

Notice from the Autorité des marchés financiers

Exemption under section 2.4 of *Regulation 45-106 respecting Prospectus and Registration Exemptions* – Private issuer – Discretionary exemption

Under paragraph (1)(c), section 2.4 of *Regulation 45-106 respecting Prospectus and Registration Exemptions* (“Regulation 45-106”), the exemption in respect of a private issuer may be used if an issuer has distributed securities only to persons described in this section. However, in certain instances, it appears that some companies are unable to confirm that they have met the condition under section 2.4 although they relied on the exemption in respect of a “closed company” formerly available under section 3 of the *Securities Act* (R.S.Q. c. V-1.1).

The *Autorité des marchés financiers* (the “AMF”) wishes to remind market participants that, under section 263 of the Act, it may, on such conditions as it may determine, exempt a person or a group of persons from any or all of the requirements under Titles II to VI of the Act or the regulations where it considers the exemption not to be detrimental to the protection of investors. Where an issuer is unable to confirm that it has met the condition set out under paragraph (1)(c), section 2.4 of Regulation 45-106, the AMF may grant, on a case-by-case basis, a discretionary prospectus and registration exemption.

Such an exemption would be granted solely in exceptional circumstances, for example, in respect of a former “closed company” that is unable to trace the identity of past investors because of the lapse of time or is unable to determine whether they are part of the list of persons referred to in subsection 2.4(2). In such cases, a company may be unable to confirm that it has distributed securities only to persons described in section 2.4 and would therefore be deprived of the use of the private issuer exemption. The AMF could then consider granting a discretionary exemption, as outlined above, so that the company may benefit from an exemption that is equivalent to that stipulated in section 2.4 of Regulation 45-106. A company that is granted such an exemption would thereby benefit from all the advantages available through the exemption under section 2.4 and would be required to meet the same conditions with respect to the distribution of securities covered by the exemption application being filed and any subsequent distributions.

It should be noted that the exemption would not endorse irregular distributions, whether or not they were carried out before or after September 14, 2005 (date when Regulation 45-106 came into force), but would be granted in connection with the distribution contemporaneous with the exemption application and subsequent distributions based on facts submitted to the AMF. As well, this exemption would only apply in connection with distributions conducted in Québec and made to Québec-based investors.

The company would also be exempt from the payment of fees required on the value of the securities distributed in Québec, but would be required to pay fees in the amount of \$500 when filing an application for a discretionary exemption. Nor would it be required to file a report of exempt distribution.

In short, a company that is granted the discretionary exemption discussed in this Notice would be in the same situation as a company that benefits from the private issuer exemption set out in section 2.4 of Regulation 45-106, but would not be assigned the status of a private issuer for the purposes of the exemption in other Canadian jurisdictions.

Furthermore, without ruling on the legality of the practice whereby some companies in the past amended their constituting documents for a specific distribution only to amend them once again and return to their status as a “closed company,” the AMF would also consider the possibility of granting the proposed discretionary exemption to a company that has proceeded in this manner.

Finally, the discretionary exemption discussed in this Notice may also be available to an issuer that, since September 14, 2005, has used an exemption other than the exemption set out in section 2.4 of Regulation 45-106 because it believed it was unable to meet the condition under consideration. Depending on the alternative exemption used and the person to whom the securities were distributed, this issuer may no longer have access to the exemption set out in section 2.4 of Regulation 45-106. However, with a discretionary exemption, it may benefit from the advantages of the private issuer exemption in connection with the distribution contemporaneous with the exemption application and subsequent distributions.

We wish to further clarify the condition set out under paragraph (1)(c) of section 2.4, which reads as follows: “that has distributed securities only to persons described in this section.” The securities referred to in this paragraph are the securities of the issuer itself, and not any securities of another issuer held by the issuer.

Further information about the exemption discussed above is available from:

Sylvie Lalonde
Policy Adviser
Autorité des marchés financiers
(514) 395-0558, ext. 4398
sylvie.lalonde@lautorite.qc.ca