

CSA Amendments to Simplify Reports of Exempt Distribution – Bulletin

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By ,

On July 19, 2018, the Canadian Securities Administrators (“**CSA**”) published final amendments (“**Amendments**”) to National Instrument 45-106 – Prospectus Exemptions (“**NI 45-106**”) and its related Companion Policy that will amend the exempt distribution report set out on Form 45-106F1 – Report of Exempt Distribution (the “**New Report**”). Should all ministerial approvals be obtained, the New Report will come into force on **October 5, 2018**.

Background

In the summer and spring of 2016 certain foreign dealers and Canadian institutional investors conducting private placement offerings in Canada made the CSA aware of their concerns with the unintended effects of the certification and information requirements in the existing exempt distribution report (the “**Current Report**”). The Canadian institutional investors noted that they had been excluded from participating in foreign offerings into Canada in part due to dealers’ concerns about the certification of the Current Report as well as the more extensive information required in the Current Report. As a result of these concerns, the CSAs provided relief from the requirement to disclose whether a purchaser is a registrant or insider of the issuer, in certain circumstances.

Difficulties continued with certification, creating complications for Canadian institutional investors in accessing foreign investment opportunities, and in the fall of 2016 the CSAs provided new guidance intended to alleviate some of the concerns raised regarding certification and other matters.

On June 8, 2017 the CSAs published proposed amendments to NI 45-106 (the “**Prior Proposal**”) in response to the above issues. The Amendments adopt the Prior Proposal with some changes.

The New Report

The Amendments provide clarification and much needed flexibility with respect to the requirement that the document be certified, but still maintains the regulatory objective that the content of the New Report be true and complete. The Amendments also streamline certain information in the New Report making it easier for filers to complete.

As a result of the Amendments, the following changes have been made in the New Report:

1 Item 3: Distribution by Co-issuers:

In certain circumstances two or more issuers may distribute a single security. The New Report requires that the filer identifies the co-issuers of the security in Item 3, and only one report of exempt distribution is required to be filed for the distribution, which may be completed and filed by any one of the co-issuers. An issuer is not required to file a report for a distribution of a security if a report has

been filed by another issuer for the distribution of the same security.

2 Item 5(a):

(a) North American Industry Classification Standard (NAICS) code:

The New Report requires filers to provide the issuer's NAICS code that **in their reasonable judgment** most closely corresponds to the issuer's primary business activity.

(b) Cryptocurrencies and cryptocurrency-related assets:

In the New Report filers are to identify an issuer whose primary business is to invest all or substantially all of its assets in crypto-assets.

3 Item 5(g) Public listing status:

The New Report requires non-investment fund issuers to identify the name of the exchange on which the issuer's securities primarily trade, however this requirement only applies to **equity** securities. Filers are not required to provide any exchange information pertaining to an issuer's debt securities. The Current Report provides that all exchanges where the issuer's securities are listed are to be identified on the document.

4 Item 5(h) Size of Assets:

The New Report directs filers to select the size of the issuer's assets based on its **most recently** available annual financial statements. If the issuer has not prepared annual financial statements for its first financial year, the size of the issuer's assets at the distribution end date is to be provided.

Please note Items 5(g) and 5(h) above are only required to be completed by those issuers that do not have a SEDAR profile.

5 When reporting distributions for an investment fund, Item 6(b) of the New Report requires filers to identify the type of investment fund that most accurately identifies the investment fund issuer. In this regard, "Crypto-asset" has been added to the selection of investment fund types.

6 Item 7(d) – the list of security codes has been amended to introduce a new security code, "DCT", for distributions of securities involving digital coins or tokens.

7 Item 7(f) confirms that in calculating the number of unique purchasers per row, each purchaser is to be counted only once and joint purchasers may be counted as one purchaser.

8 Certification:

(a) The New Report will permit authorized agents to sign the New Report certification on behalf of the issuer or underwriter, if authorized to do so by an officer or director of the issuer.

(b) The certification statement in the New Report reads in part: "...I have reviewed this report and to my knowledge, having exercised reasonable diligence, the information provided in this report is true and, to the extent required, **complete**."

9 Schedule 1:

(a) Name of the Purchaser:

If two or more individuals have purchased a security as joint purchasers, information is to be provided in the New report for each purchaser on one line with their names separated with an ampersand. As an example, Jane Jones and Robert Smith are joint purchasers, indicate "Jones & Smith" under the family name column, and "Jane & Robert" under the given name column.

(b) Details of exemption relied on:

Issuers distributing securities to non-individual permitted clients will no longer be required to specify which paragraph number in the definition of "Accredited Investor" in section 1.1 of NI 45-106 applied to the purchaser. "NIPC" (non-individual permitted client) can be selected instead of the paragraph number.

(c) Other information:

If the issuer is a foreign public issuer, a wholly owned subsidiary of a foreign public issuer or the issuer is distributing only eligible foreign securities and the distribution is to permitted clients only, purchasers of the entities do not have to indicate whether they are a registrant or insider of these entities.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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