

FREQUENTLY ASKED QUESTIONS REGARDING REGULATION 45-106 RESPECTING PROSPECTUS AND REGISTRATION EXEMPTIONS - CANADIAN SECURITIES ADMINISTRATORS STAFF NOTICE 45-305

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Introduction

On September 14, 2005, Regulation 45-106 respecting Prospectus and Registration Exemptions (Regulation 45-106) became effective in every jurisdiction of Canada. We, staff of the Canadian Securities Administrators, are issuing this notice to provide interpretive guidance for certain provisions of Regulation 45-106.

Frequently asked questions on Regulation 45-106

Users of Regulation 45-106 should first consult Regulation 45-106 itself, its forms and its Policy Statement for answers to their questions about Regulation 45-106. To assist with questions regarding Regulation 45-106 we have compiled the following list of frequently asked questions (FAQs) which will be updated from time to time as new questions arise.

We have divided the FAQs into the following categories. Not all categories have entries at this time.

- A. Definitions and Interpretation
- B. Capital Raising Exemptions
- C. Transaction Exemptions
- D. Investment Fund Exemptions
- E. Employee, Executive Officer, Director and Consultant Exemptions
- F. Miscellaneous Prospectus and Registration Exemptions
- G. Registration Only Exemptions
- H. Control Block Distributions
- I. Offerings by TSX Venture Exchange Offering Document
- J. Reporting Requirements

A. Definitions and Interpretation

No entries.

B. Capital Raising Exemptions

Question 1: In section 2.2(1) of Regulation 45-106 [*Reinvestment plan*], do the words “acting for or on behalf of the issuer” mean this exemption is not available if the trustee, custodian or plan administrator of a plan acts on behalf of participants?

A: No. For the purpose of a dividend or distribution reinvestment plan established by an issuer for the benefit of its existing security holders (plan participants), the trustee, custodian or administrator (plan administrator) is typically engaged by the issuer and hence, in respect of the plan, acts “for or on behalf of the issuer”. The plan administrator therefore falls within the language contained in section 2.2(1) of Regulation 45-106. The fact that such a plan administrator may act on or in accordance with instructions of a plan participant, under the plan, does not preclude the administrator from relying on section 2.2 of Regulation 45-106.

Question 2: Why is section 2.2(1)(a) of Regulation 45-106 [*Reinvestment plan*] restricted to the purchase of securities that are “of the same class or series” as the securities to which the dividends or distributions are attributable?

A: This restriction has proven to be problematic for some existing dividend or distribution reinvestment plans under which securities are purchased that are of a different class or series as the securities to which the dividends or distributions are attributable. Every jurisdiction except Ontario has issued or will issue a blanket order providing an alternative exemption for reinvestment plans that does not contain this restriction. Ontario cannot issue a blanket order but will entertain applications for exemptive relief and will waive the fees for those applications. In addition, staff in Ontario plan to recommend amendments to Regulation 45-106 in the near term to remove this restriction in Ontario. This will allow existing reinvestment plans to continue to operate in all jurisdictions.

Question 3: Does section 2.2(1)(a) of Regulation 45-106 [*Reinvestment plan*] permit the trade of securities that are purchased with interest paid on a debenture?

A: Yes. The words “distributions out of earnings...or other sources” cover interest payable on debentures.

Question 4: Why is it that employees of an affiliate of a private issuer are not specifically enumerated in the categories set out in section 2.4(2) of Regulation 45-106 [*Private issuer*]?

A: Employees of an affiliate are not specifically enumerated in the categories set out in section 2.4(2) because they do not share the same close connection with the issuer as do the issuer’s own employees. They are excluded from the “50 persons” restriction set out in section 2.4(1)(b)(ii) in order not to disqualify a private issuer that has acquired an affiliate from benefiting from the exemption. More precisely, we would not want a private issuer to lose its status because employees of the affiliate own securities of the private issuer. In sum, sections 2.4(1)(b)(ii) and 2.4(2) serve different purposes: the first provision limits the scope of the exemption, whereas the second provision sets out the persons to whom an issuer may issue securities for the purposes of the exemption.

C. Transaction Exemptions

No entries.

D. Investment Fund Exemptions

No entries.

E. Employee, Executive Officer, Director and Consultant Exemptions

Question 1: Does a participant under a plan contemplated in section 2.2 of Regulation 45-106 [*Reinvestment plan*] or division 4 of Regulation 45-106 [*Employee, executive officer, director and consultant exemptions*] have a registration exemption that allows that participant to sell securities through the plan administrator?

A: Yes. If a participant under a plan contemplated in section 2.2 or division 4 of Regulation 45-106 requests a trustee, custodian or administrator acting for or on behalf of the issuer under a plan (Plan Agent) to sell securities

under the plan and the Plan Agent executes the sale through a registered dealer, then we consider the placing of the order to sell with a registered dealer by the plan participant and/or Plan Agent to be a trade by a person acting solely through an agent who is a registered dealer and therefore falls within the exemption set out in section 3.1 of Regulation 45-106.

Please note, however, that for dividend or distribution reinvestment plans, the activity of the Plan Agent in taking or receiving the order to sell from the plan participant is activity for which there is no registration exemption. We invite Plan Agents who engage in this activity to make application for discretionary relief from the registration requirement. For employee share plans, section 2.27 of Regulation 45-106 is available to allow the Plan Agent to receive the order.

For dividend or distribution reinvestment plans, we note that, prior to the adoption of Regulation 45-106, it is unclear whether there was an appropriate exemption for this trade.

F. Miscellaneous Prospectus and Registration Exemptions

No entries.

G. Registration Only Exemptions

Question 1: Does a participant under a plan contemplated in section 2.2 of Regulation 45-106 [*Reinvestment plan*] or division 4 of Regulation 45-106 [*Employee, executive officer, director and consultant exemptions*] have a registration exemption that allows that participant to sell securities through the plan administrator?

A: Yes. If a participant under a plan contemplated in section 2.2 or division 4 of Regulation 45-106 requests a trustee, custodian or administrator acting for or on behalf of the issuer under a plan (Plan Agent) to sell securities under the plan and the Plan Agent executes the sale through a registered dealer, then we consider the placing of the order to sell with a registered dealer by the plan participant and/or Plan Agent to be a trade by a person acting solely through an agent who is a registered dealer and therefore falls within the exemption set out in section 3.1 of Regulation 45-106.

Please note, however, that for dividend or distribution reinvestment plans, the activity of the Plan Agent in taking or receiving the order to sell from the plan participant is activity for which there is no registration exemption. We invite Plan Agents who engage in this activity to make application for discretionary relief from the registration requirement. For employee share plans, section 2.27 of Regulation 45-106 is available to allow the Plan Agent to receive the order.

For dividend or distribution reinvestment plans, we note that, prior to the adoption of Regulation 45-106, it is unclear whether there was an appropriate exemption for these trades.

H. Control Block Exemptions

No entries.

I. Offerings By TSX Venture Exchange Offering Document

No entries.

J. Reporting Requirements

Question 1: An issuer completes a private placement by way of a firm commitment underwriting, including a bought deal (collectively referred to as an underwritten private placement). The issuer sells the securities to an underwriter in reliance on the exemption in section 2.33 of Regulation 45-106 [*Acting as underwriter*]. The underwriter then sells the securities to accredited investors in reliance on the exemption in section 2.3 of Regulation 45-106 [*Accredited investor*].

Question 1(a): Is a report of exempt distribution required to be filed in respect of this transaction?

A: Yes. While this transaction is technically two trades, we view this transaction as a whole and as a result, consider it to be an indirect distribution to accredited investors by the issuer. A report of exempt distribution in Form 45-106F1 is required to be filed in accordance with section 6.1 of Regulation 45-106 [*Report of exempt distribution*].

Question 1(b): When should the Form 45-106F1 be filed?

A: The Form 45-106F1 should be filed on or before the 10th day after the distribution. We take the view that the distribution occurs on the day that the securities are sold to the accredited investors. Refer to item 5 and instruction 3 of Form 45-106F1 for direction regarding multiple distributions.

Question 1(c): Who should complete the Form 45-106F1?

A: An individual who can certify on behalf of the issuer should complete and sign the Form 45-106F1. This individual either may be employed by the issuer or employed by the underwriter.

We recognize that in certain underwritten private placements, there will be no individual employed by the issuer available to complete and sign the Form 45-106F1 and an individual employed by the underwriter may not be able to state that he or she is certifying the statements made in the report *on behalf of the issuer*. In this situation, we take the view that, for the purpose of the certificate of Form 45-106F1, the term “issuer” may include the underwriter distributing the securities to the accredited investors.

The views expressed in the answers to these questions (under J1) also apply to an underwritten private placement where the underwriter sells securities to purchasers under an exemption other than the accredited investor exemption in section 2.3 of Regulation 45-106.

Question 2: Item 7 of Form 45-106F1 states “Complete the following table for each Canadian and foreign jurisdiction where the purchasers of the securities reside”. Does this mean that issuers are required to report all distributions regardless of where they occurred and what exemption is being relied upon?

A: The reporting requirements in Regulation 45-106 do not change each jurisdiction’s policy on where a distribution occurs. To determine whether it needs to file a report, an issuer must first determine whether a distribution has occurred in the local jurisdiction. The issuer must then determine whether the exemption it is using is one that requires a report be filed.

The requirement to file the report in section 6.1 of Regulation 45-106 says “the issuer must file a report in the local jurisdiction in which the distribution takes place ... under the following exemptions”. We only want information

on the distributions that take place in our local jurisdiction and only when certain exemptions are being used.

A distribution may occur in more than one jurisdiction. For example, if an issuer located in the United States without a connection to any Canadian jurisdiction is distributing securities around the world, including to three purchasers in British Columbia and five purchasers in Alberta, that issuer is required to file a report in British Columbia detailing the distributions in British Columbia and a report in Alberta detailing the distributions in Alberta. Neither report is required to describe the distributions occurring elsewhere.

However, if the issuer has a connection to British Columbia, for example, its directors and management are resident in British Columbia, then the BCSC takes the view that the distributions around the world would also be occurring in British Columbia. The report filed in British Columbia would have to detail the distributions in British Columbia and elsewhere. The report filed in Alberta would only need to detail the distributions in Alberta.

Issuers also have the option of completing one report detailing all distributions in Canadian jurisdictions and filing that in each local jurisdiction where the report is required.

In both examples, the issuer would not be required to file a report if the issuer was using an exemption that does not require a report to be filed. If the issuer is relying on a variety of exemptions for the offering, some of which require a report while others do not, the issuer only has to include information in the report on those distributions using exemptions which require the report.

Question 3: If a distribution is occurring in multiple Canadian jurisdictions, does the issuer have to file one report or multiple reports?

A: It is up to the issuer. The issuer can choose to complete one report detailing all distributions in Canadian jurisdictions and file that report in each local jurisdiction where the report is required. Or the issuer can complete and file separate forms in each local jurisdiction.

Question 4: What are the required forms in BC?

A: In British Columbia, the executive director prescribes required forms in BC Policy 13-601 *Required Forms*.

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