

Chapter 1

Notices / News Releases

1.1 Notices

1.1.1 CSA Staff Notice 45-308 (Revised) – Guidance for Preparing and Filing Reports of Exempt Distribution under National Instrument 45-106 Prospectus Exemptions



CSA Staff Notice 45-308 Guidance for Preparing and Filing Reports of Exempt Distribution under National Instrument 45-106 Prospectus Exemptions Revised

June 25, 2015

Introduction and Purpose

Staff of the Canadian Securities Administrators (**Staff** or **we**) are publishing this Staff Notice (the **Notice**) to highlight issues identified in some reports of exempt distribution filed in Form 45-106F1 *Report of Exempt Distribution* (the **F1**) under National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**). The Notice also provides guidance to issuers, underwriters and their advisors for preparing and filing the F1. Staff are replacing a prior notice issued in April 2012 with this Notice.

Background

Securities legislation prohibits issuers and underwriters from distributing securities without a prospectus for which a receipt has been issued. NI 45-106 contains a number of exemptions from the prospectus requirement. Part 6 of NI 45-106 requires issuers or underwriters relying on prospectus exemptions specified in that Part to report exempt distributions, and sets out the form required to be filed and the deadlines for filing. Responsibility for compliance with NI 45-106 rests with the issuer or underwriter purporting to rely on the applicable exemption(s).

The use of a prospectus exemption under NI 45-106 is subject to regulatory oversight and monitoring. Staff may review filings required by NI 45-106 and/or an issuer's or underwriter's reliance on a prospectus exemption as a result of planned compliance-monitoring programmes, observed market activity, or following specific complaints or referrals. Identified non-compliance may result in appropriate corrective action.

Guidance and Identified Issues

Outlined below are issues we have observed when reviewing F1s filed with us. We are communicating these issues to assist issuers, underwriters and their advisors in avoiding similar deficiencies when preparing and filing the F1.

1. **Failing to use the correct form**

The required form for a report of exempt distribution is the F1, except in British Columbia (**BC**). Effective October 3, 2011, the British Columbia Securities Commission (the **BCSC**) introduced a new form of report of exempt distribution, Form 45-106F6 *British Columbia Report of Exempt Distribution* (the **F6**).¹

We have seen instances of issuers or underwriters filing the F6 outside BC. The filing of the F6 is only accepted in BC.

If a distribution occurs in BC and elsewhere, the issuer or underwriter is required to file the F6 with the BCSC² and file the F1 in the other applicable jurisdictions.

¹ In BC, the F6 generally must be filed electronically using the BCSC's E-services filing system. See BC Instrument 13-502 *Electronic filing of reports of exempt distribution*. Except in limited circumstances, the BCSC will not accept F6s delivered in paper or via other electronic means (such as a PDF attachment to an email).

² In limited cases, the BCSC will accept the F1 instead of the F6. Issuers that have distributed securities in BC should review BC Instrument 45-533 *Exemptions from Form 45-106F6 requirements* to determine if they may file the F1 in BC instead of the F6.

2. Failing to file the F1 on time

Part 6 of NI 45-106 requires issuers or underwriters relying on certain prospectus exemptions to file the F1 in each applicable jurisdiction where the distribution takes place. Some (but not all) of these prospectus exemptions include:

- the accredited investor exemption (section 2.3 of NI 45-106)³
- the family, friends and business associates exemption (section 2.5 of NI 45-106)
- the offering memorandum exemption (section 2.9 of NI 45-106, the OM exemption)
- the minimum amount investment exemption (section 2.10 of NI 45-106)
- the additional investment in investment funds exemption (section 2.19 of NI 45-106)

The deadline for filing the F1 is generally 10 days after the distribution.

Investment funds have the option of filing the F1 on an annual basis, within 30 days of their financial year-end, when relying on section 2.3, 2.10 or 2.19 of NI 45-106. **This option is not available for investment funds using the OM exemption** (in jurisdictions where such exemption is available).

Staff have observed that many issuers or underwriters have filed the F1 late and, in some cases, not at all.

3. Failing to pay the required fee

Some issuers or underwriters have filed the F1 with an incorrect fee or with no fee. Issuers or underwriters must pay the applicable fee in each jurisdiction in which a distribution is made, when the report is filed.

4. Failing to include a complete list of purchasers in the F1

Some F1s filed by issuers or underwriters only identified purchasers from the jurisdiction in which the F1 was filed, even though the distribution included purchasers from other jurisdictions. If distributions are made in more than one jurisdiction, the issuer or underwriter must complete a single F1 identifying all purchasers, including purchasers that reside in the jurisdiction and those that do not, and file that report in each of the jurisdictions in which the distribution is made (see Instruction 2 of the F1).

5. Failing to reconcile information in the F1

Issuers or underwriters have frequently reported a different total number of securities distributed, total dollar value raised, number of purchasers and/or exemptions used in items 6 and 7 of the F1 when compared to Schedule I of the F1 (**Schedule I**). Information in items 5, 6, and 7 of the F1 must reconcile with the information in Schedule I (see Instruction 5 of the F1).

6. Incorrectly identifying the number of purchasers

Item 7 of the F1 requires the total number of purchasers in each jurisdiction to be reported. The number of purchasers refers to the number of investors and not to the number of securities each purchaser purchased.

7. Relying on unavailable exemptions

In certain instances, issuers distributing in more than one jurisdiction have reported in the F1 distributions under an exemption that is not available in one of the jurisdictions. Issuers or underwriters should note that not all exemptions are available in all jurisdictions.

An issuer or underwriter should indicate in Schedule I the appropriate exemption for each purchaser. This may require the issuer or underwriter to report (in Schedule I) multiple exemptions relied on for the same purchaser in circumstances where the distribution is made in more than one jurisdiction and the same exemption is not available in those jurisdictions.

8. Failing to disclose all commissions and finder's fees

We have observed that some issuers or underwriters are not reporting compensation paid in connection with a distribution. In some of these cases, the payment was not disclosed because it was not called a "commission" or a "finder's fee".

³ In Ontario, subsection 73.3(2) of the *Securities Act* (Ontario) provides a similar exemption.

Item 8 of the F1 requires an issuer or underwriter to disclose compensation received or to be received by any person in connection with the distribution. Compensation includes commissions, discounts or other fees or payments of a similar nature, which result from a distribution of securities, regardless of what the payment is called. For example, a “brokerage fee” or “finance fee” for a syndicated mortgage is compensation in connection with a distribution. Compensation does not include payments for services incidental to the distribution (such as clerical, printing, legal or accounting services).

9. Failing to provide complete information regarding convertible or exchangeable securities distributed

Item 6 of the F1 requires information regarding the security distributed. If the security is convertible or exchangeable into an underlying security, the F1 states that the issuer or underwriter must include:

- a description of the underlying security,
- the terms of conversion or exercise, and
- any expiry date.

10. Improperly reporting distributions under the minimum amount exemption

In order to rely on the prospectus exemption in section 2.10 [*Minimum amount investment*] of NI 45-106, the purchase price must be at least \$150,000 by a purchaser other than an individual (among other conditions).⁴ If an issuer or underwriter relies on this exemption, it should ensure that the purchase price reported is at least that minimum amount. We also remind issuers or underwriters that it is not permitted to distribute securities under this exemption to multiple purchasers acting in concert or as a “syndicate” in order to pool separate purchases and reach the \$150,000 minimum.

11. Failing to certify the F1

We have received some reports with unsigned certificates. An issuer or underwriter must include the date and the signature of the person identified as signing the F1 in the certificate section of the F1.

⁴ Effective May 5, 2015, the minimum amount exemption is no longer available for individuals.

Questions

Alberta

Jonathan Taylor
Manager, CD Compliance & Market Analysis
Alberta Securities Commission
Direct Line: 403-297-4770
Fax: 403-297-2082
Email: jonathan.taylor@asc.ca

Manitoba

Chris Besko
Director, General Counsel
The Manitoba Securities Commission
Direct Line: 204-945-2561
Fax: 204-945-0330
Email: chris.besko@gov.mb.ca

New Brunswick

Susan Powell
Deputy Director, Securities
Financial and Consumer Services Commission
Direct Line: 506-643-7697
Fax: 506-658-3059
Email: susan.powell@fcnb.ca

Newfoundland and Labrador

Don Boyles
Deputy Superintendent of Securities
Office of the Superintendent of Securities
Government of Newfoundland and Labrador
Direct Line: 709-729-4501
Fax: 709-729-6187
Email: dboyles@gov.nl.ca

Northwest Territories

Gary MacDougall
Superintendent of Securities
Office of the Superintendent of Securities
Government of the Northwest Territories
Direct Line: 867-873-7490
Fax: 867-873-0243
Email: gary_macdougall@gov.nt.ca

Nova Scotia

Kevin Redden
Director, Corporate Finance
Nova Scotia Securities Commission
Direct Line: 902-424-5343
Fax: 902-424-4625
Email: kevin.redden@novascotia.ca

Nunavut

Shamus Armstrong
Acting Director, Legal Registries
Department of Justice
Government of Nunavut
Direct Line: 867-975-6598
Fax: 867-975-6594
Email: sarmstrong@gov.nu.ca

Ontario

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

Elizabeth Topp
Ontario Securities Commission
Senior Legal Counsel, Corporate Finance
Direct Line: 416-593-2377
Email: etopp@osc.gov.on.ca

Aba Stevens
Ontario Securities Commission
Legal Counsel, Corporate Finance
Direct Line: 416-263-3867
Email: astevens@osc.gov.on.ca

Frederick Gerra
Ontario Securities Commission
Legal Counsel, Investment Funds and Structured Products
Direct Line: 416-204-4956
Email: fgerra@osc.gov.on.ca

Prince Edward Island

Steve Dowling
General Counsel
Prince Edward Island Securities Office
Direct Line: 902-368-4551
Fax: 902-368-5283
Email: sddowling@gov.pe.ca

Québec

Georgia Koutrikas
Analyst, Corporate Finance
Autorité des marchés financiers
Tel: 514-395-0337, ext. 4393
Fax: 514-873-6155
Email: georgia.koutrikas@lautorite.qc.ca

Valérie Dufour
Analyst, Corporate Finance
Autorité des marchés financiers
Tel: 514-395-0337, ext. 4389
Fax: 514-873-6155
Email: valerie.dufour@lautorite.qc.ca

Saskatchewan

Sonne Udemgba
Deputy Director, Legal
Financial and Consumer Affairs Authority of Saskatchewan
Direct Line: 306-787-5879
Fax: 306-787-5899
Email: sonne.udemgba@gov.sk.ca

Yukon

Rhonda Horte
Securities Officer
Office of the Yukon Superintendent of Securities
Direct Line: 867-667-5466
Fax: 867-393-6251
Email: rhonda.horte@gov.yk.ca

British Columbia – for questions on F6 only

Leslie Rose

Senior Legal Counsel, Corporate Finance

British Columbia Securities Commission

Direct Line: 604-899-6654

Toll free across Canada: 1-800-373-6393

Email: lrose@bcsc.bc.ca