoranda can be prepared with less information than a prospectus. Although many regulatory differences in the exempt markets are found among the provinces, the most critical are those that apply to the definition of investors who can acquire exempt securities, limits on amounts to be purchased, and the type of disclosed information. As discussed above, the OSC recently proposed a new set of regulations affecting exempt markets in Ontario.[5] Regulation will become more harmonized as a result, but some important differences would remain.

The discussion below focuses on two particular forms of regulations affecting exempt markets: (i) limitations on issuing securities to investor types; and (ii) certain disclosure and registration requirements. The appendix summarizes the regulations including those related to the proposed Ontario model.

Investor limitations

Given that exempt securities are issued with fewer disclosure requirements than are required of public securities (and without prior screening or clearance by the applicable securities commissions), regulators have imposed rules to limit the sale of such securities to "sophisticated" investors, including insiders and family investors, who in principle are supposed to have a better understanding of the risks that are involved and are in a better position to withstand a loss.

[5] The Ontario Securities Commission, *Introduction of Proposed Prospectus Exemptions and Proposed Reports of Exempt Distribution in Ontario: Supplement to the OSC Bulletin* 37, 12 (Supp-3), March 20, 2014.

Currently, Ontario primarily limits exempt markets to "accredited investors" who must satisfy certain rules, such as an investor and spouse having at least $1 million in net financial assets, or $5 million in total net assets, or net income above $200,000 (or $300,000 with a spouse) over the previous two years with a reasonable expectation of exceeding that in the current year. Generally, few limitations are imposed on how much equity an investor may acquire or the size of offerings of exempt securities, and there is no requirement for the issuer to provide any disclosure to the accredited investor.

The proposed Ontario rules will broaden the category of investors to include "eligible investors" in a way that is similar, but not the same as, existing rules in all other provinces. The proposed Ontario rules would allow investors to invest in exempt securities, if they have:

(i) $400,000 in net assets or more, including their primary residence; or

(ii) $250,000 in net assets or more, excluding their primary residence; or

(iii) $75,000 in net income (or, with a spouse, $125,000 of net income) in the previous two years, with the expectation of having the same or larger net income in the year of the offering.

This is all provided that the issuer gives to the investor an offering memorandum (described below) prior to the investment.

Each "eligible investor" will also be restricted from purchasing, in aggregate from the market as a whole, no more than $30,000 in exempt securities over a rolling 12-month period under such an offering-memorandum exemption. Investors in Ontario who are not accredited investors or eligible investors will be restricted to acquiring, in aggregate from the market as a whole, not more than $10,000 in exempt securities over a rolling 12-month period under such an offering-memorandum exemption.

All of the other provinces currently apply similar rules for accredited investors but also enable a larger market of eligible investors to acquire exempt securities. For example, in Alberta, Quebec, Saskatchewan, Manitoba, Prince Edward Island and the territories, investors holding at least $400,000 in net assets or having at least $75,000 in net income, or $125,000 in net income together with a spouse, are eligible to acquire exempt securities provided the issuer gives them an offering memorandum. In British Columbia, New Brunswick, Nova Scotia, and Newfoundland and Labrador, there is no requirement for the investor to be an eligible investor before the issuer can sell securities to the person, as long as the issuer provides an offering memorandum to the investor. None of the provinces currently impose the $30,000 restriction described above; however, Quebec and Alberta are currently proposing to adopt this restriction.

Disclosure and registration requirements

When exempt securities are issued in Canada to accredited investors, there is no requirement for the issuer to provide the investor with any disclosure regarding the issuer or its business. When exempt securities are issued to eligible investors, the issuer provides to such investors an offering memorandum that is required to contain certain information with respect to the issuer and the offering, such as: the net proceeds from the offering; the proposed use of net proceeds; the nature of the business of the issuer; any working capital deficiency; names of directors, officers and principal security holders of the issuer: the issuer's long-term objectives; disclosure of related parties; a description of material risks; and audited financial statements of the issuer (see the appendix).

Generally, there is no requirement for the issuer to provide ongoing information to either accredited or eligible investors after they have acquired the issuer's securities, though, in some cases, other legislation (like business-corporations legislation) may require the issuer (if it is a corporation) to provide annual audited financial statements to the investors.

In connection with the proposed expansion by the OSC of the ability to sell exempt securities to eligible investors, the OSC proposes that issuers, after issuing such securities, will be required to provide certain information on an annual basis, such as: audited financial statements; changes to capital structure, nature of business, directors and management; and acquisition and disposition of assets.

The other provinces that currently allow the issuance of exempt securities to eligible investors do not currently require similar annual disclosure (except for financial statements, according to corporate law). However, Alberta, Saskatchewan, Quebec and New Brunswick are proposing to adopt some or all of the annual disclosure requirements that the OSC is proposing.

In addition to the above regulation, which focuses on placing requirements on issuers, Canadian securities regulation also requires that any person or entity that is in the business of selling securities of issuers be registered under one or more registration categories. Dealers (such as securities dealers, mutual fund dealers, exempt-market dealers, etc.) registered under these categories and the individually registered salespersons employed by those dealers are required to comply with a significant number of rules that govern specifics including: training; capital requirements; insurance and bonding requirements; implementation of robust compliance personnel and systems; record keeping; appropriate sales practices; complaints-handling systems; reporting to clients; and a process for determining whether a particular security is suitable for a particular client.

Dealers in a number of categories are able to sell exempt-market securities, and many do; however, exempt-market dealers (being one of the categories of registration), sometimes known as EMDs, can sell only exempt-market securities.

In some circumstances, registrants sell securities of issuers that are related to, or affiliated with, the registrant. It is recognized that conflicts of interest are inherent in such sales. These conflicts of interest are generally mitigated through compliance with rules and regulations that require one or more of: (i) detailed disclosure to the client of the nature of the conflict of interest and consent of the client; (ii) review and approval for sale of any such related-party securities by a committee of the registrant that is made up of persons independent of the registrant; or (iii) requiring that the related issuer can only sell such securities if an independent registrant also sells at least a set percentage of the offering.

Except in certain specific circumstances, generally no province prohibits outright the sale by a registrant of related-party product. However, Ontario is proposing to prohibit registrants from selling exempt-market securities of related-party issuers to residents of Ontario under the proposed Ontario offering-memorandum exemption referred to above. Currently, Ontario does not propose to allow such sales even if the registrant proposes to implement one or more of the three mitigating items referred to in the previous paragraph.

It is generally believed that the stricter related-party restriction will primarily impact EMDs, given that EMDs only sell exempt-market securities as noted above.

Overall, the intent of these securities regulations is:

(i) to protect investors from fraudulent behaviour, as in public markets, despite less disclosure being required;

(ii) when disclosure is required (as it is when exempt securities are sold to eligible investors), that the offering memorandum contain all material information with respect to the issuer and the exempt securities; and

(iii) ensure that the securities proposed to be acquired by investors are suitable for them (based on their particular circumstances, such as age, career, income and assets) or, if the investor proposes to acquire securities that are not suitable for him, he understands the material risks of acquiring such securities.

Certainly, risks can be significant for ill-informed investors, and exempt securities can have significantly less liquidity than securities issued by some public issuers. Yet, despite these risks, the exempt markets are a significant source of capital. This raises the question of whether businesses are accepting the higher financing costs due to any additional investor risk with less information disclosure, in exchange for faster speed of raising capital and lower regulatory costs than would be faced in the public markets. In other words, are businesses and investors voting with their feet to move to exempt markets? If so, this raises questions about the effectiveness of financial-market regulations with respect to market efficiency, financial stability and investor protection, to which I now turn.

THE ROLE OF FINANCIAL INTERMEDIATION AND CAPITAL MARKETS

Canadian governments are concerned with economic growth to generate higher incomes for families and more revenues to support public services. As many studies have shown, Canada has improved its economic performance in the past decade through better employment, investment and improved terms of trade with the rest of the world. However, Canada still lacks a strong record in productivity — the ability to produce goods and services from a given amount of labour and capital resources available to the economy.[6] Studies have shown that business acquisition of capital is one of the important determinants of productivity. Investment is critical to the innovation process since businesses adapt to new technologies by purchasing new vintages of capital goods.

The willingness of businesses to invest in productive assets depends on various factors, including access to capital and the cost of capital. In turn, capital costs depend on financial markets that match savers (those who provide funds to capital markets) with borrowers (those who need funds provided by savers). The role of financial intermediation is to reduce transaction, risk and information costs faced by investors funding the capital needs of businesses. Those who consume less than their available resources wish to invest in assets to

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[6] See, for example, E. Diewert and E. Yu, "New Estimates of Real Income and Multi-Productivity Growth for the Canadian Business Sector, 1961 to 2011," *International Productivity Monitor* 24 (2012): 27-48.

yield the highest possible returns. Those who have consumption expenditures in excess of resources wish to raise capital at the least cost. To the extent that financial markets reduce the cost of raising capital and raise the risk-adjusted rate of return accruing to investors, businesses will have a greater incentive to invest and investors will be more willing to invest in assets, thereby improving productivity and economic performance.

Financial regulation therefore plays an important role in economic performance. Governments typically have three objectives:

- **Market efficiency:** Regulations should ensure that financial markets are efficient, resulting in low financial intermediary costs with savings being put to their best economic use. Risks among investors should be pooled as broadly as possible and transaction and information costs minimized as much as possible. Competition among market players contributes to market efficiency by ensuring that financial intermediation costs are reduced for both investors and businesses. Thus, competitors should operate in markets on a level playing field.
- **Financial stability:** Regulations should support the stability of financial markets to reduce financial contagion arising from runs on markets when investors lose confidence.
- **Investor protection:** Regulations should protect investors from fraud or misrepresentation taken by capital-raising entities that cause higher counter-party risks. Transparency helps protect investors from surprises. Enforcement by regulators discourages fraud and misrepresentation.

Financial regulations that support financial stability and investor protection also contribute to market efficiency. However, a trade-off of these objectives will occur at times. For example, rules to eliminate all potential risks to ensure financial stability could undermine market efficiency by driving out certain forms of financing or products desired in a market. Alternatively, low capital requirements for financial firms to reduce financial costs could result in financial instability when the economy experiences a downturn. Similarly, financial regulations that reduce compliance costs for financial firms, but do not adequately protect investor interests, could reduce confidence and undermine efficiency as fraud or misrepresentation by bad players make it more difficult for good players to raise funds.

Adverse selection, moral hazard and optimal financial regulation

The intent of various securities-disclosure rules is to protect investor interests from fraud or misrepresentation and to overcome potential adverse-selection problems as mentioned above. Some elaboration of these issues is required here in order to understand the optimality of various rules.[7]

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[7] Some of this analysis below is based on my own unpublished theoretical work regarding adverse selection and taxation of market securities. For an early discussion of concepts, see J. Mintz, "Policy Perspectives on Capital Market Issues," in *Financing Growth in Canada*, ed. P. Halpern (Calgary, Alta.: University of Calgary Press, 1997), 729-52.

Capital markets contend with two forms of imperfect information that arise when lenders have less knowledge about the quality of investments or actions taken by borrowers that could result in lower returns on capital.

The first is *moral hazard* by which an “insider” (for example, management) can take actions of benefit to themselves but which increase the likelihood or size of a loss faced by “outsiders” (for example, investors) who are not able to control actions taken by the manager. Markets develop mechanisms to help reduce “moral hazard” problems. For example, contracts are developed that enable investors to monitor a company with agents (including choosing members of a corporate board). Investors might avoid purchasing products unless certain information is published and subject to review by advisers who can provide information to markets. Companies may create associations to develop quality standards to disqualify certain types of businesses from participating in a market to reduce fraud or misrepresentation.

The role of regulation is to protect investors from moral hazard. This is achieved in part by transparency and disclosure that enables investors to better assess company performance or obtain the advice needed to make such an assessment. However, even with current disclosure required in public markets, opportunities for fraud or misrepresentation arise (such as in the case of Bre-X, in which public disclosures contained misrepresentations of mining assets). Other regulations are therefore needed to reduce the potential for moral-hazard costs, including the assessment and enforcement of penalties for bad behaviour.

The other form of imperfect information in capital markets is “adverse selection.”[8] When buyers of securities are unable to judge quality, the price of securities sold in the market reflects average quality.[9] Sellers of poor-quality securities will take advantage of such pricing by issuing securities in markets at a better price reflecting average quality. The entry of poor-quality securities reduces the average price at which securities can be sold by high-quality firms. High-quality firms will choose to use internal financing rather than sell underpriced securities to the market, thereby leading to under-investment by good-quality firms compared to the absence of adverse selection. A classic market failure will arise whereby good-quality firms are driven out of the market by bad-quality firms.[10] Ultimately, investors will not be willing to hold any security for sale.

In the face of adverse selection, markets develop mechanisms to convey information to investors, such as firms adopting signals to convey their quality to investors. One approach is for owners to put “skin in the game” by taking a significant share of ownership — higher investment by the owner then correlates with quality. Firms might commit to a higher degree of securitized debt or preferred equity to signal commitment. Or alternatively, firms might signal their quality by listing shares in capital markets that require certain eligibility rules that make it costly for poor-quality firms to enter the market.

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[8] Adverse selection, whereby buyers do not know the quality of sellers, can cause a market not to exist. See the seminal article by G. Akerlof, “The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism,” *Quarterly Journal of Economics* 84, 3 (1970): 488-500.

[9] In the discussion below, quality is measured by the average rate of return: high-quality firms providing a superior risk-adjusted rate of return on investments compared to low-quality firms.

[10] Akerlof, “The Market.”

A key aspect of a successful signalling strategy in markets is that poor-quality firms bear a higher cost to obtain the signal than high-quality firms. When signal costs are inversely correlated with quality, poor-quality firms have difficulty mimicking high-quality firms, thereby helping overcome adverse-selection problems.[11] Thus, a higher commitment by inside investors to capital financing, greater use of debt or preferred equity, and greater disclosure could enable good-quality firms to be separated from bad-quality firms in markets.

Even with market mechanisms to overcome moral-hazard and adverse-selection problems, markets will still operate with some informational imperfections that impose economic costs compared to a world in which information is known with perfection. For example, firms that issue securities to markets will do so at a discounted price, since it will convey information that they do not have sufficient internal resources from "insiders" to fund their investments. Good-quality businesses may therefore under-invest in capital projects since the presence of poorer-quality firms makes it more difficult for them to raise capital in markets. Regulation should, therefore, enhance improved market performance by reducing informational costs.

So how can various regulations impact capital markets in the face of adverse selection? The key aspect of efficient regulatory policy is that such regulations should make it harder for poor-quality firms to mimic good-quality firms in security markets.[12] Regulations that reduce the costs of signals used in markets will undermine costly signalling and make it easier for bad-quality firms to enter the market.[13] Regulations should instead allow for high-quality firms to raise capital faster and with lower intermediation costs than can poor-quality firms.

Examples of regulations that make it harder for bad-quality firms to mimic good-quality firms include the following. Bankruptcy rules that give the lowest priority to equity owners in claims to assets make it costly for managers or inside owners to hold a stake of ownership in a bad-quality firm. Requirements to issue audited statements and other disclosed information increases the cost of signalling quality by poor-quality companies who face higher disclosure costs. Certain qualifications or requirements establishing reputation of registered dealers helps ensure greater confidence in markets.

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[11] Even with signalling devices, some inefficiency remains since good-quality firms lose profits in order to separate themselves from bad-quality firms.

[12] The parallel to taxation is that governments should tax, not subsidize, a signal in order to reduce the spillover caused by too many firms entering the market. For example, instead of subsidizing equity, government should tax new equity issues if the share of ownership by the entrepreneur is a signal of quality, to separate good-quality from bad-quality firms.

[13] Some analysis finds that adverse selection leads to over-investment, especially in high-return and risky projects. In this case, investments in such projects should be discouraged by public policy. See R. Boadway and M. Keen, "Financing and Taxing New Firms under Asymmetric Information," *FinanzArchiv/Public Finance Analysis* 62 (2006): 471-502. However, the imperfect sharing of risks arising from entrepreneurs unable to access capital suggests that investment may be too little, thereby suggesting policies that lead to better sharing of risks (L. H. Braido, C. E. Da Costa and B. Dahlby, "Adverse Selection and Risk Aversion in Capital Markets," *FinanzArchiv/Public Finance Analysis* 72 (2011): 471-502; 303-326).

Of course, some regulations could make the cost of acquiring a signal less expensive, thereby resulting in too many bad-quality firms entering a market. Easy credit conditions enable poor-quality firms to issue risky securities, thereby squeezing out good-quality firms from participating in the market. Bankruptcy forgiveness for small firms supported by governments encourages more poor-quality firms to acquire costly debt signals.[14] As suggested by several analyses,[15] incentives for equity financing can result in low economic returns since too many poor-quality firms enter the market.

Overall, regulation should enable security markets to reduce the cost of adverse selection with rules that make it more difficult for poor-quality firms to participate in markets.

Exempt markets and regulations

Exempt markets are a significant part of the financial system, competing with public markets, stock exchanges, financial intermediaries and international markets. A business chooses to issue equity and debt in exempt markets rather than seeking alternative financing since it is cheaper to do so. Indeed, many firms that participate in public markets still offer securities in exempt markets to reduce financing costs. However, to the extent that poor-quality firms enter exempt markets, it makes it more difficult for good-quality firms to issue securities on better terms. Therefore, optimal regulation in the exempt market should focus on ensuring that high-quality firms can separate themselves from the poor-quality firms in exempt markets. This point will be further discussed below.

IS THE EXISTING REGULATORY FRAMEWORK FOR EXEMPT MARKETS OPTIMAL?

Given the size of exempt markets in Canada, it is important that they operate efficiently. Businesses in private markets rely on exempt markets in part to reduce financing costs and the regulatory costs that apply to public markets. Obviously, moral-hazard and adverse-selection problems are not severe enough that investors would shun the market altogether even though some evidence from venture-capital markets, affected by tax incentives that encouraged too many bad-quality projects being funded, suggests that adverse-selection issues are relevant.[16]

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[14] Note that many tax policies could also undermine signalling in markets, including interest deductibility, which enables bad-quality firms to issue more debt, and tax-favoured treatment of equity (such as venture-capital tax breaks), which makes it easier for poor-quality firms to issue equity.

[15] Incentives for new equity financing lead to sub-normal returns such as in the case of labour-sponsored venture-capital corporation tax credits (D. Cumming and J. MacIntosh, "Crowding Out Private Equity: Canadian Evidence," *Journal of Business Venturing* 21 (2006): 569-609) and the Quebec Stock Savings Plans (C. Carpentier and J.-M. Suret, "The Quebec Stock Savings Plans: A Tax Expenditure Analysis," *Canadian Tax Journal* 54, 1 (2006): 142-166).

[16] Some evidence of poor returns in venture-capital markets suggests inferior returns due to adverse selection in addition to points raised above. Private non-angel investors earn poor rates of return (Allan Riding, "Business Angels and Love Money Investors: Segments of the Informal Market for Risk Capital," *Venture Capital: An International Journal of Entrepreneurial Finance* 10 (2008): 355-369). Investors in initial and seasoned public offerings of small businesses earn low rates of return and small businesses have low survival rates (C. Carpentier, J.-F. L'Her and J.-M. Suret, "Seasoned Equity Offerings by Small and Medium Sized Enterprises," *Small Business Economics* 38 (2012): 449-465). It is unclear, however, how well venture-capital markets describe the exempt-security market given the much larger size of the latter, which includes many institutional and large-firm securities.

However, this does not mean that an unregulated exempt market is optimal; some form of regulation is appropriate. Yet, little evidence is available as to the performance of exempt markets and how regulation affects these markets. After all, the current regulatory regime is focused on the type of "sophisticated" investor who can participate in exempt markets. It is far from clear that this is the appropriate approach to regulating the exempt market since it fails to distinguish amongst different types of firms and the role of exempt-market dealers in ensuring good disclosure.[17] In this section, several questions are raised related to optimal regulation of the market.

What do we know about exempt markets?

To understand the extent to which proposed rules for exempt markets are well designed, it is important to understand the market. As mentioned, the quality of data and analysis is insufficient for well-designed regulation. Such data, if it were available, would help regulators develop well-informed regulations affecting the market and, if made public, would improve public analysis of policy decisions. To understand the costs and benefits associated with regulation, it is critical to know the structure and performance of the market. Specifically, several issues are at play:[18]

- What is the size distribution of firms issuing securities in exempt markets?
- What sectors issue securities in exempt markets? What types of securities are issued (e.g., debt and equity)?
- Who invests in exempt securities? What fraction of "accredited investors" are individual and related investors versus institutional investors?
- What role does the exempt market play by sector in the Canadian economy?
- What is the cost of intermediation relative to public offerings?
- What is the use of capital — short-term (overnight) versus mid- to long-term investments? What is the rate of return and risk associated with exempt-market securities and how does this compare with offerings in public markets?

The last issue is perhaps the most critical. To understand whether there is a significant issue with investor protection, one would like to know if investors are subject to more fraud, poor returns or losses in exempt markets than in the more heavily regulated public market. If not, it raises issues regarding the effectiveness of regulations in public markets especially with respect to disclosure, and suggests that the optimal solution is not just the layering of more regulation upon exempt markets. If exempt markets are more subject to risk than public markets with perhaps higher default rates by firms, are there regulations that assist high-quality firms in exempt markets in separating themselves from low-quality firms?

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[17] Of course, few data are available to make any assessment of the current performance of the exempt-securities market. In a June 14, 2014 letter to the Alberta Securities Commission, Quebec's Autorité des marchés financiers, and the New Brunswick Financial and Consumer Services Commission, the Canadian Foundation for Advancement of Investor Rights (FAIR) discusses potential lack of compliance with current regulations, such as 41 per cent of exempt-market dealers being deficient in describing risks to clients. While arguing for restrictions on exempt markets to limit investments sold to investors, no assessment was made as to the appropriateness of this approach to regulation as opposed to other alternatives.

[18] The School of Public Policy is engaging research to better understand exempt markets and their performance.

What is the current impact of regulations in exempt markets

Existing regulations that limit the size of investment or type of investor (income or net-asset tests) are intended to ensure that only sophisticated investors can make large investments in exempt markets. These regulations raise some important questions in terms of their impact on capital markets.

The first area in question relates to the point that asset and income tests for investors to acquire exempt securities limit the availability of capital in the market, which imposes economic costs on markets by limiting access to capital.

- Raising the threshold levels, for example, could exclude some investors in the market, which would be a testable proposition.
- If the threshold were raised, would it improve economic performance (such as reducing default rates) if income or asset tests were tightened?
- Should firms have difficulty raising capital in the exempt market, would they then turn to public markets or shift to other markets instead to raise capital, thereby resulting in distortions with respect to business efficiency?

The second area in question is understanding the correlation between income and net-asset tests with investor "sophistication." Some investors with higher wealth or a professional occupation may be more sophisticated.[19] Accounts that are professionally managed are more likely to earn better returns than accounts of investors who do not seek advice.[20] Institutional investors may also perform better than individual investors. Would relatives and friends have more information and be able to hold greater amounts of securities in exempt markets? If a reputable registered dealer sells the product, would it be appropriate to reduce thresholds that define accredited investors?

The third area in question relates to how disclosure requirements play a role in improving investor yields arising from market participation. Prospectuses are complex and many individuals on their own may not be able to use the material; experts, on the other hand, help convey information to investors in plain language, and frequent reporting presumably improves information available to investors. Studies are somewhat mixed on the impact of frequent reports, with a recent paper suggesting that frequency may actually result in less accuracy and more variance in results.[21]

Overall, many studies are based primarily on public markets. To understand performance of exempt markets and the influence of regulation, specific analysis is needed as to how regulations might impact exempt-market performance.

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[19] The disposition behaviour reduces financial performance if investors sooner sell stocks that have appreciated in price or hold longer stocks with a price below purchase price. In one study, it was found that demographic and social factors, as well as investor wealth or professional occupation, resulted in lower returns. See R. Dahr and N. Zhu, "Up Close and Personal: Investor Sophistication and the Disposition Effect," *Management Science* 52, 5 (2006): 726-40.

[20] See, for example, Z. Shapira, "Patterns of Behavior of Professionally Managed and Independent Investors," *Journal of Banking and Finance* 8, 25 (2001): 1573-87.

[21] T. Pitre, "Effects of Increased Reporting Frequency on Nonprofessional Investors' Earnings Predictions," *Behavioral Research in Accounting* 24, 1 (2012): 91-107.

How is investor protection best served by regulations?

Investor protection from fraud or misrepresentation (moral hazard) is an important goal of regulation. Transparency, such as disclosure of financial information, is one form of regulation to assist investors, perhaps with professional advice, to improve their understanding of the investment they make. Other rules, including debt limitations or liquidity requirements, could also serve to protect investors from poor behaviour.

Exempt markets do require less disclosure compared to public markets. To protect investors, regulators have imposed various limitations to improve the functioning of the market. However, such tests focused on the investor do not typically account for the type of issuer. For example, companies, which are closely monitored by other participants in the markets including financial institutions, could face fewer investor-type restrictions. Better-operating companies might also be willing to bear certain costs related to information that would be important to investors, such as audited financial statements.

The key point is that regulations in exempt markets should vary not just according to the type of investor but also by characteristics of the issuer. Large firms bearing higher costs to provide certain forms of disclosure therefore separate from poor-performing smaller firms to signal their quality.

THE $30,000 CAP: IS THIS GOOD REGULATION?

This above theory is relevant to the annual $30,000 cap on eligible investor holdings in exempt securities issued under the offering-memorandum exemption, as currently proposed in Ontario, Alberta, Saskatchewan and Quebec. The point of the limitation is to minimize losses incurred by investors who are presumably less sophisticated than accredited investors, the latter having more income or wealth (we have little evidence that this regulatory approach is optimal in ensuring investor protection). If adopted by Quebec, Saskatchewan and Alberta, where the offering-memorandum exemption has been in existence for several years, the limitation would also limit the size of the exempt market in these provinces.

The problem with the $30,000 cap is that it does little, outside of imposing an arbitrary restriction, to counter misrepresentation or fraud. The regulatory system is more effective if regulators better enforce the “suitability requirement” for registrants selling securities to clients as stated in Section 13.3 of Canadian Securities Administrators (“CSA”) National Instrument 31-103:

“(1) A registrant must take reasonable steps to ensure that, before it makes a recommendation to or accepts an instruction from a client to buy or sell a security, or makes a purchase or sale of a security for a client’s managed account, the purchase or sale is suitable for the client.

(2) If a client instructs a registrant to buy, sell or hold a security and in the registrant’s reasonable opinion following the instruction would not be suitable for the client, the registrant must inform the client of the registrant’s opinion and must not buy or sell the security unless the client instructs the registrant to proceed nonetheless.”

Further, using the analysis provided above, it would seem that the $30,000 cap is precisely the wrong approach to regulation to improve both efficiency and investor protection. Companies seeking larger amounts of capital will incur greater costs in raising capital under the offering-memorandum exemption than will firms seeking smaller amounts of capital (for example, a company raising $30 million will need 1,000 investors while a company raising $3 million will only need 100 investors). Increasing the transaction costs for a better-quality company to operate in the market for larger capital amounts undermines market performance by making it harder for these firms to signal their quality to separate themselves from less able firms seeking smaller amounts in the market. Regulations should instead make it more difficult for lesser-quality firms to mimic high-quality firms. The $30,000 cap has the potential to do the opposite.

CONCLUSIONS

The largely unstudied exempt markets account for a major share of securities issues by Canadian businesses. This paper provides an overview of the regulatory framework, suggesting that much more effort is needed to study this important market. The exempt market plays an important economic role in Canadian capital markets — regulations should be optimal in their design to balance market efficiency, financial stability and investor protection as objectives.

Regulations vary by province with different standards used to regulate disclosure requirements and investor qualifications for holding exempt securities. However, these regulations are set in a vacuum of information, as we do not understand the characteristics of exempt markets, the economic impact of various restrictions and alternative forms of investor protection. Certainly, regulators should consider not just the characteristics of investors but also other factors, such as different levels of disclosure, in formulating regulatory policy.

APPENDIX: OFFERING-MEMORANDUM EXEMPTION MODEL AND PROVINCIAL REGULATIONS

The following table provides a general comparison of the proposed Ontario offering-memorandum exemption model to the existing offering-memorandum exemption models in other jurisdictions in Canada. The Alberta model is the existing model generally adopted by Alberta, Manitoba, Northwest Territories, Nunavut, Prince Edward Island, Quebec, Saskatchewan and Yukon. The British Columbia model is the existing model adopted by British Columbia, New Brunswick, Nova Scotia and Newfoundland and Labrador. The proposed Ontario model is the model that Ontario and New Brunswick propose to be adopted in their jurisdictions. Highlighted in the proposed Ontario model are those elements that other jurisdictions are also proposing to be adopted in their respective jurisdictions, either in whole, in part or in a modified way.

	ALBERTA MODEL	BRITISH COLUMBIA MODEL	PROPOSED ONTARIO MODEL
Qualification criteria	Reporting issuers and non-reporting issuers can use the exemption.	Same as Alberta model.	Same as Alberta model.
Types of securities	No restrictions on the types of securities distributed under the exemption.	Same as Alberta model.	“Specified derivatives” and “structured finance products” cannot be issued under the exemption. [Alberta, Quebec and Saskatchewan also propose to adopt this change.]
Offering parameters	No limit on: (a) the size of offerings; (b) the number of offerings an issuer may make (either in total or in a given period); or (c) the number of offerings that may be made by individuals involved with the issuer, such as directors, officers, control persons or promoters. No requirements with respect to the length of time an offering can remain open.	Same as Alberta model.	Same as Alberta model.
Registrants	No restrictions on whether a registrant that is connected or related to the issuer may participate in a distribution.	Same as Alberta model.	The issuer cannot be a “related issuer” of a registrant involved in a distribution under the exemption. “Related issuer” is a defined term but generally denotes a relationship of influence or control between two parties, similar to the concept of an “affiliate.”

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	ALBERTA MODEL	BRITISH COLUMBIA MODEL	PROPOSED ONTARIO MODEL
Investor qualifications: Accredited investor	An “accredited investor” includes: – an individual who, either alone or with a spouse, beneficially owns financial assets (see Appendix “A”) having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $1 million; – an individual whose net income before taxes exceeded $200,000 in each of the two most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the two most recent calendar years and who, in either case, reasonably expects to exceed that net income in the calendar year. Available if the purchaser pays at least $150,000 in cash at the time of the distribution, the distribution is of a security of a single issuer and the purchaser was not created to aggregate $150,000 from a number of investors in order to receive the exemption.	Same as Alberta model.	Same as Alberta model.
Investor qualifications: Investment limits and definition of “eligible investor”	The purchaser must purchase as principal and either be (a) an “eligible investor” or (b) if the purchaser is not an eligible investor, the acquisition cost to the purchaser cannot exceed $10,000. The existing definition of “eligible investor” includes a person whose: (i) net assets, alone or with a spouse, exceed $400,000; (ii) net income before taxes exceeded $75,000 in each of the two most recent calendar years and who reasonably expects to exceed that income level in the current calendar year; or (iii) whose net income before taxes, alone or with a spouse, exceeded $125,000 in each of the two most recent calendar years and who reasonably expects to exceed that income level in the current calendar year.	The purchaser must purchase as principal.	The purchaser must purchase as principal, and the acquisition cost of all securities acquired by a purchaser who is an individual in the last 12 months under this exemption cannot be more than: (a) $10,000 for purchasers who are not eligible investors; and (b) $30,000 for purchasers who are eligible investors (excluding accredited investors). [Alberta, Quebec and Saskatchewan also propose to adopt these changes but also propose to exempt family, friends and business associates from the $30,000 limit.] The proposed new definition of “eligible investor” for Ontario (and New Brunswick) now replaces the comparable provisions in the Alberta-model definition with the following: (i) a person, other than an individual, whose net assets exceed $400,000; (ii) an individual whose net assets, alone or with a spouse, exceed $250,000, excluding the value of the individual’s primary residence; (iii) an individual whose net income before taxes exceeded $75,000 in each of the two most recent calendar years and who reasonably expects to exceed that income level in the current calendar year; or (iv) an individual whose net income before taxes, alone or with a spouse, exceeded $125,000 in each of the two most recent calendar years and who reasonably expects to exceed that income level in the current calendar year.

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	ALBERTA MODEL	BRITISH COLUMBIA MODEL	PROPOSED ONTARIO MODEL
Risk-acknowledgement form	Required to be obtained from each purchaser at the same time or before the purchaser signs the agreement to purchase the security in Form 45-106F4. Issuer to retain copies of the risk-acknowledgement form for eight years.	Same as Alberta model.	Required to be obtained from each purchaser who is an individual (other than a "permitted client") at the same time or before the purchaser signs the agreement to purchase the security in the new Form 45-102F13. Issuer to retain copies of the risk-acknowledgement form for eight years. [Alberta proposes to also accept a Form 45-106F13 for purchasers who are individuals until Jan. 1, 2017 if the issuer concurrently conducted a distribution in Ontario or New Brunswick.] [Alberta, Quebec and Saskatchewan are also proposing not to require risk-acknowledgement forms from permitted clients.]
Point-of-sale disclosure	At the same time or before the purchaser signs the agreement to purchase the security the issuer must: (a) deliver the offering memorandum (in Form 45-106F2 for non-qualifying issuers); and (b) obtain a signed risk-acknowledgement form as described above.	Same as Alberta model.	Same as Alberta model.
Advertising and marketing materials	There are no specific restrictions on advertising related to offerings made under the exemption. Guidance in 45-106CP states as follows: "[The capital raising exemptions] in NI 45-106 do not prohibit the use of registrants, finders or advertising in any form (for example, internet, e-mail, direct mail, newspaper or magazine) to solicit purchasers under any of the exemptions." "Any solicitation activities that aim to identify a particular category of investors should clearly state the kind of investor being sought and the criteria that investors will be required to meet. Any print materials used to find accredited investors, for example, should clearly and prominently state that only accredited investors should respond to solicitation." "NI 45-106 does not restrict the use of advertising to solicit or find purchasers. However, issuers and selling security holders should review other securities legislation and securities directions for guidelines, limitations and prohibitions on advertising intended to promote interest in an issuer or its securities."	Same as Alberta model.	Issuers must incorporate, by reference, into the offering memorandum all marketing materials (a defined term that excludes a prescribed form of "OM standard term sheet") related to the distribution. Marketing materials prepared after the offering memorandum is delivered to a purchaser are deemed to be incorporated by reference into the offering memorandum. Marketing materials incorporated by reference into the offering memorandum must be filed with the OSC at the time the offering memorandum is filed (i.e., within 10 days after the distribution) or, if prepared after the filing of the offering memorandum, within 10 days of the marketing materials being disclosed to prospective purchasers. [Alberta, Quebec and Saskatchewan are also proposing to adopt these changes.]

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	ALBERTA MODEL	BRITISH COLUMBIA MODEL	PROPOSED ONTARIO MODEL
Statutory or contractual rights in the event of a misrepresentation	Investors have certain rights of action for damages or rescission in the event of a misrepresentation.	Same as Alberta model.	Same as Alberta model.
Rights of withdrawal	Investors have a two-business-day right of withdrawal.	Same as Alberta model.	Same as Alberta model.
Resale restrictions	Indefinite hold period (must be qualified by a prospectus or sold pursuant to a prospectus exemption).	Same as Alberta model.	Same as Alberta model.
Ongoing disclosure	No ongoing continuous-disclosure requirements under the exemption (corporate law still requires delivery of financial statements to shareholders).	Same as Alberta model.	Non-reporting issuers must file with the OSC and make available to their purchasers, within 120 days of their year-end, audited financial statements, along with a notice detailing the use of the aggregate gross proceeds raised under all distributions under the offering. The audited financial statements must be prepared in compliance with NI 51-102 and NI 52-107 (meaning they must be IFRS compliant unless an exception is available). As well, non-reporting issuers must make available for their purchasers a notice of any of the following events, within 10 days of the occurrence of the event: (a) a fundamental change in the nature, or a discontinuation, of the issuer's business; (b) a significant change to the issuer's capital structure; (c) a major reorganization, amalgamation or merger involving the issuer; (d) a takeover bid, issuer bid or insider bid involving the issuer; (e) a significant acquisition or disposition of assets, property or joint-venture interests; (f) changes to the issuer's board of directors or executive officers, including the departure of the issuer's chief executive officer, chief financial officer, chief operating officer, president or persons acting in similar capacities. [Alberta, Quebec and Saskatchewan are also proposing to adopt the requirement to provide audited statements.]
Reporting of distributions	Report of exempt distribution in Form 45-106F1 within 10 days of the distribution.	Report of exempt distribution in Form 45-106F6 within 10 days of the distribution.	Report of exempt distribution in new Form 45-106F11 within 10 days of the distribution.

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Jack M. Mintz was appointed the Palmer Chair in Public Policy at the University of Calgary in January 2008.

Widely published in the field of public economics, he was touted in a 2004 UK magazine publication as one of the world's most influential tax experts. He serves as an Associate Editor of *International Tax and Public Finance* and the *Canadian Tax Journal,* and is a research fellow of CESifo, Munich, Germany, and the Centre for Business Taxation Institute, Oxford University. He is a regular contributor to the National Post, and has frequently published articles in other print media.

Dr. Mintz presently serves on several boards including Imperial Oil Limited, Morneau Shepell, and as Chair of the Social Sciences and Humanities Research Council. He is also appointed by the Federal Minister of Finance to the Economic Advisory Council to advise on economic planning.

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