

CSA Notice and Request for Comment
Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* relating to Syndicated Mortgages

and

Proposed Changes to Companion Policy 45-106CP *Prospectus Exemptions*

March 8, 2018

Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are publishing for a 90-day comment period proposed amendments (the **Proposed Amendments**) to National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**) and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) related to syndicated mortgages.

The Proposed Amendments are set out in Annexes A and C of this notice. Related changes to Companion Policy 45-106CP *Prospectus Exemptions* (the **Proposed Changes**) are set out in Annex B. This notice will also be available on the following websites of CSA jurisdictions:

nssc.novascotia.ca
www.albertasecurities.com
www.bcsc.bc.ca
www.fcaa.gov.sk.ca
www.fcnb.ca
www.lautorite.qc.ca
www.mbsecurities.ca
www.osc.gov.on.ca

Substance and Purpose

The Proposed Amendments include changes to the prospectus and registration exemptions available for the distribution of syndicated mortgages. A syndicated mortgage is a mortgage in which two or more persons participate, directly or indirectly, as lenders in the debt obligation that is secured by the mortgage.

In particular, the Proposed Amendments:

- Remove the prospectus and registration exemptions under sections 2.36 of NI 45-106 and 8.12 of NI 31-103 respectively for the distribution of syndicated mortgages in the CSA jurisdictions where the exemptions are available.

- Introduce additional requirements to the offering memorandum exemption under section 2.9 of NI 45-106 (the **OM Exemption**) that apply when the exemption is used to distribute syndicated mortgages.
- Amend the private issuer prospectus exemption under section 2.4 of NI 45-106 (the **Private Issuer Exemption**) so that it is not available for the distribution of syndicated mortgages.

The Proposed Changes provide guidance regarding the new requirements introduced by the Proposed Amendments and regarding the determination of the issuer of a syndicated mortgage.

The purpose of the Proposed Amendments is to introduce additional investor protections related to the distribution of syndicated mortgages and to increase harmonization regarding the regulatory framework for syndicated mortgages across all CSA jurisdictions.

Background

All CSA jurisdictions currently have prospectus and registration exemptions for securities that are mortgages (the **Mortgage Exemptions**) if they are sold by a mortgage broker licensed in the Canadian jurisdiction where the property is located. The rationale for the Mortgage Exemptions is that an alternative regulatory regime applies to the distribution of mortgages.

In Alberta, British Columbia, Manitoba, New Brunswick, Québec and Saskatchewan, the Mortgage Exemptions are not available for syndicated mortgages.

There has been a significant increase in the offering of syndicated mortgages in connection with real estate developments in certain jurisdictions. These offerings potentially raise investor protection concerns, particularly when sold to retail investors, because they may:

- be used to raise seed financing for real estate developments, such as the costs of initial design proposals and start-up expenses;
- be sold based on projected values of a completed development;
- not be fully secured by a charge against real property, since the amount of the loan may significantly exceed the current fair value of the land;
- be subordinate to future financings, such as construction financing, which may be substantial and effectively render the investment more similar in risk to an equity investment rather than a fixed income investment;
- be offered by issuers with no source of income, rendering the payment of ongoing interest dependent on future financing or reserves from the principal advanced; and
- be subject to the risk of delay and increased costs inherent to real estate development.

Summary of the Proposed Amendments

Changes to the Mortgage Exemptions

Consistent with the current approach in Alberta, British Columbia, Manitoba, New Brunswick, Québec and Saskatchewan, the Proposed Amendments, together with related legislative amendments in Ontario, would remove the Mortgage Exemptions for syndicated mortgages in

Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island and Yukon.

Alternative prospectus exemptions would be required for the distribution of syndicated mortgages in all CSA jurisdictions. If we make the Proposed Amendments, we expect that syndicated mortgages will most likely be offered primarily under the accredited investor exemption under section 2.3 of NI 45-106 (the **AI Exemption**), the OM Exemption or the family, friends and business associates exemption under section 2.5 of NI 45-106 (the **FFBA Exemption**), although other prospectus exemptions may be available.

In those jurisdictions where the Mortgage Exemptions currently apply to syndicated mortgages, market participants that are in the business of trading syndicated mortgages would be required to consider whether the registration requirement applies to them. Since entities involved in financing real estate developments tend to engage in repeated financing activities, we expect that some of these firms will be required to become registered as a dealer or to rely on a registration exemption. In Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island and Yukon, the amendment to the registration exemption will be made effective one year later than the change to the prospectus exemption to allow time for market participants to register as required.

Changes to the Offering Memorandum Exemption

The OM Exemption is available for the distribution of syndicated mortgages. The OM Exemption allows for the distribution of securities to retail investors and is premised on adequate disclosure being provided to prospective purchasers.

Projected values of the completed development and the fact that the syndicated mortgage is secured against real property are often emphasized in connection with the marketing of these investments. The protection provided by this security interest depends primarily on the current fair market value of the real property relative to the obligations and any prior ranking charges.

The Proposed Amendments require issuers to deliver an appraisal of the current fair market value of the property subject to the syndicated mortgage to prospective purchasers under the OM Exemption. The appraisal would be prepared by a qualified appraiser who is independent of the issuer. Any other value of the property disclosed by the issuer would be required to have a reasonable basis and the issuer would be required to disclose the material factors and assumptions underlying that value and whether it was prepared by a qualified appraiser who is independent of the issuer.

Consistent with the current approach in British Columbia, the Proposed Amendments also include supplemental disclosure requirements that are tailored to syndicated mortgages, including disclosure of development risks, prior obligations secured against the real property and the price paid by the developer to acquire the real property. The intention of these amendments is to require adequate information for:

- potential purchasers under the OM Exemption to make an informed investment decision, and

- any registrants involved in the distribution to discharge their obligations to know the product being offered and to conduct a meaningful analysis of the suitability of the investment.

Issuers of syndicated mortgages would be required to meet the requirements of Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers*, as supplemented by proposed Form 45-106F18 *Supplemental Offering Memorandum Disclosure for Syndicated Mortgages*. The new disclosure requirements include information regarding the business and financial position of the borrower under the syndicated mortgage. We expect that the issuer of the syndicated mortgage and the borrower will generally be the same entity. However, in circumstances where the issuer of the syndicated mortgage is not the borrower, its ability to rely on the OM Exemption will be dependent on its ability to provide the required information regarding the borrower and to certify that it does not contain a misrepresentation. We consider information regarding the borrower to be essential, since it is the borrower that will be required to make payments of principal and interest under the syndicated mortgage.

Any mortgage broker involved in the distribution of a syndicated mortgage under the OM Exemption would also be required to provide a certificate that the offering memorandum does not contain a misrepresentation with respect to matters within its knowledge and that the mortgage broker has made best efforts to ensure that matters that are not within its knowledge do not contain a misrepresentation. The certificate requirement for mortgage brokers is modelled on the current requirements that apply in British Columbia. In some jurisdictions, a person that certifies an offering memorandum is subject to the statutory right of action for purchasers if the offering memorandum contains a misrepresentation.

Changes to the Private Issuer Exemption

The Proposed Amendments would make the Private Issuer Exemption unavailable for the distribution of syndicated mortgages. The Private Issuer Exemption is intended for small businesses to raise capital and we do not believe that it is appropriate for this exemption to be used for products such as syndicated mortgages. We are also concerned with our ability to monitor developments related to syndicated mortgage distributions without adequate reporting through reports of exempt distribution, which are not required under the Private Issuer Exemption. Since the FFBA Exemption and the AI Exemption will be available as alternatives to the Private Issuer Exemption, this proposed amendment should not significantly restrict the range of potential purchasers for syndicated mortgages.

Removing the Private Issuer Exemption for syndicated mortgages would result in more consistent reporting for syndicated mortgage distributions through the report of exempt distribution. The additional reporting would provide us with more information about this market, enabling us to develop more targeted compliance and investor education programs related to syndicated mortgages.

Impact on Investors

Investors in syndicated mortgages who purchase under the amended OM Exemption would be entitled to enhanced disclosure relating to their investment. We anticipate that this additional

disclosure would result in more informed investment decisions and enable registrants involved in the distribution to better fulfil their obligations related to the distribution.

Investors in syndicated mortgages distributed under other prospectus exemptions would benefit from the potential involvement of a registrant in the distribution, in the same manner as for the distribution of other real estate related securities.

Anticipated Costs and Benefits of the Proposed Amendments and Proposed Changes

The Proposed Amendments and Proposed Changes are intended to enhance investor protection, particularly in connection with distributions to retail investors under the OM Exemption.

The proposed amendments to the OM Exemption are intended to enhance the ability of investors to understand the risks related to investing in syndicated mortgages and the extent to which the security interest in the property subject to the syndicated mortgage provides meaningful protection in the event of a default under the syndicated mortgage. The additional disclosure proposed under the OM Exemption is also intended to assist registrants in discharging their obligations to their clients.

The Proposed Amendments would also result in greater harmonization regarding the regulation of syndicated mortgages.

The costs associated with the Proposed Amendments and Proposed Changes may include the costs of:

- obtaining a property appraisal and providing supplemental disclosure for distribution under the OM Exemption;
- filing of reports of exempt distribution for the distribution of syndicated mortgages that could otherwise have been made in reliance on the Private Issuer Exemption; and
- registering as an exempt market dealer and ongoing compliance for market participants in jurisdictions where syndicated mortgages may currently be offered in reliance on the Mortgage Exemptions.

With the exception of the costs of registration and compliance, we do not expect these costs to be significant. For firms that are currently in the business of trading in syndicated mortgages and are licensed under mortgage broker legislation, the transition to registration as an exempt market dealer could potentially involve significant costs. These firms would be subject to new requirements and would be required to adopt new policies and procedures. We are proposing that the changes to the registration exemption for mortgages will take effect one year later than the other Proposed Amendments to minimize the immediate impact on these firms.

We consider that the costs associated with the Proposed Amendments and the Proposed Changes are proportionate to the benefits of increased investor protection.

Alternatives Considered

We have not considered any alternatives to the Proposed Amendments related to the Mortgage Exemptions or the OM Exemption. We consider the additional investor protections related to the distribution of syndicated mortgages included in the Proposed Amendments to be necessary.

As an alternative to removing the Private Issuer Exemption for syndicated mortgages, we considered requiring an issuer distributing syndicated mortgages under that exemption to file a report of exempt distribution. However, because the AI Exemption and FFBA Exemption would allow for the distribution of syndicated mortgages to substantially the same potential purchasers as the Private Issuer Exemption, we did not think that alternative was preferable. Further, adding a reporting requirement to the Private Issuer Exemption would require additional changes to the form of report of exempt distribution and system changes to the electronic filing systems in certain jurisdictions, which could result in additional costs and complexity for market participants.

Local Matters

Annex D is being published in any local jurisdiction that is proposing related changes to local securities laws, including local notices or other policy instruments in that jurisdictions. It may also include additional information that is relevant to that jurisdiction only.

Request for Comments

We welcome your comments on the Proposed Amendments and Proposed Changes.

In addition, we would appreciate comments regarding the following questions:

Appraisals

1. As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?

Mortgage broker requirements

2. Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements.
3. Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?

Exclusion of syndicated mortgages from the Private Issuer Exemption

4. Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.

Alternative prospectus exemptions

5. Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?
6. Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for “qualified syndicated mortgages” under British Columbia Securities Commission Rule 45-501 *Mortgages*?
7. Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?

Please submit your comments in writing on or before June 6, 2018. If you are not sending your comments by email, please send a CD containing the submissions (in Microsoft Word format).

Address your submission to all of the CSA as follows:

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

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

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Ontario Securities Commission
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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

Annex A – Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions*

Annex B – Proposed Changes to Companion Policy 45-106CP *Prospectus Exemptions*

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

Annex D – Local Matters

Questions

Please refer your questions to any of the following:

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