

Chapter 6

Request for Comments

6.1.1 Notice of Proposed Amendment and Restatement of Rule 45-501 Exempt Distributions, Companion Policy 45-501CP Exempt Distributions, Form 45-501F1, Form 45-501F2 and Form 45-501F3 and Rescission of Current Rule 45-501 and Companion Policy 45-501CP, Form 45-501F1, Form 45-501F2 and Form 45-501F3

**NOTICE OF PROPOSED AMENDMENT AND RESTATEMENT OF
RULE 45-501 *EXEMPT DISTRIBUTIONS*,
COMPANION POLICY 45-501CP *EXEMPT DISTRIBUTIONS*,
FORM 45-501F1, FORM 45-501F2 AND FORM 45-501F3
AND
RESCISSION OF CURRENT RULE 45-501 AND
COMPANION POLICY 45-501CP,
FORM 45-501F1, FORM 45-501F2 AND FORM 45-501F3**

Request for Public Comment

The Commission is publishing for a 90-day comment period the following documents:

- proposed amended and restated Rule 45-501 - *Exempt Distributions* (the Proposed Rule);
- proposed amended and restated Companion Policy 45-501CP - *Exempt Distributions* (the Proposed Companion Policy); and
- proposed amended and restated Forms 45-501F1, 45-501F2 and 45-501F3 (the Proposed Forms).

These materials are collectively referred to as the Proposed Materials.

The Proposed Materials are intended to replace the current Rule 45-501 - *Exempt Distributions* (Current Rule 45-501), the Companion Policy to Current Rule 45-501 (the Current Companion Policy) and the current Forms 45-501F1, F2 and F3 (the Current Forms), which came into effect in Ontario on November 30, 2001. We request comments by July 18, 2003.

Background

Current Rule 45-501 made significant changes to the exempt market regime in Ontario with the implementation of, among other changes, two new exemptions: the accredited investor exemption and the closely-held issuer exemption. Since Current Rule 45-501 was implemented in November 2001, the Commission has been monitoring the effectiveness of this rule and noting areas where amendments would be beneficial. These amendments, including issues identified in Staff Notice 45-702 – *Frequently Asked Questions*, are reflected in the Proposed Materials.

Purpose and Substance of Amendments to Rule and Forms

If adopted, the Proposed Rule will address some areas that have been the subject of comment from practitioners, will reduce the need for certain exemptive relief applications and will clarify and amend certain provisions. The Proposed Rule and the Proposed Forms have also been amended to reflect the consequential amendments to Current Rule 45-501 and the Current Forms upon the coming into force of Rule 13-502 - *Fees* and to include additional information required to assist Commission staff. The Proposed Rule also includes amendments to Current Rule 45-501 published previously as a result of the proposed repeal and replacement of Multilateral Instrument 45-102 - *Resale of Securities* (MI 45-102) and the related forms and companion policy.

The Commission notes that the amendments in the Proposed Materials are primarily of a technical nature, and are not intended to reflect a policy shift in the rationale for the exempt distributions regime in Current Rule 45-501. The members of the Canadian Securities Administrators (the CSA) are currently considering a proposed approach to harmonizing the various exempt distributions regimes across Canada, and recently published a concept paper entitled *Blueprint for Uniform Securities Laws for Canada*. The amendments in the Proposed Materials are not meant to address the proposals discussed in the concept paper.

Purpose and Substance of Amendments to Companion Policy

The purpose of the Proposed Companion Policy is to set forth the views of the Commission as to the manner in which the Proposed Rule and the provisions of the Act relating to exempt distributions are to be interpreted and applied. The purpose of the amendments is to provide the views of the Commission with respect to the amendments contained in the Proposed Rule.

Summary of Changes to Current Rule 45-501

Current Rule 45-501 continues to be in force. If the Proposed Rule is adopted, it will replace Current Rule 45-501. The most significant changes to Current Rule 45-501 are summarized in the following outline:

- The following amendments have been made to the definition of “accredited investor”:
 - paragraph (q) has been amended to include brothers and sisters;
 - paragraph (t) has been amended to include a limited liability company;
 - paragraph (w) has been expanded to include a mutual fund or a non-redeemable investment fund that has previously distributed securities under a prospectus; and
 - paragraph (y) now includes trust corporations governed by the *Trust and Loan Corporations Act* (Canada) or under comparable legislation in any other jurisdiction.
- The definition of “closely-held issuer” has been amended in order that current and former directors and officers do not count towards the limit of 35 non-accredited investors, regardless of how such directors and officers acquired their securities.
- The closely-held issuer exemption has been amended by deleting existing clause 2.1 (1)(b) which restricts the use of the exemption in circumstances where a promoter is participating.
- Section 2.8 has been amended to clarify that this exemption includes court-approved reorganizations under bankruptcy and insolvency legislation. The amendments to this section will also allow many exchangeable share transactions to be completed without obtaining exemptive relief.
- A new section 2.15 has been added. This exemption will allow trades in a security pursuant to an offer to acquire made by a person or company that would have been a take-over bid or issuer bid if the offer to acquire was made to a security holder in Ontario. This exemption will facilitate private company sales in circumstances where all of the selling shareholders are not resident in Ontario.
- A new section 2.16 has been added to allow for the purchase of “business assets” from a person or company if the fair value of the business assets purchased is not less than \$100,000. A new definition of “business assets” has been included in the Proposed Rule, as discussed above.
- Part 7 has been amended to reflect the consequential amendments as a result of Rule 13-502 - *Fees* coming into force. Accordingly, sections 7.3, 7.4 and 7.6 and subsections 7.5(4), (5) and (6) have been deleted. Subsection 7.5(3) has been amended to reflect consequential amendments as a result of the proposed repeal and replacement of MI 45-102. In addition, to further harmonize our form requirements with those of the other CSA jurisdictions, section 7.2 and subsection 7.5(2) have been deleted.
- A new Part 9 has been added to provide the Director with the authority to grant exemptions from the requirements of Part 7 of the Proposed Rule, which deals with the required forms.
- Upon OSC Rule 13-502 - *Fees* coming into force on March 31, 2003, consequential amendments to Current Rule 45-501 were made. These consequential changes have been anticipated in the Proposed Rule.
- In order to reflect the proposed repeal and replacement of MI 45-102, consequential amendments to Current Rule 45-501 were proposed. These proposed consequential changes have been anticipated in the Proposed Rule.

Summary of the Proposed Materials

Mandatory elements of the Proposed Materials are set out in the Proposed Rule and the Proposed Forms. The Proposed Companion Policy provides explanation and additional guidance on elements of Proposed Rule 45-501.

The Proposed Rule

Part 1 of the Proposed Rule contains definitions used in this rule. Amendments were made to certain definitions, including the definitions of “accredited investor” and “closely-held issuer”. A new definition of “business assets” was also added.

Part 2 of the Proposed Rule provides for certain exemptions from the registration and prospectus requirements in addition to those contained in the Act. Clause 2.1(1)(b) of Current Rule 45-501 has been deleted. Two new exemptions have been added, as discussed above.

Part 3 of the Proposed Rule removes certain registration and prospectus exemptions in the Act as replaced by the exempt market regime found in Current Rule 45-501. This Part also provides for the removal of certain exemptions in the Act and the Proposed Rule if certain conditions are not met. Subsection 3.4(1) has been amended to include additional exemptions. Otherwise, this Part remains unchanged.

Part 4 of the Proposed Rule imposes certain requirements in respect of the use of an offering memorandum in connection with certain exempt distributions. This Part has not changed from Current Rule 45-501.

Part 5 of the Proposed Rule contains the provision for the removal of an exemption that refers to a dealer unless the dealer is appropriately registered under the Act for the type of trade contemplated. This Part has not changed from Current Rule 45-501.

Part 6 of the Proposed Rule provides for restrictions on first trades in securities acquired under certain exemptions. Section 6.1 has been amended to reflect a consequential amendment as a result of the proposed repeal and replacement of MI 45-102. Sections 6.1, 6.2 and 6.3 have also been amended to reflect the addition of the proposed exemptions contained in sections 2.15 and 2.16.

Part 7 of the Proposed Rule provides for the form of the reports to be filed in connection with certain exempt distributions and the resale of securities acquired under such exempt distributions. This Part has been amended to reflect consequential amendments as a result of Rule 13-502 - *Fees* coming into force. This Part has also been amended to reflect the deletion of the requirement under subsection 7.5(2) to file a Form 45-501F2.

Part 8 of the Proposed Rule provides transitional provisions. This Part has been amended to reflect consequential amendments as a result of the proposed repeal and replacement of MI 45-102.

Part 9 grants the Director the authority to grant relief from the requirements of Part 7 of the Proposed Rule. This Part has been added.

Part 10 of the Proposed Rule states the effective date.

The Proposed Forms

Form 45-501F1 is required to be filed by sellers in connection with trades made under specified exemptions. Current Form 45-501F2 has been repealed. No changes have been made to Current Form 45-501F3.

The Proposed Companion Policy

The Proposed Companion Policy sets forth the views of the Commission as to the manner in which certain provisions of the Act and the rules relating to exempt distributions are to be interpreted and applied.

We have made a number of amendments to the Current Companion Policy for the following reasons:

- to provide clarification on the use of the accredited investor exemption and the closely-held issuer exemption, including on the resale of securities of a closely-held issuer;
- to provide further guidance on the exemption contained in section 2.12 of the Proposed Rule;
- to reflect the guidance provided in Staff Notice 45-702 - *Frequently Asked Questions*;
- to provide guidance on the use of the new exemption contained in section 2.15 of the Proposed Rule through the addition of a new section 2.11 of the Proposed Companion Policy;
- to provide guidance on the use of the new exemption contained in section 2.16 of the Proposed Rule through the addition of a new section 2.12 to the Proposed Companion Policy; and

- to clarify that it is the Commission's policy that offering material delivered to the Commission under section 4.3 of the Proposed Rule will not be made available to the public.

Authority for Proposed Rule and Proposed Forms

The following sections of the Act provide the Commission with authority to adopt Proposed Rule and Forms. Paragraphs 143(1)8 and 20 authorize the Commission to make rules which provide for exemptions from the registration and prospectus requirements under the Act and for the removal of exemptions from those requirements. Paragraph 143(1)13 authorizes the Commission to make rules regulating trading or advising in securities to prevent trading or advising that is fraudulent, manipulative, deceptive or unfairly detrimental to investors. Paragraph 143(1)39 authorizes the Commission to make rules requiring or respecting the media, format, preparation, form, content, execution, certification, dissemination and other use, filing and review of all documents required under or governed by this Act.

Related Instruments

The Proposed Rule and the Proposed Companion Policy are related in that they deal with the same subject matter. Both the Proposed Rule and the Proposed Companion Policy are related to Parts XII and XVII of the Act and Parts III and V of the Regulation.

Costs and Benefits

The Proposed Materials are meant to improve the effectiveness of the Current Rule 45-501, the Current Companion Policy and the Current Forms. The Commission believes that the benefits of the Proposed Materials outweigh the costs, if any.

Comments

Interested parties are invited to make written submissions with respect to the Proposed Materials. Submissions received by July 18, 2003 will be considered.

Submissions should be made to:

‰ John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario M5H 3S8

A diskette containing an electronic copy of the submissions (in DOS or Windows format, preferably Word) should also be submitted. As the Act requires that a summary of written comments received during the comment period be published, confidentiality of submissions received cannot be maintained.

Questions may be referred to:

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Text of Proposed Materials

The text of the Proposed Rule, the Proposed Companion Policy and the Proposed Forms follows.

Rescission of Current Rule 45-501

The coming into force of the Proposed Materials will result in the rescission of the Current Rule 45-501, the Current Companion Policy and the Current Forms. The text of the proposed rescission will be as follows:

“Rule 45-501 - *Exempt Distributions* is hereby rescinded.”

April 18, 2003.