

CSA Notice and Request for Comment

Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* to introduce the Listed Issuer Financing Exemption

July 28, 2021

Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are publishing for a 90 day comment period proposed amendments to National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**) to introduce a new prospectus exemption available to reporting issuers that are listed on a Canadian stock exchange (the **Listed Issuer Financing Exemption**). We are also publishing consequential amendments to National Instrument 13-101 *System for Electronic Document Analysis and Retrieval* (**NI 13-101**) and National Instrument 45-102 *Resale of Securities* (**NI 45-102**) and, collectively with the proposed amendments to NI 45-106 and NI 13-101, the **Proposed Amendments**).

We are also publishing for comment proposed changes to Companion Policy 45-106CP (**45-106CP**).

If adopted, the Proposed Amendments would create a new capital raising method for reporting issuers listed on a Canadian stock exchange.

The text of the Proposed Amendments is contained in Annexes A through E of this notice and will also be available on websites of CSA jurisdictions, including:

www.lautorite.qc.ca

www.albertasecurities.com

www.bsc.bc.ca

nssc.novascotia.ca

www.fcnb.ca

www.osc.ca

www.fcaa.gov.sk.ca

mbsecurities.ca

Substance and Purpose

We are proposing the Listed Issuer Financing Exemption to provide a more efficient method of capital raising for reporting issuers that have securities listed on a Canadian stock exchange and that have filed all timely and periodic disclosure documents required under Canadian securities legislation.

The proposed exemption relies on the issuer's continuous disclosure record, as supplemented with a short offering document, and would allow these issuers to distribute freely tradeable listed

equity securities to the public. Issuers would generally be limited to raising the greater of \$5,000,000 or 10% of the issuer's market capitalization to a maximum total dollar amount of \$10,000,000. In order to use the exemption, the issuer must have been a reporting issuer for at least 12 months.

The offering document would be a "core document" under Canadian securities legislation, forming part of the issuer's continuous disclosure record for purposes of secondary market civil liability. In the event of a misrepresentation in the offering document or in the issuer's continuous disclosure record for a prescribed period, purchasers under the Listed Issuer Financing Exemption would have the same rights of action under secondary market civil liability as purchasers on the secondary market. In addition, purchasers under the exemption would have a contractual right of rescission against the issuer for a period of 180 days following the distribution in the event of a misrepresentation. The offering document would not be reviewed by CSA staff before use.

Background

One of the fundamental pillars of securities legislation is that an issuer distributing a security must file and obtain a receipt for a prospectus. The prospectus must contain full, true and plain disclosure of all material facts relating to the securities being offered. Investors who purchase securities under a prospectus are provided certain statutory rights.

The short form prospectus regime was designed to facilitate efficient capital raising for reporting issuers while providing investors with all the protections of a prospectus, including statutory rights of withdrawal, rescission and damages.

The CSA has heard from many stakeholders that the time and cost to prepare a short form prospectus may be an impediment to capital raising, particularly for smaller issuers.

In CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*, staff noted we were considering whether conditions were right to revisit the merits of an alternative prospectus offering model for reporting issuers. In the comment period, we heard support from several commenters for this project, as well as some support for alternative prospectus concepts previously proposed, but not implemented, such as the Integrated Disclosure System (IDS)¹ and Continuous Market Access (CMA)².

As a result of the responses to CSA Consultation Paper 51-404, in early 2018³ the CSA undertook a research project on potential alternative offering models. That project included

¹ In 2000, the CSA published for comment a concept proposal called Integrated Disclosure System (IDS). Under the IDS, reporting issuers would have been required to provide investors with more comprehensive and timely continuous disclosure by using an abbreviated offering document integrating the reporting issuer's disclosure base.

² In 2002, the British Columbia Securities Commission published for comment a proposal on a system called Continuous Market Access (CMA). This regime was designed to replace the existing prospectus regime. CMA provided reporting issuers with access to markets by disclosing the offering in a press release. No offering document was required, but reporting issuers were subject to an enhanced continuous disclosure regime and the obligation to disclose all material information about the reporting issuer.

³ See CSA Staff Notice 51-353 *Update on CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*.

research of alternative regimes in foreign jurisdictions, targeted consultations with market participants, a general survey of issuers listed on Canadian exchanges, a targeted survey of costs associated with short form prospectus offerings, and analysis of data on all prospectus and private placement offerings conducted in 2017 by issuers listed on Canadian exchanges.

What we found from our market consultations and research of public offering regimes in Europe, Australia and the United States, is that our prospectus regime generally works well for larger offerings and that it strikes a good balance between issuer disclosure requirements and investor protection. However, we heard that for smaller offerings (that is, under \$10 million), the system can be onerous, the costs associated with preparing a prospectus can be prohibitive, and that dealers have limited interest in smaller offerings. Consequently, issuers are not as inclined to access public markets for smaller offerings.

The MiG Report data for 2020 illustrates that smaller issuers are much less likely to use prospectuses than larger issuers. In 2020, TSX Venture Exchange-listed reporting issuers raised \$1.9 billion by way of prospectus as compared to \$4.5 billion by way of private placement. In contrast, Toronto Stock Exchange-listed reporting issuers raised \$19.4 billion by way of prospectus as compared to only \$10 billion by way of private placement⁴. Data from FP Advisor also suggests that most short form prospectuses are filed to raise greater than \$10 million. In the five year period from 2016 to 2020, of the 657 short form prospectus offerings by issuers listed on a Canadian exchange, 44 prospectuses (7%) raised \$5 million or less, 95 prospectuses (14%) raised between \$5-\$10 million and 518 prospectuses (79%) raised greater than \$10 million through the sale of equity securities⁵.

During our consultations, we heard that the costs of completing a short form prospectus offering are a barrier for issuers who want to raise smaller amounts of capital. Issuers cited underwriter and legal costs as the most significant expenditures. Our costs survey also showed that the costs of a prospectus offering were disproportionate to the amounts raised.

To respond to this reality, we propose creating the Listed Issuer Financing Exemption, a prospectus exemption for small offerings that, although available to all issuers, would benefit smaller issuers more specifically. The Listed Issuer Financing Exemption recognizes the comprehensive continuous disclosure regime for reporting issuers, supported by certification requirements and secondary market liability, and the fact that any investor can acquire securities of a reporting issuer on the secondary market.

We think the Listed Issuer Financing Exemption would

- reduce the cost of accessing public markets;
- allow smaller issuers access to public markets and retail investors;
- provide retail investors with a greater choice of investments available in the primary public markets;
- result in better and more current disclosure in the market for those smaller issuers that previously only used the private placement system; and

⁴ The MiG Report, Toronto Stock Exchange and TSX Venture Exchange, December 2020.

⁵ Based on FP Advisor, New Issues - Financial Post Data as of June 11, 2021 and OSC Calculations. Data represents Canadian dollar-denominated short form prospectus offerings for equity securities completed between 2016 and 2020 (excluding offerings under the base shelf system).

- provide an incentive for all issuers raising smaller amounts of capital to do so by public offering instead of by private placement.

We have developed this proposal with our mission in mind: increasing market efficiency while ensuring investor protection.

Summary of the proposed Listed Issuer Financing Exemption

The Listed Issuer Financing Exemption is subject to the following key conditions:

	Condition	Rationale
Qualifications	<p>The issuer must have</p> <ul style="list-style-type: none"> • securities listed on a Canadian stock exchange • been a reporting issuer for 12 months in at least one jurisdiction in Canada • filed all timely and periodic disclosure documents as required under the continuous disclosure requirements in Canadian securities legislation • active business operations 	<ul style="list-style-type: none"> • Ensures oversight of pricing and discounts • Recognizes comprehensive continuous disclosure regime for reporting issuers • Limits use to issuers who have established a continuous disclosure record and are in compliance with their continuous disclosure filing requirements • Limits use of the exemption to only those issuers that have a business
Total dollar amount	<p>The total dollar amount that an issuer may raise using the exemption during any 12 month period may not exceed:</p> <ul style="list-style-type: none"> • the greater of \$5 million or 10% of the aggregate market value of the issuer's listed equity securities, to a maximum total dollar amount of \$10 million; or • 100% dilution 	<ul style="list-style-type: none"> • Connecting scaled limits on the total amount that can be raised to market capitalization restricts issuers from unduly diluting their shareholders • Addresses comments received that we need a two-tiered approach with significantly fewer requirements for smaller offerings • Limits the impact on the short form prospectus system as the majority of issuers using short form prospectuses raise more than \$10 million • The limitation on the amount raised will restrict an issuer from using the exemption for larger transactions that may involve a significant change in the issuer's business

	Condition	Rationale
Type of offering document	<p>The issuer must prepare and file a short offering document, proposed new Form 45-106F* <i>Listed Issuer Financing Document</i>, containing prescribed disclosure highlighting:</p> <ul style="list-style-type: none"> • any new developments in the issuer’s business, • the issuer’s financial condition, including confirmation that the issuer will have sufficient funds to last 12 months after the offering, • how proceeds from the current offering will be used, and • how proceeds from any other offering in the previous 12 months were actually used 	<ul style="list-style-type: none"> • Recognizes that investors may be more likely to read a brief document that contains the key information necessary for making an investment decision than a much longer prospectus • For venture issuers that do not currently use the short form prospectus system, results in better and more current disclosure to the market than if they used other prospectus exemptions
Liability	<ul style="list-style-type: none"> • The issuer must certify that the offering document, together with the continuous disclosure of the issuer for the past 12 months, contains disclosure of all material facts about the issuer or the securities being distributed and does not contain a misrepresentation • The offering document would be prescribed as a “core document” in the issuer’s continuous disclosure record, subject to statutory secondary market civil liability in the event of a misrepresentation • Purchasers under the exemption would have two options for recourse in the event of a misrepresentation: <ul style="list-style-type: none"> • rights of action under secondary market civil liability • a contractual right of rescission against the issuer 	<ul style="list-style-type: none"> • Ensures the quality and reliability of the disclosure in the offering document and in the issuer’s continuous disclosure • Secondary market civil liability puts purchasers under the Listed Issuer Financing Exemption on the same footing as investors in the secondary market • Having a contractual right of rescission against the issuer ensures the issuer is not unfairly enriched as a result of its misrepresentation • Addresses the concern that applying primary liability would increase underwriter due diligence costs and result in a much longer offering document, defeating our intention to provide a more efficient means of capital raising for issuers having an up-to-date continuous disclosure record

	Condition	Rationale
Restriction on use of proceeds	<ul style="list-style-type: none"> Exemption not available if the issuer is planning to use the proceeds for a significant acquisition or restructuring transaction, such that the issuer would be required to provide additional financial statements under prospectus rules 	<ul style="list-style-type: none"> Restricts use of the exemption in situations where greater disclosure and scrutiny may be required
Type of securities	<ul style="list-style-type: none"> Securities must be listed equity securities or securities convertible into listed equity securities Subscription receipts may be issued if not used in connection with a significant acquisition, restructuring transaction or other type of transaction that would require security holder approval 	<ul style="list-style-type: none"> Exemption is meant to mirror investors' ability to purchase securities on the secondary market without a hold period Exemption is limited to listed equity securities that are easier for investors to understand and that have the benefit of a market valuation
Resale restrictions	<ul style="list-style-type: none"> Securities would not be subject to a hold period 	<ul style="list-style-type: none"> No hold period necessary as the issuer is required to disclose all material facts at time of offering Addresses comments from stakeholders that the hold period continues to be a deterrent for private placement investment
Underwriter/registrant involvement	<ul style="list-style-type: none"> While investment dealers and exempt market dealers may participate, there is no requirement for an underwriter to be involved No registration exemption 	<ul style="list-style-type: none"> Will reduce cost of offerings Market participants noted that issuers will likely use dealers for larger offerings and to reach new investors Dealers would have to satisfy their obligations, including suitability (KYC and KYP), to place clients in the offering
Report of exempt distribution	<ul style="list-style-type: none"> The issuer would be required to report use of the exemption by filing a Form 45-106F1 <i>Report of Exempt Distribution</i> The issuer would not be required to complete Schedule 1 	<ul style="list-style-type: none"> Report will allow us to obtain structured data on the offering including type and amount of securities issued and any dealer or finder involvement Purchaser information not necessary where there are no

	Condition	Rationale
	– Confidential Purchaser Information.	<p>limits on the type of investor that may participate</p> <ul style="list-style-type: none"> • Not requiring purchaser information will reduce the administrative burden for the issuer

Consequential Amendments

National Instruments

We propose to make the following housekeeping amendments to the rights offering exemption in NI 45-106 to correct:

- subparagraphs 2.1(3)(b)(ii) and (iii), such that issuers must have filed all periodic and timely disclosure required by any order issued by, or undertaking made to, the regulator or securities regulatory authority; and
- the calculation of total funds available required in the use of available funds table in section 18 of Form 45-106F15 *Rights Offering Circular for Reporting Issuers*.

We propose to consequentially amend NI 45-102 to add the proposed Listed Issuer Financing Exemption to Appendix E Seasoning Period Trades, which would mean securities issued under the exemption would be subject to a seasoning period. Given one of the conditions to use of the proposed exemption is that the issuer must have been a reporting issuer for 12 months, this means that, for practical purposes, no hold period will apply to the securities.

We also propose to amend NI 13-101 to include the new form of offering document in the list of required filings.

Local Matters

Annex E is being published in Ontario.

Request for Comments

We welcome your comments on the Proposed Amendments and the changes to 45-106CP. In addition to any general comments you may have, we also invite comments on the following specific questions.

1. Under the Proposed Amendments, the total dollar amount that an issuer can raise using the Listed Issuer Financing Exemption would be subject to the following thresholds:
 - (a) the greater of 10% of an issuer’s market capitalization and \$5,000,000
 - (b) the maximum total dollar limit of \$10,000,000

(c) a 100% dilution limit.

Are all of these thresholds appropriate, or should we consider other thresholds?

2. In order for the CSA to measure and monitor the use of the Listed Issuer Financing Exemption, we propose that issuers would be required to file a report of exempt distribution within 10 days of the distribution date, as with most capital raising prospectus exemptions. However, issuers would not be required to provide the detailed confidential purchaser information required in Schedule 1. We are not proposing to require the completion of the purchaser-specific disclosure required under Schedule 1 because there are no limitations on the types of investors who may purchase under the exemption and we do not expect to require this information.
 - (a) Are there other elements of the report of exempt distribution that we should consider relaxing for distributions under the exemption?
 - (b) Would the requirement to file the report of exempt distribution in connection with the use of the exemption be unduly onerous in these circumstances? If so, why?
 - (c) Should we consider an alternative means of reporting distributions under the exemption, such as including disclosure in an existing continuous disclosure document, such as Management's Discussion and Analysis or a specific form or report that is filed on SEDAR?
 - (d) If alternative reporting is provided, what information should issuers be required to disclose, in addition to the following:
 - the number and type of securities distributed,
 - the price at which securities are distributed,
 - the date of the distribution, and
 - the details of any compensation paid by the issuer in connection with the distribution and the identity of the compensated party?
 - (e) If alternative reporting is provided, how frequently should reporting be required?
3. For jurisdictions that already charge capital market participation fees, would the imposition of an additional filing fee for a report of exempt distribution under the Listed Issuer Financing Exemption discourage use of the exemption?
4. We propose that the securities eligible to be distributed under the Listed Issuer Financing Exemption would be limited to listed equity securities, units consisting of a listed equity security and a warrant exercisable into a listed equity security, or securities, such as subscription receipts, that are convertible into a unit consisting of a listed equity security and a warrant. These are securities that most investors would be familiar with and which are easier for an investor to understand. This list would allow for the Listed Issuer Financing

Exemption to be used to distribute convertible debt. Are there reasons we should exclude convertible debt from the exemption?

5. We designed the Listed Issuer Financing Exemption contemplating that it would be used, from time to time, for discrete private placements, with a single closing date. Do you expect issuers would want to use the exemption to provide continuous, non-fixed price offerings as well? If so, what changes would be necessary to permit continuous distributions under the exemption? Do you see any concerns with permitting continuous distributions?
6. Over the last several years, the CSA has tried to address various capital raising challenges by introducing a number of streamlined prospectus exemptions targeted to reporting issuers with listed equity securities, including the existing security holder exemption and the investment dealer exemption. The use of these exemptions has been limited. We have heard from market participants that the existence of these rarely used prospectus exemptions may contribute to the complexity of the exempt market regime. If we adopt the proposed Listed Issuer Financing Exemption, should we consider repealing any of these other exemptions?
7. Investment dealers and exempt market dealers may participate in an offering under the proposed Listed Issuer Financing Exemption; however, there is no requirement for dealer or underwriter involvement. In addition, no exemption from the registration requirement is provided for acts related to distributions under the exemption, so any persons in the business of trading in securities will require registration or an available registration exemption for any activities undertaken in connection with distributions under the exemption.
 - (a) If adopted, do you anticipate that issuers would involve a dealer in offerings under the exemption?
 - (b) If not, how do you expect issuers will conduct their offerings, for example, via their own website?
8. We propose that distributions under the Listed Issuer Financing Exemption would be subject to secondary market liability and provide original purchasers with a contractual right of rescission against the issuer. We propose secondary market liability because the exemption is premised on the reporting issuer's continuous disclosure and limited to distributions of listed equity securities that are traded on the secondary market. Although the exemption provides for the distribution of freely tradeable securities to any class of purchaser, similar to a prospectus offering, the quantum of liability is more limited than it would be for a prospectus offering.
 - (a) Does the proposed liability regime provide appropriate incentives for issuers to provide accurate and complete disclosure under the exemption and adequate investor protection or should we consider imposing prospectus level liability?
 - (b) Some of the key objectives of the exemption include reducing the costs to an issuer of accessing the public markets and providing investors with a briefer document that they are more likely to read. Would imposing prospectus-level liability impact the objectives of the exemption?

- (c) Would the absence of statutory liability for dealers lead to lower standards of disclosure?
- (d) One of the conditions of the exemption is that the issuer must provide a contractual right of rescission in the agreement to purchase the security with the purchaser. Would a requirement for the issuer to enter into an agreement with purchasers be unduly burdensome?

Please submit your comments in writing on or before **October 26, 2021**.

Address your submission to all of the CSA as follows:

British Columbia Securities Commission
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)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Service NL
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Nunavut

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

Larissa Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Fax: 604-899-6581
lstreu@bcsc.bc.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2460, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax : 514-864-8381
consultation-en-cours@lautorite.qc.ca

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

Contents of Annexes

The following annexes form part of this CSA Notice:

Annex A:	Proposed amendments to National Instrument 45-106 <i>Prospectus Exemptions</i> , including new Form 45-106F* <i>Listed Issuer Financing Exemption Offering Document</i>
Annex B:	Proposed changes to Companion Policy 45-106CP
Annex C:	Proposed amendments to National Instrument 13-101 <i>System for Electronic Document Analysis and Retrieval (SEDAR)</i>
Annex D:	Proposed amendments to National Instrument 45-102 <i>Resale of Securities</i>
Annex E:	Local Matters – Ontario

Questions

Please refer your questions to any of the following:

<p>Larissa Streu Senior Legal Counsel, Corporate Finance British Columbia Securities Commission 604-899-6888 lstreu@bcsc.bc.ca</p>	<p>Leslie Rose Senior Legal Counsel, Corporate Finance British Columbia Securities Commission 604-899-6654 lrose@bcsc.bc.ca</p>
<p>David Surat Senior Legal Counsel, Corporate Finance Ontario Securities Commission 416-593-8052 dsurat@osc.gov.on.ca</p>	<p>Jessie Gill Senior Legal Counsel, Corporate Finance Ontario Securities Commission 416-593-8114 jessiegill@osc.gov.on.ca</p>
<p>Tracy Clark Senior Legal Counsel Alberta Securities Commission 403-355-4424 Tracy.Clark@asc.ca</p>	<p>Gillian Findlay Senior Legal Counsel Alberta Securities Commission 403-297-3302 Gillian.Findlay@asc.ca</p>

<p>Ella-Jane Loomis Senior Legal Counsel, Securities Financial and Consumer Services Commission (New Brunswick) 506-453-6591 ella-jane.loomis@fcnb.ca</p>	<p>Diana D'Amata Senior Regulatory Advisor Autorité des marchés financiers 514-395-0337, ext. 4386 diana.damata@lautorite.qc.ca</p>
<p>Heather Kuchuran Director, Corporate Finance Financial and Consumer Affairs Authority of Saskatchewan, Securities Division 306-787-1009 Heather.kuchuran@gov.sk.ca</p>	<p>Wayne Bridgeman Deputy Director, Corporate Finance The Manitoba Securities Commission, Securities Division 204-945-4905 wayne.bridgeman@gov.mb.ca</p>
<p>Abel Lazarus Director, Corporate Finance Nova Scotia Securities Commission 902-424-6859 abel.lazarus@novascotia.ca</p>	