

TIPS FOR FILING REPORTS OF EXEMPT DISTRIBUTION

OSC Staff Notice 45-709

June 21, 2012

Purpose

OSC Staff have prepared this notice to provide guidance to issuers, underwriters and their advisors in filing reports of exempt distribution in Ontario under National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106).¹

Background

Securities legislation in Ontario prohibits the distribution of securities without a prospectus for which a receipt has been issued. NI 45-106 contains a number of exemptions from the prospectus requirement under which exempt distributions may be made. Part 6 of NI 45-106 requires issuers or underwriters relying on the prospectus exemptions specified in that Part to report exempt distributions and sets out the form of report required to be filed as well as the deadlines for filing the report.

Issuers and underwriters involved in exempt distributions must determine when a distribution has occurred in Ontario. For additional guidance on when a distribution has occurred in Ontario, issuers and underwriters should refer to:

- relevant case law, including the recent decision *Crowe et al. v. Ontario Securities Commission*,
- applicable OSC rules and related companion policies (for example Part 6 of NI 45-106 and related guidance in the companion policy), and
- other relevant notices, such as Interpretation Note 1 *Distributions of Securities Outside Ontario* (March 25, 1983) and proposed Multilateral Instrument 72-101 *Distributions Outside of the Local Jurisdiction* (September 8, 2000).

If there is uncertainty as to whether a distribution has occurred in Ontario, we recommend that the report should also be filed in Ontario.

¹ CSA Staff Notice 45-308 – *Guidance for Preparing and Filing Reports of Exempt Distribution* under National Instrument 45-106 *Prospectus and Registration Exemptions* also provides guidance on compliance with the reporting requirements in NI 45-106.

Tips

The following are tips to assist issuers, underwriters and their advisors in filing reports of exempt distribution in Ontario under NI 45-106. Please note this staff notice is not meant to be a complete checklist for these reports, but rather a quick reference tool to enable an issuer or underwriter to avoid certain deficiencies in completing and filing reports of exempt distribution.

1 File the report in the correct form.

In Ontario, the correct form of report of exempt distribution under NI 45-106 is Form 45-106F1 (Form F1). See section 6.3 of NI 45-106.

The British Columbia Securities Commission (BCSC) recently introduced an alternate report of exempt distribution, Form 45-106F6 (Form F6). Exempt distributions in British Columbia (BC) which occurred on or after October 3, 2011 must be reported to the BCSC using Form F6². Exempt distributions in both BC and Ontario must be reported to the BCSC using Form F6 and to the OSC using Form F1.

Note that an electronic version of Form F1 is now available on the OSC's website in addition to the paper form.

2 File the report on time.

Reports of exempt distribution are due no later than 10 days after the distribution date. See section 6.1(2) of NI 45-106.

Investment funds are not required to file a report within 10 days of the distribution date for a distribution under section 2.3 [*Accredited investor*], section 2.10 [*Minimum amount*] or section 2.19 [*Additional investment in investment funds*] if the fund files the report not later than 30 days after the financial year-end of the fund. See section 6.2(2) of NI 45-106.

3 Identify the correct prospectus exemption relied on for the distribution in Ontario.

An issuer or underwriter must indicate in Form F1 the prospectus exemption(s) relied on for the distribution.

Issuers and underwriters should note that the following prospectus exemptions are not available in Ontario: section 2.5 [*Family, friends and business associates*], section 2.9 of NI 45-106 [*Offering memorandum*] and section 5.2 [*TSX Venture Exchange offering*].

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

An issuer or underwriter should indicate in Schedule I to Form F1 a valid prospectus exemption for the distribution to each purchaser. This may necessitate reporting in Schedule I multiple exemptions relied on for the distribution to the same purchaser where the distribution is made in more than one jurisdiction and the same exemption is not available in those jurisdictions.

4 Ensure that the identified purchase price of the securities distributed is correct.

In order to rely on the prospectus exemption in section 2.10 [*Minimum amount investment*], the purchase price must be at least \$150,000 (among other conditions). If an issuer or underwriter relies on this exemption, it should ensure that the purchase price set out in item 7 of Form F1 and Schedule 1 to Form F1 is at least that minimum amount.

5 If the purchase price for the securities distributed is \$0, provide an explanation.

The purchase price for the securities distributed is required to be disclosed in item 7 of Form F1 and Schedule 1 to Form F1. The purchase price may be \$0 where no funds are raised, and instead property is being acquired. These distributions may be completed under several different prospectus exemptions. If the distribution is being made under a prospectus exemption other than section 2.12 [*Asset acquisition*] or section 2.13 [*Petroleum, natural gas and mining properties*], the issuer or underwriter should include a footnote explaining the reason for the purchase price of \$0.

6 Disclose all commissions and finder's fees.

Item 8 of Form F1 requires information regarding 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. Compensation does not include payments for services incidental to the distribution (such as clerical, printing, legal or accounting services).

7 Provide complete information regarding convertible or exchangeable securities distributed.

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

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

8 Ensure that the information in both the Form F1 and Schedule 1 to Form F1 is consistent.

The number of purchasers, jurisdiction of residence, price per security and total dollar value raised from purchasers in each jurisdiction must be completed in item 7 of Form F1. Schedule 1 to Form F1 requires an issuer or underwriter to report the name of the purchaser, number and type of securities, total purchase price, prospectus exemption relied on and the date of the distribution. Issuers and underwriters should verify that the information included in item 7 of Form F1 and Schedule 1 is correct and consistent.

9 Ensure that all purchasers are identified in Schedule 1 to Form F1.

Schedule 1 to Form F1 should include a complete list of purchasers under the distribution, including purchasers that reside in Ontario, purchasers that reside in other Canadian jurisdictions and purchasers that reside outside of Canada.

If the distribution is made in more than one Canadian jurisdiction, the issuer or underwriter must complete a single Form F1 identifying all purchasers and file that report in each of the Canadian jurisdictions (other than BC) in which the distribution is made. As noted above, the issuer or underwriter must file a Form F6 with the BCSC.

10 Ensure that the correct number of purchasers is set out in Form F1.

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

11 Date and sign the Form F1.

An issuer or underwriter must include the date and the signature of the person identified as signing the form in the certificate section of the Form F1.

12 Ensure that the correct fees are paid.

A filing fee must accompany a Form F1 for a distribution of securities of an issuer that is not subject to a participation fee. Refer to OSC Rule 13-502 *Fees*.

Questions

Questions may be referred to:

Jo-Anne Matear, Manager Corporate Finance Branch Tel: 416.593.2323 Email: jmatear@osc.gov.on.ca	Elizabeth Topp, Senior Legal Counsel Corporate Finance Branch Tel: 416.593.2377 Email: etopp@osc.gov.on.ca
Carolyn Slon, Legal Counsel Corporate Finance Branch Tel: 416.593.2364 Email: cslon@osc.gov.on.ca	Melissa Schofield, Senior Legal Counsel Investment Funds Branch Tel: 416.595.8777 Email: mschofield@osc.gov.on.ca
Moses Seer, Administrative Support Clerk Corporate Finance Branch Tel: 416.593.3684 Email: mseer@osc.gov.on.ca	