

CSA Notice and Request for Comment***Draft Regulation 45-107 respecting Listing Representation and
Statutory Rights of Action Disclosure Exemptions***

November 28, 2013

Introduction

All of the members of the Canadian Securities Administrators (the **CSA**), other than the securities regulatory authorities in Ontario and British Columbia (the **participating jurisdictions** or **we**), are publishing for a 90-day comment period draft *Regulation 45-107 respecting Listing Representation and Statutory Rights of Action Disclosure Exemptions* (**draft Regulation 45-107**).

Draft Regulation 45-107 is not being proposed in Ontario and British Columbia as in those jurisdictions existing¹ or proposed² local regulations address or are expected to address the issues discussed below, as necessary.

Substance and purpose of draft Regulation 45-107

Draft Regulation 45-107 proposes exemptions from certain requirements of the securities legislation of the participating jurisdictions that apply in the context of prospectus exempt financings, conducted by issuers and by investment dealers or international dealers acting as underwriters, offered to institutional and other sophisticated investors in Canada.

The purpose of draft Regulation 45-107 is two-fold. First, in the context of the international financings referred to above, it provides an exemption from the statutory prohibition against making a representation about the intention to list securities on an exchange or market. Second, it provides an exemption from the requirement that applies in some of the participating jurisdictions, that an offering document used in connection with a prospectus exempt distribution include a prescribed statement with respect to certain statutory rights of action.

Draft Regulation 45-107 will codify certain discretionary exemptive relief that the CSA has been granting in the context of U.S. and international offerings of securities to Canadian institutional and other sophisticated investors and consequently alleviate the need for these discretionary exemption applications.

¹ See <http://www.bcsc.bc.ca/policy.aspx?id=1266&cat=>

² See the Notice and Request for Comment regarding Ontario Securities Commission rule 45-501 *Ontario Prospectus and Registration Exemptions* at: http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20130425_45-501_rfc-pro-amend.htm

Background

(a) Listing representation prohibition

We are proposing an exemption from the requirement in the securities legislation of each of the participating jurisdictions that prohibits a person, with the intention of effecting a trade in a security, from making a representation that the security will be listed on an exchange or quoted on a quotation and trade reporting system, or that application has been or will be made to list the security, unless consent or authorization, as applicable, is first obtained (the **listing representation prohibition**).

Certain exceptions to this prohibition currently exist in most jurisdictions. These include:

- where an application has already been made to list or quote the securities and other securities of the same issuer are already listed on an exchange or quoted on a quotation and trade reporting system, or
- where the exchange or quotation and trade reporting system has granted approval to the listing or quoting of the securities, conditional or otherwise, or has consented to, or indicated that it does not object to, the representation.

We understand that foreign securities laws do not generally prohibit the making of listing representations, provided that the representations are factually correct. We also understand that many foreign exchanges and markets do not provide consent, conditional approval or non-objection regarding a proposed listing. Consequently, foreign issuers cannot typically rely on the existing statutory exceptions permitting a listing representation and must make an application to each of the securities regulators in Canada for relief from this prohibition.

Given the typically short timeframe for U.S. and international offerings, it may be difficult to obtain express consent in each applicable jurisdiction of Canada before a foreign offering document can be used in those jurisdictions. Making such applications also adds to the time and cost associated with extending a foreign offering into Canada.

(b) Offering document disclosure

Securities legislation in New Brunswick, Nova Scotia and Saskatchewan requires that, where an “offering memorandum” (as defined in the securities legislation of those jurisdictions) is provided to a prospective purchaser in connection with a distribution to which statutory rights of action apply, these statutory rights must be described in the offering memorandum (the **statutory rights of action disclosure requirement**). Where an offering memorandum contains a misrepresentation, a purchaser who purchased a security offered by the offering memorandum during the period of distribution has a right of action for damages or rescission against the issuer or selling securityholder.

In the context of offerings conducted by issuers and by investment dealers or international dealers acting as underwriters, an offering document is prepared in accordance with foreign securities laws, and then the statutory rights of action disclosure requirement is typically addressed either by amending the offering document for sales to investors in that jurisdiction of

Canada or, more commonly, a supplemental document known as a “wrapper” is prepared and attached as the cover page to the foreign offering document. The wrapper together with the foreign offering document then forms the offering document for purposes of offering securities in Canada.

Market participants have suggested that, in the context of offerings conducted by U.S. issuers and dealers or other global offerings of foreign securities, the time and expense associated with retaining counsel and preparing a “wrapper” to meet these local requirements in Canada or, alternatively, making applications for relief from these requirements discourages some foreign issuers and underwriters from extending foreign offerings into Canada. Because these offerings are being made only to institutional and other sophisticated investors, Canadian securities regulators have been prepared to provide discretionary exemptive relief to permit the disclosure to be made in an alternative form. Draft Regulation 45-107 would remove the need to make such applications.

Summary of draft Regulation 45-107

(a) Relief from listing representation prohibition

Draft Regulation 45-107 would provide an exemption from the listing representation prohibition provided that the offering is an offering of “designated foreign securities” made only to “permitted clients”.

Designated foreign securities are defined in draft Regulation 45-107 as securities offered primarily in a foreign jurisdiction that are either:

- issued by an issuer that
 - is incorporated, formed or created under the laws of a foreign jurisdiction
 - is not a reporting issuer in a jurisdiction of Canada,
 - has its head office outside of Canada, and
 - has a majority of its executive officers and directors resident outside of Canada;
- securities that are issued or guaranteed by the government of a foreign jurisdiction.

The term “permitted client” has the same meaning as in *Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations*.

(b) Relief from statutory rights of action disclosure requirement

Draft Regulation 45-107 would provide an exemption from the statutory rights of action disclosure requirement in the following circumstances:

- The offering is an offering of “designated foreign securities”
- It is made only to “permitted clients”, and
- Certain alternative disclosure of these rights of action is provided.

The exemption from the statutory rights of action disclosure requirement is conditional on the disclosure being provided in alternative ways. The disclosure can be provided in a one-time

notice that has been delivered to the permitted client by an investment dealer or international dealer acting as underwriter that is signed by the permitted client. This notice will explain that, with respect to the current and future distributions of designated foreign securities by the foreign issuer, the purchaser will have certain statutory rights in the event of a misrepresentation. In the case of a one-time notice, a description of such rights will not be provided at the time of each offering of designated foreign securities by the foreign issuer to the purchaser.

Draft Regulation 45-107 does not affect the statutory rights of action available to purchasers of securities in the applicable jurisdictions.

(c) Considerations for investment funds

Investment funds offering securities in reliance on draft Regulation 45-107 would continue to be subject to other securities regulatory requirements, if applicable, such as investment fund manager registration.

Investment funds investing in offerings made in reliance on draft Regulation 45-107 would continue to be subject to investment restrictions such as fund on fund restrictions that may limit the ability to purchase securities of a foreign issuer that is an investment fund.

Related amendments

The CSA is also proposing amendments to *Regulation 33-105 respecting Underwriting Conflicts (Regulation 33-105)* to provide relief, in the context of these same U.S. and international offerings to institutional and other sophisticated investors, from the requirement in Regulation 33-105 to provide disclosure relating to connected and related issuers in a prospectus-exempt disclosure document. The proposed exemption from Regulation 33-105 will only apply where offerings by foreign issuers provide comparable alternative disclosure to purchasers.

Alternatives considered

We could continue granting time-limited exemptive relief, but are of the view that this would result in repeated expense and time commitment for applicants. We have also considered granting blanket order relief in each of the jurisdictions, but are of the view that a regulation would be easier and more efficient for market participants.

How to provide your comments

Please provide your comments in writing by **February 26, 2014**. Regardless of whether you are sending your comments by email, you should also send or attach your submissions in an electronic file in Microsoft Word, Windows format.

Please address your submission to the CSA as follows:

Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan

The Manitoba Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Deliver your comments **only** to the two addresses that follow. Your comments will be distributed to the other CSA member jurisdictions.

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
Fax: 514-864-6381
E-mail: consultation-en-cours@lautorite.qc.ca

Ashlyn D' Aoust
Legal Counsel, Corporate Finance
Alberta Securities Commission
Suite 600, 250 – 5th Street SW
Calgary, AB T2P 0R4
Fax: 403-297-2082
E-mail: ashlyn.daoust@asc.ca

Please note that comments received during the comment period will be made publicly available. We will post all comments to the Alberta Securities Commission and Autorité des marchés financiers websites at www.albertasecurities.com and www.lautorite.qc.ca, respectively.

Questions

Please refer your questions to any of:

Kristina Beauclair
Securities Analyst
Autorité des marchés financiers
514 395-0337 ext. 4397
kristina.beauclair@lautorite.qc.ca

Ashlyn D' Aoust
Legal Counsel, Corporate Finance
Alberta Securities Commission
403 355-4347
ashlyn.daoust@asc.ca

Sonne Udemgba
Deputy Director, Legal, Securities Division
Financial and Consumer Affairs Authority of
Saskatchewan
306 787-5879
sonne.udemgba@gov.sk.ca

Chris Besko
Deputy Director
The Manitoba Securities Commission
204 945-2561
chris.besko@gov.mb.ca

Wendy Morgan
Legal Counsel
Financial and Consumer Services Commission
(New Brunswick)
506 643-7202
wendy.morgan@fcnb.ca

Katharine Tummon
Superintendent of Securities
Prince Edward Island
902 368-4542
kptummon@gov.pe.ca

Shirley Lee
Director, Policy & Market Regulation
Nova Scotia Securities Commission
902 424-5441
leesp@gov.ns.ca

Rhonda Horte
Deputy Superintendent
Office of the Yukon Superintendent of
Securities
867 667-5466
rhonda.horte@gov.yk.ca

Donald MacDougall
Deputy Superintendent, Legal & Enforcement
Northwest Territories Securities Office
867 920-8984
donald_macdougall@gov.nt.ca