

Notice and Request for Comments

Proposed repeal and replacement of National Instrument 45-106 *Prospectus and Registration Exemptions* Form 45-106F1, Form 45-106F2, Form 45-106F3, Form 45-106F4 and Form 45-106F5 and Companion Policy 45-106CP *Prospectus and Registration Exemptions*

Proposed amendments to National Instrument 45-102 *Resale of Securities*, Form 45-102F1 and Companion Policy 45-102CP *Resale of Securities*

Background

We, the Canadian Securities Administrators (the CSA), are publishing for a 90-day comment period the following documents:

- National Instrument 45-106 *Prospectus and Registration Exemptions* (**New NI 45-106**),
- Form 45-106F1 *Report of Exempt Distribution*, Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers*, Form 45-106F3 *Offering Memorandum for Qualifying Issuers*, Form 45-106F4 *Risk Acknowledgement* and Form 45-106 F5 *Risk Acknowledgement – Saskatchewan Close Personal Friends and Close Business Associates* (collectively, the **New Forms**), and
- Companion Policy 45-106CP *Prospectus and Registration Exemptions* (**New 45-106CP** and , together with New NI 45-106 and the New Forms, the **New Exemptions Materials**).

The New Exemptions Materials would replace the following documents currently in effect:

- National Instrument 45-106 *Prospectus and Registration Exemptions* (**Current NI 45-106**),
- Form 45-106F1 *Report of Exempt Distribution*, Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers*, Form 45-106F3 *Offering Memorandum for Qualifying Issuers*, Form 45-106F4 *Risk Acknowledgement* and Form 45-106 F5 *Risk Acknowledgement – Saskatchewan Close Personal Friends and Close Business Associates* (collectively, the **Current Forms**), and
- Companion Policy 45-106CP *Prospectus and Registration Exemptions* (Current 45-106CP and, together with Current NI 45-106 and Current 45-106CP, the **Current Exemptions Materials**).

The Current NI 45-106 and Current Forms came into effect either as a rule, a policy, or a regulation, in all CSA jurisdictions, except Yukon, on September 14, 2005. Each member of the CSA, except Yukon, is expected to repeal the Current Exemptions Materials and replace them with the New Exemptions Materials. The New NI 45-106 and New Forms will be implemented as a rule, commission regulation, or policy in all CSA member jurisdictions.

We are also publishing for comment proposed amendments to:

- National Instrument 45-102 *Resale of Securities* (**NI 45-102**),
- Form 45-102F1 *Notice of Intention to Distribute Securities under Section 2.8 of NI 45-102 Resale of Securities*, and
- Companion Policy 45-102CP *Resale of Securities* (**45-102CP**)
(collectively, the **Amended Resale Materials**).

We are also proposing consequential amendments (**Consequential Amendments**) to update National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**). The Consequential Amendments would amend NI 51-102 to update cross references to New NI 45-106.

The text of the New Exemption Materials, the Amended Resale Materials, related amending instruments, and Consequential Amendments together with versions of New 45-106CP, New Forms and the Amended Resale Materials blacklined against the versions of those documents currently in force, follow or can be found elsewhere on a CSA member website.

In addition, the text outlining proposed related amendments to local securities legislation is being published concurrently with this Notice or can be found elsewhere on a CSA member website.

The Current NI 45-106 harmonizes and consolidates many of the exemptions from the prospectus and registration requirements previously contained in provincial statutes, and national, multilateral and local instruments. NI 45-102, first adopted in November 2001 in a number of jurisdictions, harmonizes the resale restrictions that apply to securities distributed in reliance on prospectus exemptions.

Changes to the *Securities Act* (Ontario) that would be required to implement proposed National Instrument 31-103 *Registration Requirements* also may affect the proposed New NI 45-106. At this time the Government of Ontario has not completed its consideration of possible legislative amendments. Any statutory amendments will only become law if they are passed by the Legislative Assembly of Ontario.

If and when a consultation draft of the legislation is published, this could result in the Ontario Securities Commission having to publish a modified rule proposal in Ontario.

Additional information on the New Exemptions Materials and the Amended Resale Materials, required for publication in Ontario, can be found in the form of notice published in the OSC Bulletin or on its Website at www.osc.gov.on.ca.

Substance and purpose of proposed changes

The proposed changes to the instruments fall into the following two main categories:

1. Substantive changes to improve the effectiveness of the instruments. These include:
 - a. amendments to clarify some provisions of the instruments,
 - b. amendments to address areas that an instrument, form or companion policy does not address, including codifying discretionary relief that we have granted and answers to certain frequently asked questions, including those in CSA Staff Notice 45-305 *Frequently asked questions regarding National Instrument 45-106 Prospectus and Registration Exemptions*, and
 - c. amendments to streamline and harmonize requirements in the instruments.

2. Changes consequential to proposed National Instrument 31-103 *Registration Requirements* (NI 31-103). We propose to restructure New NI 45-106 so that the prospectus exemptions set out in Part 2 of the Current NI 45-106 are independent from the dealer registration exemptions in that Part. We propose to add a provision rendering the registration exemptions in New NI 45-106 inoperative in most jurisdictions after NI 31-103 comes into force. In addition, we propose to add a provision retaining the registration exemptions in New NI 45-106 in certain circumstances in British Columbia and Manitoba after NI 31-103 comes into force.

In British Columbia and Manitoba, the registration exemptions in Part 3 of New NI 45-106 will apply to a person unless the person is registered in any Canadian jurisdiction. A person may not rely on the registration exemptions in New NI 45-106 in British Columbia or Manitoba if they are already registered in either of those jurisdictions.

Certain registration exemptions now contained in Current NI 45-106 are reproduced in NI 31-103 and, following a transition period after NI 31-103 comes into force, the New NI 45-106 will be primarily a prospectus exemptions rule.

For further information, please see the discussion below under “Sections 3.0 and 3.01 – Application”, which outlines the availability of the registration exemptions in New NI 45-106. For further information regarding NI 31-103, including the registration exemptions set out in that instrument, please see the notice accompanying NI 31-103 published for comment on February 29, 2008.

Summary of the proposed substantive changes

The significant proposed changes to improve the effectiveness of the Current Exemptions Materials are set out below. This is not a complete list of all the changes.

Changes to improve the effectiveness of the Current NI 45-106

Section 1.1 – Definitions

We are proposing to delete subsection (c) of the definition of “executive officer”. Subsection (c) is redundant because all persons covered by the text of subsection (c) are also covered by the text of subsection (d) of the definition.

We are also adding a definition of “self-directed RESP” as we are introducing a national exemption for certain trades in self-directed RESPs.

In addition, some jurisdictions may be adopting changes to a number of definitions in their legislation. As a result of those changes, the following definitions in Current NI 45-106 may no longer be required in those jurisdictions:

- control person
- director
- reporting issuer

Sections 2.2 and 3.2 – Reinvestment plan

We are proposing to make two changes to this exemption.

1. This exemption permits dividends or distributions to be reinvested to acquire new securities. The form of this exemption adopted in September 2005 requires that the securities issued under this exemption be of the same class as the securities to which the dividend or distribution is attributable. However, as discussed in question B.2 of CSA Staff Notice 45-305, all jurisdictions have provided an alternative exemption without this restriction, either through a blanket order or, in Ontario, an amendment to the exemption. The proposed change will mean that issuers with a reinvestment plan that issues a different class of securities can rely on the exemption in New NI 45-106. The jurisdictions with blanket orders expect to revoke those orders when New NI 45-106 comes into force. This change preserves the status quo in all CSA jurisdictions.

2. In conjunction with expanding the reinvestment plan exemption in the manner described above, we are proposing to require an issuer who issues securities of a different class to provide information to its plan participants about the rights of the class of securities being distributed. This can be done by either providing the description or a notice of a source where the participant can obtain the information without charge. We have included in Part 8 a transitional provision so that an issuer who has an existing plan can provide the required information with a mailing to its securityholders (such as with the proxy materials for an annual general meeting).

Sections 2.4 and 3.4 – Private issuer

We are proposing two main changes to this exemption.

1. We are changing it so that an issuer that was a reporting issuer but that no longer has public shareholders (for example, following a takeover bid and compulsory acquisition or a reorganization) can rely on the private issuer exemption.

2. We are adding grandchildren to the list of family members to whom securities can be issued. We understand that the failure to include grandchildren in the list was sometimes a problem for certain trusts established for the benefit of grandchildren.

Sections 2.5 and 3.5 – Family, friends and business associates

We are adding grandchildren to the list of family members (similar to the change proposed for sections 2.4 and 3.4)

Sections 2.9 and 3.9 – Offering memorandum

We are proposing changes that will harmonize the availability of the offering memorandum exemption in sections 2.9(2) and 3.9(2) for investment funds. As a result of these changes, the exemption in Alberta, Manitoba, Northwest Territories, Nunavut, Prince Edward Island, Québec and Saskatchewan would be available to a mutual fund that is a reporting issuer or to a non-redeemable investment fund.

New Brunswick is proposing to remove the restriction on commissions and finder's fees in sections 2.9(4) and 3.9(4).

Sections 2.12, 3.12, 2.13 and 3.13 – Asset acquisition and Petroleum, natural gas and mining properties

Proposed changes make it clear that the acquisition of assets or natural resource properties, as the case may be, can be made directly or indirectly (such as through a wholly-owned subsidiary). This proposed change is based on exemptive relief we have granted.

Section 2.16 and 3.16 – Take-over bid and issuer bid

Proposed changes clarify that prospectus and registration requirements do not apply in connection with a take-over bid or issuer bid in a jurisdiction of Canada.

Sections 2.18 and 3.18 – Investment fund reinvestment plan

The proposed changes allow an investment fund that is not in continuous distribution to rely on the exemption provided that the fund gives investors information which is substantially similar to the information contained in a prospectus.

Sections 2.22 and 3.22 – Definition of consultant

We are proposing to add employees of consulting companies to the list of eligible persons. Trades to those employees are permitted under the exemption only if the employee spends a significant amount of time and attention on the affairs and business of the issuer or its related entity.

Sections 2.34 and 3.34 – Specified debt

In addition to changing its title, we are proposing to make two changes to this exemption.

1. Currently, debt securities of or guaranteed by certain permitted supranational agencies can be traded under this exemption. We are adding to the list of permitted supranational agencies. This proposed change is based on exemptive relief and blanket orders granted in certain jurisdictions.

2. We are removing the exemption for trades in debt securities for Ontario school boards or certain corporations established under the *Education Act* (Ontario) as this exemption is only available in Ontario. Ontario is proposing to move this exemption to OSC Rule 45-501 *Ontario Prospectus and Registration Exemptions*.

Sections 2.36 and 3.36 – Mortgages

Alberta is proposing to be included in s. 2.36(3) of NI 45-106 and thereby remove the exemption for syndicated mortgages in Alberta.

Sections 2.38 and 3.38 – Not for profit issuer

British Columbia is proposing to remove the British Columbia-only requirement that a not for profit issuer must provide an information statement to purchasers.

Sections 2.43 and 3.43 – Self-directed RESPs

We are proposing to add an exemption for trades in self-directed RESPs. This exemption is similar to exemptions currently available in many jurisdictions where a self-directed RESP is a security.

Sections 3.0 and 3.01 – Application

We are proposing to add that the CSA jurisdictions, except British Columbia and Manitoba, plan to eliminate the registration exemptions in New NI 45-106. British Columbia and Manitoba propose to restrict the use of the registration exemptions in New NI 45-106 to persons who are not otherwise registered in another province or in another category of registration.

The text of proposed sections 3.0 and 3.01 is as follows:

3.0 On • [being six months after the coming into force of National Instrument 31-103 *Registration Requirements*], Part 3 does not apply in any jurisdiction except British Columbia and Manitoba.

3.01 On • [being six months after the coming into force of National Instrument 31-103 *Registration Requirements*] in British Columbia and Manitoba, Part 3 does not apply to any person who is registered in any jurisdiction.

Section 3.03 – Person or company not in the business of trading

We are proposing to add that, in British Columbia and New Brunswick, a person or company may trade a security without registration if the person or company is not in the business of trading securities.

Section 3.50 – Investment dealer acting as portfolio manager

We are proposing to make two changes to this exemption.

1. We are proposing to change this exemption to clarify the rules and policies of the Investment Dealers Association of Canada that a registered investment dealer must follow in order to rely on this exemption.

2. We are proposing to remove subsection 3.8(3) which is an Ontario-only requirement to provide the securities regulatory authority with certain information in respect of registered investment dealers as this information is available on the National Registration Database.

Section 6.1 – Report of exempt distribution and Form 45-106F1

We are proposing to clarify that issuers that distribute their own securities and underwriters that distribute securities that they acquired under section 2.33 [*Acting as underwriter*] must file a report of exemption distribution in Form 45-106F1.

In the instructions to Form 45-106F1, we are proposing to require that the same report of exempt distribution be filed in all jurisdictions where a report is required. Currently an issuer may, but is not required to, file the same report in all jurisdictions where the issuer has made the distribution.

Section 6.6 – Reporting requirements in British Columbia

While a person trading securities exclusively in British Columbia who is not otherwise registered will not be required to register as an exempt market dealer, British Columbia is proposing requiring that the person (i) file an initial notice and an annual notice with the British Columbia Securities Commission and (ii) provide a risk acknowledgement form to the investor to whom it proposes to sell securities.

Changes to Forms 45-106F2 and F3

We are proposing to clarify the financial statements that are required to be included with an offering memorandum. These changes will make the financial statement requirements more consistent with the requirements of National Instrument 51-102 *Continuous Disclosure Obligations* and other national instruments.

We are also proposing to add requirements that clarify the disclosure expected for issuers with mining and oil and gas activities.

Changes to 45-106CP

We have added guidance to 45-106CP to address:

- amendments consequential to NI 31-103
- reinvestment plans
- not for profit issuers
- employees, executive officers, directors, and consultants

Amendments to NI 45-102

Section 2.5 – Restricted period

We are proposing changes to the legending requirements. These are intended to make the requirements more effective in situations where the purchaser of the securities does not receive a certificate. The proposed changes also address written notice requirements in circumstances where a security is entered into a direct registration or other electronic book-entry system and eliminate the requirement that the direct registration or other electronic book-entry system be acceptable to the regulator and, in Québec, the securities regulatory authority.

Section 2.8 – Exemption for a Trade by a Control Person

We are proposing changes to make it clear that a control person (or other person required to file a notice in Form 45-102F1) cannot have concurrent notices outstanding for the same securities. The Form 45-102F1 is intended to provide notice to the market that a control person is selling securities. If the form could effectively be an evergreen document because a control person files a new notice before the previous one expires, the form cannot serve its intended function. As a result of this proposed change, after each new filing of a Form 45-102F1, the control person will have to wait seven days before relying on the prospectus exemption in section 2.8 of NI 45-102. However, we are also proposing that a previously filed Form 45-102F1 will expire on the earlier of the date the control person files an insider report and 30 days from the date the Form 45-102F1 was filed.

NI 45-102 – Appendices D and E

We are amending these appendices to reflect the amendments consequential to NI 31-103 and to clarify the resale provisions applicable to securities distributed under the following exemptions in New NI 45-106:

- Section 2.31 – Dividends and distributions
- Section 2.42 – Conversion, exchange or exercise
- Section 5.2 – Offerings by TSX Venture Exchange Offering Document

Amendments to 45-102CP

We have expanded or added guidance to 45-102CP to address:

- lending requirements
- when section 2.10 of NI 45-102 applies

Other issue - approved credit rating

We are currently reviewing the use of credit ratings in New NI 45-106. Once we have completed our review, we will assess whether any amendments are required to the exemptions in New NI 45-106 that currently contain a credit rating requirement.

Request for Comments

We welcome your comments on the proposed amendments to the instruments and any relevant local amendments. In addition to any general comments you may have, we also invite comments on the following specific questions.

1. We are proposing to change the definition of private issuer so that the exemption would be available in the future to an issuer that completes a transaction if immediately following the transaction all securities of the issuer are beneficially owned only by persons who would be eligible to purchase the securities under section 2.4(2) and 3.4(2) of New NI 45-106. This is intended to allow an issuer that completes a going private transaction (for example, by way of an amalgamation squeeze out or a takeover bid with a subsequent statutory compulsory acquisition) to use the private issuer exemption after the going private transaction. We have not specified any types of transaction. Are there any specific transactions that would allow an issuer to reduce its number of security holders which we should not permit for this purpose?

2. In our view, the legending requirements help to ensure that illegal trades are not made during the restricted period by restricting the trade and notifying intermediaries and prospective purchasers of the restriction. Do the legending requirements with the proposed changes fulfill this purpose? Does the current system of legending work efficiently or could it be improved? If so, in what way? Could we achieve the same outcome in another way, without requiring legending?

Please submit your comments in writing on or before May 29, 2008. If you are not sending your comments by email, a diskette containing the submissions (in Windows format, Word) should also be forwarded.

Address your submission to all of the Canadian securities regulatory authorities, as follows:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

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

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We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. All comments will also be posted to the BCSC web-site at www.bcsc.bc.ca and the websites of the other CSA jurisdictions to improve the transparency of the policy-making process.

Questions

Please refer your questions to any of:

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