

CSA Multilateral Notice and Request for Comment Draft *Regulation to amend Regulation 45-106 respecting Prospectus Exemptions* relating to Reports of Exempt Distribution

June 8, 2017

Introduction

The Canadian Securities Administrators (**CSA** or **we**) are publishing for a 90-day comment period proposed amendments (the **Proposed Amendments**) to *Regulation 45-106 respecting Prospectus Exemptions* (**Regulation 45-106**) that would amend the report of exempt distribution set out in Form 45-106F1 *Report of Exempt Distribution* (the **Report**). The British Columbia Securities Commission did not publish the proposed regulation for comment, although staff anticipates doing so in the near future, after obtaining necessary approval.

The Proposed Amendments are published with this notice. Certain other relevant information is set out in Annex A. This notice will also be available on the following websites of CSA jurisdictions:

www.albertasecurities.com

www.fcaa.gov.sk.ca

www.msc.gov.mb.ca

www.osc.gov.on.ca

www.lautorite.qc.ca

www.fcnb.ca

nssc.novascotia.ca

Substance and Purpose

Issuers and underwriters who rely on certain prospectus exemptions to distribute securities are required to file the Report within the prescribed timeframe.

The Proposed Amendments:

- provide greater clarity and flexibility regarding the certification requirement of the Report while still supporting the regulatory objectives of filed Reports being true and complete, and
- streamline certain information requirements to assist filers in completing the Report while still providing us with the information necessary for oversight and policy development.

The Proposed Amendments are primarily intended to address concerns expressed by foreign dealers conducting offerings into Canada, and Canadian institutional investors, about the

unintended effects of the certification requirement and other information requirements in the Report on these offerings. However, we believe the Proposed Amendments will be beneficial to all filers.

The Proposed Amendments also include minor amendments addressing feedback received by CSA staff following the implementation of the Report.

Background

In April 2016, we published the Report which came into force in all CSA jurisdictions on June 30, 2016.¹ The Report replaced both the prior version of Form 45-106F1 *Report of Exempt Distribution* and Form 45-106F6 *British Columbia Report of Exempt Distribution*. The Report was intended to:

- 1) reduce the compliance burden for issuers and underwriters by having a harmonized report of exempt distribution, and
- 2) provide securities regulators with the necessary information to facilitate more effective regulatory oversight of the exempt market and improve analysis for policy development purposes.

In spring and summer 2016, CSA staff became aware of concerns expressed by foreign dealers conducting offerings into Canada, as well as Canadian institutional investors, about the certification requirements and certain information requirements in the Report. We understand that in certain instances, Canadian institutional investors noted that they had been excluded from participating in foreign offerings into Canada in part due to dealers' concerns regarding the certification of the Report as well as the more extensive information required in the Report.

As a result of these concerns, we provided relief from the requirement to disclose whether a purchaser is a registrant or an insider of the issuer in certain circumstances. This relief was provided by all CSA members, except Ontario, by issuing blanket orders effective June 30, 2016 (the **Blanket Order Relief**). In Ontario, the relief was provided through an Ontario-only amendment that came into force on July 29, 2016.

We understood that there continued to be difficulties in respect of the certification, creating unintended complications in respect of access by Canadian institutional investors to foreign investment opportunities. On September 29, 2016, CSA staff re-issued CSA Staff Notice 45-308 (Revised) *Guidance for Preparing and Filing Reports of Exempt Distribution under Regulation 45-106 respecting Prospectus Exemptions* to alleviate certain of the concerns raised regarding certification and other matters. The Proposed Amendments are intended to further address these concerns.

¹ In Ontario, the Report was amended on July 29, 2016 as further described in this section of the notice.

Summary of the Proposed Amendments

The key Proposed Amendments together with an explanation of the rationale for each change are summarized below.

Certification

Item 10 of the Report requires that a director or officer of the issuer or underwriter certify that he or she has read and understood the Report and all of the information provided in the Report is true.

We propose to amend the certification to:

- clarify that the individual certifying the Report is doing so on behalf of the issuer or underwriter,
- require the individual to certify that the information provided in the Report is “true and, to the extent required, complete”,
- include a knowledge qualifier,
- permit authorized agents to sign the certification, and
- remove the bold all-caps statement that it is an offence to make a misrepresentation and replace it with a reminder of the obligation to file the Report.

Annex A to this notice includes a blackline of Item 10 indicating the proposed changes and the rationale for each change.

Information Requirements

The table below describes the Proposed Amendments relating to certain information requirements in the Report.

| Information Requirement | Proposed Changes |
|---|---|
| Item 5 – Issuer Information & Item 6 – Investment Fund Issuer Information | |
| Item 5g) Public listing status and Item 6e) Public listing status of the investment fund | <p>The Report requires filers to provide the names of all exchanges on which the issuer’s securities are listed.</p> <p>We propose to amend each of these Items so that filers are only required to provide the name of the exchange on which the issuer’s securities primarily trade. Filers will still only need to include the name of an exchange for which the issuer has applied for and received a listing.</p> <p>We believe this amendment will reduce the burden on filers completing the Report for issuers with securities listed on multiple exchanges globally, while still</p> |

| | |
|---|---|
| | providing information that is relevant for our analysis of exempt market activity. |
| Item 9 – Directors, Executive Officers and Promoters of the Issuer | |
| Issuer exemption category | <p>The Report contains an exemption from the information requirement of this Item for five categories of issuers and requires filers to consider and indicate whether each of the exemption categories is applicable to the issuer.</p> <p>We propose to amend this Item so that filers are only required to indicate one of the applicable exemption categories.</p> <p>We believe this amendment will reduce the burden on filers by limiting the time and analysis necessary to determine whether an exemption from information required by the Item is available.</p> |
| Schedule 1 – Purchaser Information | |
| Details of exemption relied on if relying on section 2.3 [<i>Accredited investor</i>] of Regulation 45-106² | <p>Schedule 1 to the Report requires filers to provide the paragraph number in the definition of “accredited investor” in section 1.1 of Regulation 45-106 that applies to the purchaser.</p> <p>We propose to amend Schedule 1 to allow issuers distributing securities to non-individual permitted clients to indicate this without having to specify the applicable paragraph number in the definition of “accredited investor” in section 1.1 of Regulation 45-106.</p> <p>We believe this amendment will reduce the burden on filers completing Schedule 1, particularly in circumstances where an issuer is distributing eligible foreign securities only to permitted clients, while still providing information about individual purchasers that will assist in our compliance programs and future policy work.</p> |

² In Ontario, the accredited investor exemption is set out under subsection 73.3(2) of the *Securities Act* (Ontario).

Other Amendments

The Proposed Amendments also include other minor amendments that:

- reflect changes to how the Bank of Canada publishes foreign exchange rate data,
- reflect the Blanket Order Relief, except in Ontario where the relief has already been adopted,
- clarify certain instructions, and
- update the contact information of the securities regulatory authority or regulator in each local jurisdiction.

We have also included an amendment to the exemption section of Regulation 45-106 which clarifies the exemption granting authority in Alberta.

Local Matters

An Annex includes, where applicable, additional information that is relevant in a local jurisdiction only.

Request for Comments

We welcome your comments on the Proposed Amendments.

Please submit your comments in writing on or before September 6, 2017. If you are not sending your comments by email, please send a CD containing the submissions (in Microsoft Word format).

Address your submission to the CSA as follows:

Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Deliver your comments **only** to the addresses below. Your comments will be distributed to the other participating CSA jurisdictions.

M^c Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22^e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3
Fax: 514 864-6381
consultation-en-cours@lautorite.qc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416 593-2318
comments@osc.gov.on.ca

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. Please note that comments received will be made publicly available and posted on websites of the Alberta Securities Commission at www.albertasecurities.com, the Ontario Securities Commission at www.osc.gov.on.ca and the Autorité des marchés financiers at www.lautorite.qc.ca, and may be posted on the websites of certain other securities regulatory authorities. You should not include personal information directly in the comments to be published. It is important that you state on whose behalf you are making the submission.

Content of the Annex

This notice contains the following annex:

Annex A –Proposed amendments to Item 10 – Certification of Form 45-106F1 *Report of Exempt Distribution*

Questions

Please refer your questions to any of the following:

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ANNEX A

Proposed amendments to Item 10 – Certification of Form 45-106F1 Report of Exempt Distribution

Permitting authorized agents to sign

- This addresses the practical reality that law firms and other filing agents often prepare and file the report.

Revising what is being certified to “true and, to the extent required, complete”

- This provides a more fulsome certification standard while addressing concerns with certifying completeness when: 1) not all parts of the report are applicable, and 2) in some cases, filers can only select one option when multiple options may apply and there is limited ability to include additional notes in the report.

ITEM 10 – CERTIFICATION

Provide the following certification and business contact information of an officer-~~or~~, director, or agent of the issuer or underwriter. If the issuer or underwriter is not a company, an individual who performs functions similar to that of a director or officer may certify the report. For example, if the issuer is a trust, the report may be certified by the issuer's trustee. If the issuer is an investment fund, a director or officer of the investment fund manager (or, if the investment fund manager is not a company, an individual who performs similar functions) may certify the report if the director or officer has been authorized to do so by the investment fund.

The certification may ~~not~~ be delegated, but only to an agent ~~or other individual preparing~~ that has been authorized by an officer or director of the issuer or underwriter to prepare and certify the report on behalf of the issuer or underwriter.

If the individual completing and filing the report is different from the individual certifying the report, provide ~~the~~ his or her name and contact details in Item 11.

The signature on the report must be in typed form rather than handwritten form. The report may include an electronic signature provided the name of the signatory is also in typed form.

IT IS AN OFFENCE TO MAKE A MISREPRESENTATION IN THIS REPORT

Securities legislation requires an issuer or underwriter that makes a distribution of securities under certain prospectus exemptions to file a completed report of exempt distribution.

By completing the information below, I certify, on behalf of the issuer/underwriter/investment fund manager, to the securities regulatory authority or regulator ~~that, as applicable, that I have reviewed this report and to my knowledge, having exercised reasonable diligence, the information provided in this report is true and, to the extent required, complete.~~

- ~~I have read and understand this report; and~~
- ~~all of the information provided in this report is true.~~

| | | |
|--|----------------------|------------------------------------|
| <u>Name of issuer/underwriter/ investment fund manager/agent</u> | | |
| Full legal name | <input type="text"/> | <input type="text"/> |
| | Family name | First given name |
| | | Secondary given names |
| Title | <input type="text"/> | |
| Name of issuer/underwriter/ investment fund manager | | |
| Telephone number | <input type="text"/> | Email address <input type="text"/> |
| Signature | <input type="text"/> | Date <input type="text"/> |
| | | YYYY MM DD |

Replacing the statement “IT IS AN OFFENCE TO MAKE A MISREPRESENTATION IN THIS REPORT” with a new statement that provides a reminder of the obligation to file the report

- The new statement is intended to serve as a “pause and reminder” to the individual certifying the report of the obligation to file a completed report, thereby deterring misleading and untrue statements and enhancing the integrity of the data collected through the report.

Including a knowledge qualifier

- This is intended to address stakeholder concerns that the certification does not have a knowledge qualifier, as found in the certification in several other CSA forms, and to acknowledge the due diligence defence in securities legislation.

Adopting a corporate-style signature block, such that the name of the issuer/underwriter/investment fund manager/agent appears first and, below that, the name of the person signing

- This clarifies that in signing the certification, the individual certifying the report is doing so on behalf of the issuer/underwriter/investment fund manager/agent.