

CSA Notice of publication
*Regulation to amend Regulation 45-106 respecting Prospectus
Exemptions*
**Amendment to Policy Statement to Regulation 45-106 respecting
Prospectus Exemptions**
Amendments relating to Reports of Exempt Distribution

July 19, 2018

Introduction

The Canadian Securities Administrators (**CSA** or **we**) are making amendments (the **Regulation Amendments**) to *Regulation 45-106 respecting Prospectus Exemptions* (**Regulation 45-106**) to amend Form 45-106F1 *Report of Exempt Distribution* (the **Report**). We are also making a related change to *Policy Statement to Regulation 45-106 respecting Prospectus Exemptions* (**Policy Statement 45-106**).

We refer to the Regulation Amendments and the change to Policy Statement 45-106 collectively as the **Revisions**.

Provided all necessary ministerial approvals are obtained, the Revisions will come into force on **October 5, 2018** in all CSA jurisdictions.

The text of the Regulation Amendments is published with this notice.

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 Revisions:

- 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 Revisions 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 Revisions will be beneficial to all filers.

The Revisions also include minor amendments addressing feedback received by CSA staff following the implementation of the Report, including those comments received during the comment period.

Background

The Report came into force in all CSA jurisdictions on June 30, 2016. 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 harmonized reports of exempt distributions, 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 the spring and summer of 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. Certain Canadian institutional investors noted that they had been excluded from participating in foreign offerings into Canada in part due to dealers' concerns about 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 the Ontario Securities Commission (**OSC**), by issuing blanket orders effective June 30, 2016. In Ontario, this relief was provided through an Ontario-only amendment to Regulation 45-106 that came into force on July 29, 2016.

We understand 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 issued a revised version of CSA Staff Notice 45-308 (Revised) *Guidance for Preparing and Filing Reports of Exempt Distribution under Regulation 45-106* respecting Prospectus Exemptions (**CSA Staff Notice 45-308**) that contained new guidance intended to alleviate certain of the concerns raised regarding certification and other matters. We have adopted the Revisions to further address these concerns.

The CSA, other than the British Columbia Securities Commission, published proposed amendments to Regulation 45-106 relating to the Report (**the 2017 Proposal**) for a 90-day comment period on June 8, 2017. The British Columbia Securities Commission published the 2017 Proposal for a 60-day comment period on October 4, 2017.

Summary of Written Comments Received by the CSA

The comment period expired in all CSA jurisdictions, except British Columbia, on September 6, 2017. We received 6 written submissions. In British Columbia, the comment period expired on December 4, 2017 and no submissions were received. We have considered the comments received and thank all of the commenters for their input. The names of the commenters are contained in Annex A and a summary of their comments, together with our responses, is contained in Annex B. The comment letters can be viewed on the Autorité des marchés financiers website at www.lautorite.qc.ca and the OSC website at www.osc.gov.on.ca.

Summary of Changes to the 2017 Proposal

After considering the written comments received, we have made the following changes to the 2017 Proposal:

- **Certification:** We have revised the instructions to clarify that if the Report is being certified by an agent on behalf of an issuer or underwriter, the name of the agent should be provided in the box titled “Name of issuer/underwriter/investment fund manager/agent” and the information for the agent’s certifying individual should be used to complete all other boxes.
- **North American Industry Classification Standard (NAICS) code:** We have amended Item 5a) of the Report to explicitly request filers to provide the issuer’s NAICS code that in their reasonable judgment most closely corresponds to the issuer’s primary business activity.
- **Public listing status:** In Item 5g) of the Report, we amended the requirement for non-investment fund issuers to identify the name of the exchange on which the issuer’s securities primarily trade, to provide that this requirement only applies to equity securities. Filers are not required to provide any exchange information pertaining to an issuer’s debt securities.
- **Size of assets:** We have amended Item 5h) to direct filers to select the size of the issuer’s assets based on its most recently available annual financial statements.
- **Distribution by co-issuers:** We recognize that there are circumstances where two or more issuers distribute a single security. We have amended Regulation 45-106 to provide that an issuer or underwriter is not required to file a report for a distribution of securities if a report has been filed by another issuer or underwriter for the distribution of the same security. We have also amended Item 3 of the Report to require that, in these instances, the filer identifies the co-issuers of the security.
- **Purchasers’ secondary given names:** We have amended paragraph b)3 of Schedule 1 to add the words “(if applicable)” to the requirement for purchasers’ secondary given names.

- Cryptocurrencies and cryptocurrency-related assets: Given the increase in the number of offerings in the exempt market by issuers that invest in cryptoassets, we have amended:
 - Item 5a) of the Report to require filers to identify an issuer whose primary business is to invest all or substantially all of its assets in cryptoassets.
 - Item 6b) of the Report to require filers to identify where the type of investment fund that most accurately identifies an investment fund issuer is a cryptoasset investment fund.

We have also amended the list of security codes in the general instructions of the Report to introduce a new security code “DCT” for distributions of securities involving digital coins or tokens. These changes will allow us to more accurately monitor issuers that invest in cryptocurrencies and cryptocurrency-related assets and to identify distributions of securities involving digital coins or tokens.

The Regulation Amendments also clarify certain instructions, including updating the table of security codes in the general instructions of the Report and clarifying Item 7f) of the Report relating to the calculation of the number of purchasers.

Provided all necessary ministerial approvals are obtained, all issuers must use the amended Report for any filings submitted on or after October 5, 2018.

Revision of CSA Staff Notice 45-308

We are publishing concurrently with this Notice a revised version of CSA Staff Notice 45-308 to reflect the Revisions.

Local Matters

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

Annexes

This notice contains the following annexes:

Annex A – List of Commenters

Annex B – Summary of Comments and CSA Responses

Questions

Please refer your questions to any of the following:

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ANNEX A

LIST OF COMMENTERS

1. Blake, Cassels & Graydon LLP, Davies Ward Phillips & Vineberg LLP, McCarthy Tétrault LLP, Osler, Hoskin & Harcourt LLP and Stikeman Elliott LLP
2. Canadian Foundation for Advancement of Investor Rights
3. Norton Rose Fulbright Canada LLP
4. RP Investment Advisors LP
5. Securities Industry and Financial Markets Association (SIFMA)
6. Stikeman Elliott LLP

ANNEX B

SUMMARY OF COMMENTS AND CSA RESPONSES

This Annex summarizes the comments we received and our responses to those comments.

No.	Topic	Comments	Responses
General			
1.	General support for proposed amendments	Most commenters expressed support for the proposed amendments. A commenter noted that the proposed amendments address many of the issues they have observed and especially those raised by foreign dealers who underwrite and distribute new securities in Canada. Two commenters noted that the reduced regulatory burden that would result from the implementation of the proposed amendments would facilitate more efficient capital raising in the Canadian exempt market. Another commenter expressed appreciation for the CSA's efforts to be responsive about the unintended effects of the certification requirement and other information requirements in the report.	We acknowledge these comments of support and thank the commenters.
2.	Exempt market oversight	One commenter expressed concern about the CSA's overall regulatory focus relating to the exempt market and suggested that the proposed amendments focus on alleviating regulatory burden for exempt market participants rather than taking action to respond to problems associated with the exempt market.	<p>Monitoring activities related to raising capital in the exempt market, including from retail investors, remains a primary focus of our compliance and oversight programs. The amendments to the report, for the most part, are intended to address concerns in respect of exempt offerings involving Canadian institutional investors.</p> <p>Additionally, the CSA's compliance and oversight programs monitor firms and issuers who rely on prospectus exemptions. Where necessary, guidance is provided to filers to assist</p>

No.	Topic	Comments	Responses
			them to understand and apply the provisions of these prospectus exemptions and to help them meet their regulatory obligations.
Certification [Item 10]			
3.	Support for proposed certification amendments	One commenter noted that the proposed revised certification wording is a significant improvement over the existing wording in that it expressly recognizes the existence of a due diligence defence and it contains a knowledge qualifier. Another commenter noted that clarifying and introducing greater flexibility with respect to the certification requirements will help alleviate various concerns that dealers have expressed.	We acknowledge these comments of support and thank the commenters.
4.	Clarification that certifying individual is not certifying in his or her personal capacity	Two commenters suggested additional language to further clarify that the individual certifying the report is doing so on behalf of the filer and not in his or her own personal capacity.	The certification already includes language that the certifying individual is certifying “on behalf of” the issuer, underwriter or investment fund manager. Further guidance is provided at item #22 of Annex 3 of CSA Staff Notice 45-308 (Revised), <i>Guidance for Preparing and Filing Reports of Exempt Distribution under Regulation 45-106 respecting Prospectus Exemptions (CSA Staff Notice 45-308)</i> .
5.	Guidance on reasonable diligence	A commenter suggested that the words “exercise reasonable diligence” be replaced with “made reasonable inquiries with respect to information outside my personal knowledge” to clarify the expectation on the certifying individual’s due diligence investigation regarding information required to complete the report.	The knowledge qualifier is worded to align with the due diligence defence under the securities legislation of most jurisdictions, which provides a defence to liability based on the person’s knowledge after exercising reasonable diligence. What constitutes reasonable diligence will depend on the circumstances. For example, guidance is provided at item #9.1 of Annex 3 of

No.	Topic	Comments	Responses
			CSA Staff Notice 45-308 on the reasonable steps an underwriter filing a report should undertake to obtain and confirm the required information regarding the issuer.
6.	Clarification when an authorized agent certifies the report	A commenter asked for clarification on how to fill out the boxes titled "Name of issuer/underwriter/investment fund manager/agent" and "full legal name" where a dealer has engaged a law firm to assist it in preparing and filing the required reports.	We have revised the instructions to clarify the certification in circumstances where the report is being certified by an agent on behalf of the issuer or underwriter. If a law firm is preparing and certifying a report on behalf of the issuer or underwriter, provide the full name of the law firm in the box titled "Name of issuer/underwriter/investment fund manager/agent" and provide the full name of the individual at the law firm certifying the report in the box titled "Full legal name".
7.	Authority of delegation to agent	One commenter suggested the certification be amended to expressly confirm the authority of the agent to act on behalf of and bind the issuer.	Item 10 of the report states that the certification may be delegated only to an agent that has been authorized by an officer or director of the issuer or underwriter. We do not think the proposed amendment is necessary. The authority of an agent to act on behalf of an issuer or underwriter is governed by the relationship between the issuer or underwriter and its agent.

No.	Topic	Comments	Responses
Information Requirements			
8.	Public listing status [Items 5(g) and 6(e)]	One commenter suggested amendments so that the name of the exchange on which the issuer’s “equity” securities primarily trade be required. Additionally, the commenter suggested that if only debt securities of the issuer trade on an exchange, it should be allowed to name “any” exchange on which they trade.	<p>With respect to an issuer’s equity securities, we have amended the requirement to identify the name of the exchange on which an issuer’s securities primarily trade to apply to equity securities only.</p> <p>We recognize that identifying the exchanges on which an issuer’s debt securities are listed may be problematic for filers given both the nature of debt and how debt is traded. We have amended the requirement in the report so that filers are not required to provide any exchange information pertaining to an issuer’s debt securities.</p>
9.	Support for proposed amendment to allow issuers distributing securities to non-individual permitted clients (NIPC) to indicate this [Schedule 1]	Three commenters were supportive of the proposed amendment to permit filers to select NIPC which, in their view, will reduce a significant compliance burden associated with the report. One commenter supported the proposed amendment, but believed it should apply to all permitted clients, not just non-individuals.	We acknowledge these comments of support and thank the commenters. This amendment is limited to NIPC in order to address concerns in respect of offerings involving Canadian institutional investors.
Other Proposed Amendments			
10.	Support for proposed amendments to reflect Blanket Order Relief	One commenter supported the proposed amendment to subsection f) of Schedule 1 which allows permitted foreign issuers to omit information regarding whether a purchaser is an insider or a registrant.	We acknowledge this comment of support and thank the commenter.

No.	Topic	Comments	Responses
Other Comments on the Report – Not Directly Related to Proposed Amendments			
11.	Determining jurisdiction of distribution	One commenter suggested that additional guidance be added in the report as to how an issuer is to determine whether a distribution is considered to have taken place in a particular jurisdiction. Another commenter suggested that the report be amended so that the inclusion of information regarding purchasers outside Canada in Item 7 and Schedule 1 is not required under any circumstances, no matter which province the issuer is located in.	Guidance on where the issuer is required to file the report is provided at item #1 of Annex 3 of CSA Staff Notice 45-308. Issuers and underwriters should refer to applicable securities legislation, securities directions and case law to determine whether a distribution has taken place in a local jurisdiction. The suggested amendment is beyond the scope of this project.
12.	Co-issuers	One commenter proposed the adoption of a “primary” issuer concept to address the issues of (1) duplicative reporting, where two or more co-issuers are offering the same security, and (2) inaccurate and incomplete issuer information, where the information collected in Item 5 does not correspond to the information that investors would rely upon when making their investment decision.	We agree with the commenter that in circumstances where two or more issuers distribute a single security, only one report of exempt distribution should be required to be filed for the distribution, and that any one of the co-issuers should be permitted to file the report. We have amended <i>Regulation 45-106 respecting Prospectus Exemptions</i> to provide that an issuer or underwriter is not required to file a report for a distribution of a security if a report has been filed by another issuer or underwriter for the distribution for the same security. We have also amended Item 3 of the report to require that, in these instances, filers identify the co-issuers of the security distributed.
13.	Benefit of the information being requested is greater than the burden it may impose on filers	Some commenters requested the CSA reconsider some of the required disclosure introduced in the 2016 implementation of the report and questioned whether the benefit of the information requested justifies the burden imposed on filers.	We have streamlined certain information requirements in the report to further alleviate the burden it may impose on filers. Overall, we believe the report strikes an appropriate balance between the information needs of the CSA to support its compliance oversight and policy-

No.	Topic	Comments	Responses
			making functions and the regulatory burden imposed on filers.
14.	NAICS industry code [Item 5(a)]	Two commenters questioned the meaningfulness and usefulness of the NAICS industry code information requirement, noting that the identification of an issuer's NAICS industry code requires filers to exercise a significant amount of judgment and may result in inconsistency of classification. One of these commenters suggesting revising the instructions to clarify that filers ought to use their best judgment.	<p>Using a comprehensive and standardized industry classification system enables us to better understand exempt market activity and to inform our policy making function as regulators. We continue to believe the NAICS industry code is the most appropriate classification system for the purposes of the report. Based on our review of reports filed to date, we have not observed any significant inconsistencies in the NAICS industry code submitted across filers from similar industries.</p> <p>We have amended item 5(a) to explicitly require filers to provide the issuer's NAICS industry code that in their reasonable judgment most closely corresponds to the issuer's primary business activity. Item #7 of Annex 3 of CSA Staff Notice 45-308 provides guidance that the filer should use its reasonable judgment to determine the NAICS industry code that most closely matches the issuer's primary business activity.</p>
15.	Date of formation [Items 5(e) and 6(c)]	One commenter noted that the exact month and day of formation, which otherwise generally is not required disclosure for a non-reporting issuer, is often very difficult to obtain.	The requirement to provide the exact month and day of formation is consistent with the requirement for issuers that have a SEDAR profile. We understand that this information can be obtained through the issuer, and we believe this information would generally not be unduly difficult to obtain.

No.	Topic	Comments	Responses
16.	<p>CUSIP number</p> <p>[Items 5(g) and 6(e)]</p>	<p>One commenter noted that many issuers have multiple CUSIP numbers and believed the CUSIP number the CSA requires filers to disclose in these sections is the CUSIP number for the issuer’s common shares and not the CUSIP number for the particular securities described in the report.</p>	<p>We do not believe a clarifying instruction is necessary. Items 5(g) and 6(e) ask for the first 6 digits of the issuer’s CUSIP number and these 6 digits will be the same for all securities of the issuer.</p>
17.	<p>Size of issuer’s assets</p> <p>[Item 5(h)]</p>	<p>One commenter suggested that the requirement to disclose the size of the issuer’s assets for its most recent financial year-end be revised to allow the filer to provide the required information based on the most recently available financial statements.</p>	<p>We have amended the instruction to direct filers to select the size of the issuer’s assets “based on its most recently available annual financial statements” to provide clarity to issuers who have completed a financial year end but have not yet prepared their annual financial statements.</p>
18.	<p>Net proceeds to the investment fund</p> <p>[Item 7(g)]</p>	<p>One commenter asked that the CSA consider revising the requirements of Item 7(g) because the requirements are burdensome for most alternative fund managers and some issuers consider such data to be highly confidential and commercially sensitive.</p>	<p>Information about the fund on a net proceeds basis is vital to our understanding of investment funds distributing in the exempt market.</p> <p>Also, in certain jurisdictions, the reporting of net proceeds is required as part of the calculation of fees payable for reports of exempt distribution. We understand that fund managers consistently track the purchases and redemptions of their funds. Therefore, we do not believe it is burdensome to report net proceeds.</p>

No.	Topic	Comments	Responses
19.	<p>Whether the person compensated is a registrant</p> <p>[Item 8(a)]</p>	<p>One commenter suggested that the question “Indicate whether the person compensated is a registrant” be amended to “Indicate whether the person compensated has an NRD number” to better address international dealers who, technically, are not registrants but have an NRD number.</p>	<p>If a person compensated is relying on the “international dealer exemption” or the “international adviser exemption” (as set out in section 8.18 and in section 8.26, respectively, of <i>Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations</i>), the filer should respond “no” to the first question in Item 8(a) asking whether the person compensated is a registrant but, as these firms are issued an NRD number for tracking purposes, the firm should provide the firm’s NRD number in the third section of Item 8(a).</p>
20.	<p>Residential address of directors, executive officers, promoters and control persons of the issuer</p> <p>[Item 9(c) and Schedule 2, paragraph c)]</p>	<p>One commenter suggested eliminating the requirement to provide residential addresses for directors, executive officers, promoters and control persons of the issuer citing that an issuer may not necessarily have the information available and privacy issues in certain jurisdictions with disclosing residential addresses.</p>	<p>Residential address information has proven an effective means of locating and contacting individuals and is used to support our compliance functions. We believe this information would not be unduly difficult to obtain. Information collected in Schedule 2 is not on the public record of any CSA member. The release of this information through a freedom of information request is governed by freedom of information legislation in place in each CSA jurisdiction.</p>
21.	<p>Purchasers’ secondary given names</p> <p>[Schedule 1, paragraph b)3]</p>	<p>One commenter suggested that purchasers’ secondary given names should only be required to the extent that they are applicable and available.</p>	<p>To the extent that purchasers’ secondary given names are provided to the issuer, they should be disclosed in the report. We have amended the requirement for secondary given names to add the words “(if applicable)”.</p>

No.	Topic	Comments	Responses
22.	Alberta specific comments	Two comments were received that are specific to Alberta, addressing distributions outside the jurisdiction and additional prospectus exemptions in Alberta.	The comments are outside the scope of this project, and we have referred them to the appropriate staff at the ASC who are currently reviewing Alberta's approach to distributions outside the jurisdiction.