

CSA Notice and Request for Comment

Proposed Amendments to National Instrument 45-102 Resale of Securities

*Proposed Changes to Companion Policy 45-102CP to National
Instrument 45-102 Resale of Securities*

*Proposed Consequential Amendments to National Instrument 31-103
Registration Requirements, Exemptions and Ongoing Registrant
Obligations*

and

*Proposed Consequential Changes to National Policy 11-206 Process for
Cease to be a Reporting Issuer Applications*

June 29, 2017

Introduction

The Canadian Securities Administrators (the CSA or we) are publishing, for a **90-day** comment period, proposed amendments to National Instrument 45-102 *Resale of Securities* (NI 45-102) and proposed changes to Companion Policy 45-102CP to National Instrument 45-102 *Resale of Securities* (45-102CP) (collectively, the proposed amendments).

We are also proposing consequential amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) and consequential changes to National Policy 11-206 *Process for Cease to be a Reporting Issuer Applications* (NP 11-206).

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

www.bcsc.bc.ca

www.albertasecurities.com

www.fcaa.gov.sk.ca

www.mbsecurities.ca

www.osc.gov.on.ca

www.lautorite.qc.ca

www.fcnb.ca

nssc.novascotia.ca

Substance and Purpose

The proposed amendments relate to section 2.14 of NI 45-102, the resale provisions for non-reporting issuers.

Section 2.14 of NI 45-102 (the existing 2.14 exemption) provides a prospectus exemption for the resale of securities (and underlying securities) where the issuer is not a reporting issuer in any jurisdiction of Canada provided that

- the resale is on an exchange, or a market, outside of Canada or to a person or company outside of Canada, and
- residents of Canada own not more than 10% of the outstanding securities of the issuer and represent not more than 10% of the total number of security holders (the ownership conditions).

If adopted, the proposed amendments would

- provide a new prospectus exemption (the proposed exemption) for the resale of securities (and underlying securities) where the issuer is not a reporting issuer in any jurisdiction of Canada if
 - the resale is on an exchange, or a market, outside of Canada or to a person or company outside of Canada, and
 - the issuer is incorporated or organized outside of Canada unless certain circumstances suggest that the issuer does not have a minimal connection to Canada (that is, the issuer has a presence in Canada); and
- repeal the existing 2.14 exemption.

The proposed amendments are intended to address feedback we received that the ownership conditions in the existing 2.14 exemption have become an impediment to participation by certain market participants in prospectus-exempt offerings by foreign issuers.

We have prioritized the proposed amendments in response to this feedback and in response to the number of applications for exemptive relief we received in connection with the existing 2.14 exemption. We are also reviewing the resale regime in NI 45-102 in its entirety to determine whether the existing regime continues to be relevant in today's markets and to assess the impact of alternative regulatory approaches.

Background

The securities regulatory approach to distributions of securities in Canada, except in Manitoba, relies on the "closed system". All distributions of securities must be made under a prospectus or an exemption from the prospectus requirement.

The objective of the "closed system" is to prevent the free trading of securities where there is no disclosure record about the issuer. Publicly available information on the issuer and its securities is essential to enable investors to make informed investment decisions.

Most securities that are distributed using prospectus exemptions are subject to the resale restrictions in NI 45-102. The resale restrictions are intended to ensure that investors have publicly available information about the issuer and its securities, and to allow the market sufficient time to absorb information before the securities become freely trading.

NI 45-102 includes two types of resale restrictions:

- a “restricted period” where the purchaser must hold securities for at least four months from the distribution date, provided the issuer of the securities is and has been a reporting issuer for the four months immediately preceding the trade;
- a “seasoning period” where the purchaser must hold securities until the issuer of the securities is and has been a reporting issuer for the four months immediately preceding the trade.

The rationale for the existing 2.14 exemption is that it is not necessary to restrict the resale of securities over a foreign market or to a person or company outside Canada if the issuer has a minimal connection to Canada and there is little or no likelihood of a market for the securities to develop in Canada. The purpose of the ownership conditions is to measure whether the issuer has a minimal connection to Canada.

Since the adoption of NI 45-102, there have been a number of changes to securities regulation and information accessibility, and a greater access to securities markets worldwide. Canadian investors, particularly institutional investors, are increasingly acquiring securities of foreign issuers to participate in global market growth by investing in a broadly diversified global portfolio. The securities are acquired either through private placements or on foreign exchanges.

As Canadian investors continue to acquire securities of foreign issuers, we have heard the following concerns about the ownership conditions:

1. *Difficult and time consuming to determine*

Some foreign issuers decide not to offer their securities in Canada to avoid the work necessary to determine if the ownership conditions will be met. Others will only offer their securities on a “buyer beware” basis. Canadian investors cannot determine whether the ownership conditions have been met without information from the issuer. This reduces the opportunities for Canadian investors to participate in private placements with foreign issuers.

2. *Solutions are uncertain and costly*

If the ownership conditions are exceeded, or if the investor has no means of determining whether the ownership conditions are met, then Canadian investors will have to hold the securities for an indefinite period. There are a number of options to address the indefinite hold period, such as using a prospectus exemption for the resale or applying for exemptive relief. However, these options are uncertain, time consuming and costly. Investors may be prevented from realizing on their investment at an opportune time in the foreign market.

3. *No longer an appropriate measure of minimal connection to Canada*

Many foreign issuers, without any other connection to Canada, are finding they have exceeded the ownership conditions, perhaps through Canadians purchasing their securities on foreign markets. In other cases, the ownership conditions are exceeded when a Canadian institutional investor wants to take a significant position in the foreign issuer’s private placement. The increased globalization of the markets may mean it is no longer appropriate to determine a foreign issuer’s connection to Canada based solely on Canadian security holdings.

Exemptive relief granted

We have granted relief to foreign issuers or investors of foreign issuers that were unable to rely on the existing 2.14 exemption in the following circumstances:

- the ownership conditions were exceeded due to a large position held by one or several Canadian institutional investors;
- the ownership conditions were exceeded after excluding the position of Canadian institutional investors but the applicant was able to provide sufficient evidence that the foreign issuer had a minimal connection to Canada and that there was no market for the securities in Canada.

When considering the applications for resale relief, the number of Canadian security holders and the size of their holdings were not solely determinative of whether the issuer had a minimal connection to Canada or whether a market existed or was likely to develop in Canada. We considered other factors such as whether the location of the assets and revenues and the issuer's mind and management were in Canada.

AMF blanket orders

The Autorité des marchés financiers (the AMF) published on June 30, 2016 two local blanket orders (the foreign issuer blanket order and Canadian issuer blanket order) and an accompanying AMF Notice relating to *Regulation 45-102 respecting Resale of Securities* (the AMF Notice). The AMF's objective in granting the blanket orders was to respond to concerns raised by market participants and provide deal certainty to market participants in their investment decisions on a market outside of Canada. The AMF Notice and the blanket orders are available on the AMF's website at www.lautorite.qc.ca.

Foreign issuer blanket order

The foreign issuer blanket order exempts Canadian institutional investors from the prospectus requirement for the resale of securities of a foreign non-reporting issuer acquired under a prospectus exemption in Canada. The exemption is available if the foreign issuer is not a reporting issuer in a jurisdiction of Canada on the date of resale and the securities are sold on an exchange or a market outside of Canada, or to a person or company outside of Canada.

The AMF's rationale for granting the foreign issuer blanket order was that there is little or no likelihood of a market for the securities of a foreign issuer to develop in Canada, based on the issuer having a minimal connection to Canada.

Canadian issuer blanket order

The Canadian issuer blanket order exempts Canadian institutional investors from the prospectus requirement for the resale of securities of a Canadian issuer acquired under a prospectus exemption in Canada. The exemption applies in situations where the securities were distributed under a concurrent prospectus offering outside of Canada only and the Canadian institutional investor acquired the securities at the same financial consideration as investors under the prospectus offering.

The exemption is available if the securities of the Canadian issuer are only traded on an exchange or market outside Canada and the Canadian issuer is a reporting issuer in a jurisdiction of Canada at the date of resale. The securities can only be resold through an exchange, or a market, outside of Canada, or to a person or company outside of Canada.

Proposed OSC Rule 72-503

On June 30, 2016, the Ontario Securities Commission (the OSC) published for comment proposed OSC Rule 72-503 *Distributions Outside of Canada* (the 2016 Proposed OSC Rule). The comment period ended September 28, 2016.

The 2016 Proposed OSC Rule puts forward exemptions from the prospectus requirement in respect of a distribution, including a deemed distribution on resale, of securities to a person or company outside of Canada in certain circumstances. The substance and purpose of the 2016 Proposed OSC Rule was to provide certainty to participants in cross-border transactions by providing explicit exemptions that respond to the challenges that issuers and intermediaries face in determining whether a prospectus must be filed or an exemption from the prospectus requirement must be relied on in connection with a distribution of securities to investors outside of Canada.

The 2016 Proposed OSC Rule was intended to set out a regime for the distribution and resale of securities outside of Canada. Because the proposed amendments to NI 45-102 address many of the concerns expressed by market participants regarding the resale of securities outside of Canada under the existing 2.14 exemption, the OSC has decided to remove the resale provisions from the 2016 Proposed OSC Rule in the interests of harmonizing the resale of securities outside of Canada across the CSA. Concurrent with the publication of the proposed amendments for comment, the OSC is republishing for comment an amended version of the 2016 Proposed OSC Rule.

Summary of the Proposed Amendments

The policy rationale for the existing 2.14 exemption is that it is not necessary to restrict the resale of securities over a foreign market or to a person or company outside of Canada if the issuer has a minimal connection to Canada and little or no likelihood that a market for the securities to develop in Canada. This policy rationale forms the basis for the proposed amendments.

1. Proposed new exemption for foreign non-reporting issuers

The proposed exemption would allow Canadian investors to resell outside of Canada securities of a foreign issuer acquired under a prospectus exemption.

Definition of foreign issuer

We propose to introduce a definition of foreign issuer which will limit the availability of the proposed exemption to the securities of issuers having minimal connection to Canada. In this sense, the definition of foreign issuer is a replacement for the ownership conditions under the existing 2.14 exemption. Under the proposed exemption, a foreign issuer would be an issuer that is not incorporated or organized under the laws of Canada, or a jurisdiction of Canada, unless one or more of the following apply:

- the issuer has its head office in Canada;
- the majority of the executive officers or directors of the issuer ordinarily reside in Canada;
- the majority of the consolidated assets of the issuer are located in Canada.

In our view, the proposed definition provides an appropriate proxy for assessing an issuer's connection to Canada. In addition, we think that these factors would be easier to determine by either the issuer or the investor than the ownership conditions.

Other conditions to the exemption

The proposed exemption has the following conditions:

1. *the issuer is a foreign issuer at the distribution date*

The foreign issuer status would be determined at the distribution date. We are proposing that the determination be made at this date because, in our view, it provides certainty to the investor at the time of the initial purchase as to whether the proposed exemption will be available for the subsequent resale of the securities. Also, this timing makes it easier for investors to obtain the information necessary from the issuer to determine whether the issuer is a foreign issuer.

2. *the foreign issuer was not a reporting issuer in any jurisdiction of Canada at the distribution date, or is not a reporting issuer in any jurisdiction of Canada at the date of the trade*

This condition is equivalent to the requirement that must be satisfied under the existing 2.14 exemption. We are proposing to carry it forward as we believe that it remains appropriate. We are not aware of any concerns pertaining to this aspect of the existing 2.14 exemption.

3. *the trade is made through an exchange, or a market, outside of Canada, or to a person or company outside of Canada*

This condition is equivalent to the requirement that must be satisfied under the existing 2.14 exemption. We are proposing to carry it forward as we believe that it remains appropriate. We are not aware of any concerns pertaining to this aspect of the existing 2.14 exemption.

4. *if the selling security holder is an insider of the foreign issuer, no unusual effort is made to prepare the market or to create a demand in Canada for the security that is the subject of the trade*

This is a new condition that is meant to address potential policy concerns where an investor is an insider of the foreign issuer and, as a result, may have a greater opportunity or incentive to prepare the market or create a demand in Canada for the securities of the foreign issuer.

2. *Proposed repeal of existing 2.14 exemption*

Based on feedback received from market participants regarding the uncertainty and lack of availability of the existing 2.14 exemption, we propose repealing this exemption because it may no longer be necessary. We propose to replace it with the proposed exemption. We recognize that the existing 2.14 exemption applies to the securities of all non-reporting issuers that meet the ownership conditions while the proposed exemption applies to the resale of securities of non-reporting foreign issuers.

3. *Transition provisions*

Transition provisions will be considered for the final publication.

Consequential Amendments

We propose a consequential amendment to section 8.16 of NI 31-103 and a consequential change to section 14 of NP 11-206 to replace the reference to the existing 2.14 exemption with a reference to the proposed exemption. We propose a further change to section 14 to remove the obligation to ascertain the number of Canadian security holders.

Local Matters

Annex E to this notice outlines the proposed consequential amendments to local securities legislation and includes additional text, as required, to respond to local matters in a local jurisdiction. Each jurisdiction that is proposing local amendments will publish an Annex E.

Unpublished Materials

In developing the proposed amendments, we have not relied on any significant unpublished study, report or other written materials.

Request for Comments

We welcome your comments on the proposed amendments and the consequential amendment and changes. We also invite comments on the following specific questions:

1. We have proposed a definition of “foreign issuer” for the purposes of the proposed exemption.
 - a. Are the proposed elements of the definition of foreign issuer appropriate for purposes of establishing that an issuer has a minimal connection to Canada? If not, please explain which elements of the proposed definition of foreign issuer are not appropriate and why.
 - b. Are there other elements we should incorporate into the proposed definition of foreign issuer that would be a more appropriate indicator of whether an issuer has a minimal connection to Canada? If so, which ones and why.
 - c. Would investors be able to easily determine whether the majority of the consolidated assets of the issuer are located in Canada for purposes of the new foreign issuer definition? Please explain the reasons for your views.
 - d. Are there other aspects of the proposed definition of foreign issuer that would be difficult to determine and should be removed? Please explain which aspects and why.
 - e. In practice, will investors be able to obtain sufficient information from the issuer at the date of distribution to enable them to determine whether the issuer meets the definition of foreign issuer? If not, could investors easily make this determination on their own without assistance from the issuer? Please explain the reasons for your views.
2. Under the proposed exemption, the determination of whether an issuer is a foreign issuer is made at the distribution date. We are proposing that the determination be made at this date because, in our view, it provides certainty to the investor at the time of the initial purchase as to whether the proposed exemption will be available for the subsequent resale of the securities. Also, it enables the investor to ask the issuer to make representations as to its foreign issuer status at the time of distribution.
 - a. Do you agree with our analysis? If not, please explain why.
 - b. Do you believe that the date of trade is a more appropriate time to determine foreign issuer status? If so, please explain why.

- c. Do you believe we should allow a choice as to whether the determination of the foreign issuer status is made at either the distribution date or the date of trade? Please explain the reasons for your views.
3. Under the proposed exemption, the determination of the non-reporting issuer status is made at either the distribution date or the date of trade.
 - a. Do you agree with this approach?
 - b. Do you believe that determination should be made at only one of these dates? If so, which date? Please explain the reasons for your views.
4. We have stipulated as a condition to the proposed exemption that if the selling security holder is an insider of the issuer, then no unusual efforts can be made by the selling security holder to prepare the market or to create a demand in Canada for the security that is the subject of the trade.
 - a. Do you think that such a condition is appropriate? Please explain why or why not?
 - b. Would a different condition be more appropriate to address potential concerns about selling security holders that are insiders preparing the market or creating a demand in Canada for the foreign issuer's securities? Please explain and provide examples.
 - c. Do you think we should be concerned that security holders that are insiders may prepare the market or create a demand in Canada for the foreign issuer's securities? Please explain the reasons for your views.
5. Under the proposed amendments, we are proposing to repeal the existing 2.14 exemption. The existing 2.14 exemption applies to the securities of non-reporting issuers that satisfy the ownership conditions whereas the proposed exemption applies to the securities of non-reporting issuers that are foreign issuers.
 - a. Are you aware of non-reporting issuers that use the existing 2.14 exemption and would not qualify as foreign issuers under the proposed exemption? Please provide examples.
 - b. Are there other circumstances where an issuer would be able to use the existing 2.14 exemption but not the proposed exemption? Please provide examples.
 - c. Do you foresee any other issues if we repeal the existing 2.14 exemption? Please provide examples.
6. The proposed exemption would not be available for the resale outside of Canada of securities of an issuer incorporated or organized in Canada because such issuers do not fall within the definition of foreign issuer.
 - a. In your view, should we consider a similar exemption for the resale outside of Canada of securities of a Canadian issuer distributed under a prospectus exemption if the securities of the Canadian issuer are only listed on an exchange, or market, outside of Canada? Please explain the reasons for your views.
 - b. What conditions, if any, would you suggest we include in a similar exemption? Please explain the reasons for your suggestions.

How to provide your comments

Please provide your comments in writing by **September 27, 2017**. Please provide your comments in Microsoft Word format.

Please address your submissions to all members 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, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Please send your comments **only** to the addresses below. Your comments will be distributed to the other participating CSA 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
Email: consultation-en-cours@lautorite.qc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario M5H 2S8
Fax: 416-593-2318
Email: comments@osc.gov.on.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

This notice contains the following annexes:

Annex A – Proposed amendment to National Instrument 45-102 *Resale of Securities*

Annex B – Proposed changes to Companion Policy 45-102 to National Instrument 45-102 *Resale of Securities*

Annex C – Proposed amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*

Annex D – Proposed changes to National Policy 11-206 *Process for Cease to be a Reporting Issuer Applications*

Annex E – Local Matters

Questions

Please refer your questions to any of the following:

Rosetta Gagliardi
Senior Policy Advisor, Corporate Finance
Autorité des marchés financiers
514-395-0337 ext. 4365
Rosetta.gagliardi@lautorite.qc.ca

Marc-Olivier St-Jacques
Analyst, Corporate Finance
Autorité des marchés financiers
514-395-0337 ext. 4424
Marco.st-jacques@lautorite.qc.ca

Jennifer McLean
Analyst, Corporate Finance
Autorité des marchés financiers
514-395-0337 ext. 4387
Jennifer.mclean@lautorite.qc.ca

Leslie Rose
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
604-899-6654
lrose@bcsc.bc.ca

Larissa M. Streu
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
604-899-6888
lstreu@bcsc.bc.ca

Elliott Mak
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
604-899-6501
emak@bcsc.bc.ca

Tracy Clark
Senior Legal Counsel
Alberta Securities Commission
403-355-4424
Tracy.Clark@asc.ca

Andrew McKenzie
Legal Counsel
Alberta Securities Commission
403-297-4225
Andrew.Mckenzie@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
Director, General Counsel
Manitoba Securities Commission
204-945-2561
Chris.besko@gov.mb.ca

Jo-Anne Matear
Manager, Corporate Finance
Ontario Securities Commission
416-593-2323
jmatear@osc.gov.on.ca

Stephanie Tjon
Senior Legal Counsel, Corporate Finance
Ontario Securities Commission
416-593-3655
stjon@osc.gov.on.ca

Ella-Jane Loomis
Senior Legal Counsel, Securities
Financial and Consumer Services Commission (New Brunswick)
506-658-2602
Ella-jane.loomis@fcnbc.ca

Heidi G. Schedler
Senior Enforcement Counsel, Enforcement
Nova Scotia Securities Commission
902-424-7810
Heidi.schedler@novascotia.ca