

B.1.2 Notice of Commission Approval of OSC Rule 33-509 Exemption From Underwriting Conflict Disclosure Requirements

**NOTICE OF COMMISSION APPROVAL OF
OSC RULE 33-509 EXEMPTION FROM UNDERWRITING CONFLICT DISCLOSURE REQUIREMENTS**

October 5, 2023

Introduction

On July 18, 2023, the Ontario Securities Commission (the **Commission** or **we**) made proposed OSC Rule 33-509 *Exemption from Underwriting Conflicts Disclosure Requirements* (the **Proposed Rule**) as a rule under the *Securities Act* (Ontario) (the **Act**).

The Proposed Rule will, if approved by the Minister of Finance, provide an exemption in Ontario from the requirement in National Instrument 33-105 *Underwriting Conflicts* (**NI 33-105**) to include certain underwriting conflicts disclosure in an offering document used to distribute securities under a prospectus exemption in the context of foreign private placements offered to sophisticated investors in Canada.

The Proposed Rule is intended to make permanent the exemption first set out in a blanket order issued on February 18, 2021, Ontario Instrument 33-507 *Exemption from Underwriting Conflicts Disclosure Requirements* (Interim Class Order) (the **Blanket Order**), which Blanket Order was then extended by 18 months by OSC Rule 33-508 *Extension to Ontario Instrument 33-507 Exemption from Underwriting Conflicts Disclosure Requirements* (**OSC Rule 33-508**).

The Blanket Order provides an exemption from the underwriting conflicts disclosure requirements in NI 33-105 if

- (a) the distribution is made under an exemption from the prospectus requirement,
- (b) the distribution is of a security that is an “eligible foreign security” as defined in NI 33-105, and
- (c) each purchaser in Ontario that purchases a security pursuant to the distribution through such person or company is a “permitted client” as defined in section 1.1 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**).

The Blanket Order eliminates the underwriting conflicts disclosure requirements in NI 33-105 in circumstances where foreign securities are offered to institutional investors in Ontario as part of a global offering and thereby facilitates participation by institutional investors in Ontario in such global offerings.

The Blanket Order as extended by OSC Rule 33-508 will cease to be effective on February 17, 2024. The purpose of the Rule is to make permanent the exemption in the Blanket Order.

The Commission has made the Proposed Rule as a rule pursuant to paragraph 143.2(5)(b) of the Act. Paragraph 143.2(5)(b) provides that publication of a notice and request for comment in respect of a proposed rule is not required if “the proposed rule grants an exemption or removes a restriction and is not likely to have a substantial effect on the interests of persons or companies other than those who benefit under it”. We have determined that the Proposed Rule meets the criteria set out in paragraph 143.2(5)(b) of the Act. Accordingly, for this reason the Proposed Rule is not being published for comment.

On October 4, 2023, we delivered the Proposed Rule to the Minister of Finance (the **Minister**). The Minister may approve or reject the Proposed Rule or return it for further consideration. If the Minister approves the Proposed Rule or does not take any further action, the Rule will come into force on February 17, 2024.

The text of the Rule is contained in Annex A of this notice and is also available on the OSC website at www.osc.ca.

Substance and Purpose

We have been advised by a number of institutional investors that the underwriting conflicts disclosure requirements in NI 33-105 create barriers that prevent institutional investors in Ontario from participating in global offerings on a timely basis.

Certain of these institutional investors also provided similar submissions to the Capital Markets Modernization Taskforce (the **Taskforce**) established by the Government of Ontario in February 2020. On January 22, 2021, the Taskforce published its final report (the **Taskforce Final Report**) that included a recommendation that the OSC provide an exemption from the disclosure of conflicts of interest in connection with private placements to institutional investors.¹

¹ See Recommendation No. 33 in the Taskforce Final Report, available at <https://www.ontario.ca/document/capital-markets-modernization-taskforce-final-report-january-2021>

B.1: Notices

Having considered the interests of institutional investors in being able to participate in global offerings on a timely basis and the Taskforce recommendation, the OSC issued the Blanket Order on February 18, 2021. OSC Rule 33-508 caused the blanket relief issued under the Blanket Order to be extended for an additional 18-month period, from August 18, 2022 to February 17, 2024. The purpose of the Proposed Rule is to make permanent the exemption in the Blanket Order.

Without an extension, entities offering foreign securities to institutional investors in Ontario would no longer be able to rely on the exemption in the Blanket Order with the result that institutional investors in Ontario may again experience difficulties in participating in global offerings on a timely basis. We are continuing to review options for a more permanent solution and may propose an amendment to NI 33-105 at a later date.

Rule-making authority

The following provisions of the Act provide the Commission with authority to adopt the Proposed Rule:

- Paragraph 143(1)2
- Paragraph 143(1)3
- Paragraph 143(1)7
- Paragraph 143(1)13
- Paragraphs 143(1)16
- Paragraphs 143(1)39
- Paragraph 143(1)49

Questions

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ANNEX A

ONTARIO SECURITIES COMMISSION RULE 33-509
EXEMPTION FROM UNDERWRITING CONFLICTS DISCLOSURE REQUIREMENTS

PART 1 DEFINITIONS

1. **Definitions**

(1) In this Rule,

“**Act**” means the *Securities Act*, R.S.O. 1990, c. S.5, as amended from time to time;

“**eligible foreign security**” has the meaning ascribed to that term in section 3A.1 of NI 33-105;

“**NI 31-103**” means National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

“**NI 33-105**” means National Instrument 33-105 *Underwriting Conflicts*;

“**permitted client**” has the meaning ascribed to that term in section 1.1[*definitions*] of NI 31-103; and

“**underwriting conflicts of interest disclosure requirement**” means the requirement in subsection 2.1(1) of NI 33-105 that investors be provided with certain conflicts of interest disclosure in circumstances in which there is a direct or indirect relationship between the issuer or selling securityholder and the underwriter that might give rise to a perception that they are not independent of each other in connection with a distribution.

(2) Terms used in this Rule that are defined in the Act have the meaning ascribed to them in the Act, unless otherwise defined in this Rule or the context otherwise requires.

PART 2 EXEMPTION FROM UNDERWRITING CONFLICTS DISCLOSURE REQUIREMENT

2. A person or company is exempt from the underwriting conflicts of interest disclosure requirement in subsection 2.1(1) of NI 33-105 in connection with a distribution provided that:

- (a) the distribution is made under an exemption from the prospectus requirement;
- (b) the distribution is of a security that is an eligible foreign security; and
- (c) each purchaser in Ontario that purchases a security pursuant to the distribution through such person or company is a permitted client.

PART 3 EFFECTIVE DATE

3. This Rule comes into force on February 17, 2024.