



Alert

Proposed Amendments to NI 45-106 – Listed Issuer Financing
Exemption

CSA Notice and Request for Comment

July 2021



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Overview

In July 2021, the Canadian Securities Administrators (the “CSA”) published proposed amendments to National Instrument 45-106, *Prospectus Exemptions* (“NI 45-106”) to introduce a new prospectus exemption available to reporting issuers that are listed on a Canadian stock exchange (the “Listed Issuer Financing Exemption”). Proposed consequential amendments to National Instrument 13-101, *System for Electronic Document Analysis and Retrieval* (“NI 13-101”) and National Instrument 45-102, *Resale of Securities* (“NI 45-102”), as well as proposed changes to Companion Policy 45-106CP (“45-106CP”) were also published. (The aforementioned amendments are collectively referred to, herein, as the “Proposed Amendments”).

If adopted, the Proposed Amendments would create a new and efficient method of capital raising for issuers listed on a Canadian stock exchange and that have filed all timely periodic disclosure documents required under Canadian securities legislation.

The CSA Notice is open for public comment until October 26, 2021.

Background

One of the fundamental requirements under existing Canadian securities legislation is that a public reporting issuer distributing a security must file and obtain a receipt for a prospectus. The prospectus must contain full, true, and plain disclosure of all material facts relating to the securities being offered. The short form prospectus regime was designed to make it more efficient for reporting issuers to raise capital while still providing investors with all protections of a prospectus.

The CSA has received feedback from many stakeholders that the time and cost to prepare a short form prospectus may be an impediment to capital raising, particularly for smaller issuers.

In April 2017 the CSA published Consultation Paper 51-404, *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers* in order to receive stakeholder feedback on potential options for reducing regulatory burden for non-investment fund reporting issuers in the public markets.

The CSA’s market consultation and additional research revealed that, although a prospectus regime generally works well for larger offerings by striking a good balance between issuer disclosure requirements and investor protection, for smaller offerings (i.e., under \$10 million), the system can be onerous, the costs associated with preparing a prospectus can be prohibitive, and dealers have limited interest in smaller offerings. The result is that issuers are not as inclined to access public markets for smaller offerings.

In response to these concerns the CSA is proposing the Listed Issuer Financing Exemption to remove barriers for issuers who want to raise smaller amounts of capital. The Listed Issuer Financing Exemption outlined under the Proposed Amendments are expected to:

- Reduce the cost of accessing public markets;
- Allow smaller issuers access to public markets and retail investors;
- Provide retail investors with greater investment choices in the primary public markets;
- Result in better and more current disclosure in the market for those smaller issuers that previously only used the private placement system; and
- Provide an incentive for all issuers raising smaller amounts of capital to do so by public offering instead of by private placement.

The Proposed Amendments

Qualification

To qualify to use the Listed Issuer Financing Exemption an issuer must have:

- Equity securities listed on a Canadian stock exchange;
- Been a reporting issuer for at least 12 months in at least one jurisdiction in Canada;
- Filed all timely and periodic disclosure documents as required under the continuous disclosure requirements in Canadian securities legislation;
- Active business operations.

Total dollar amount

The total dollar amount that an issuer may raise using the Listed Issuer Financing Exemption during any 12-month period may not exceed:

- The greater of \$5 million or 10% of the aggregate market value of the issuer's listed equity securities, to a maximum total dollar amount of \$10 million, or
- 100% dilution.

The Offering Document

The Offering Document (i.e., proposed new form 45-106F *Listed Issuer Financing Document*) would contain prescribed disclosures, highlighting:

- Any new developments in the issuer's business;
- The issuer's financial condition, including confirmation that the issuer will have sufficient funds to last 12 months after the offering;

- How proceeds from the current offering will be used; and
- How proceeds from any other offering in the previous 12 months were actually used.

The Offering Document would not be subject to review or approval by the CSA.

Liability

The issuer would be required to certify that the Offering Document, together with the issuer's continuous disclosure for the past 12 months, contains disclosure of all material facts about the issuer or the securities being distributed and does not contain any misrepresentations.

The Offering Document would be designated as a 'core document' in the issuer's continuous disclosure record, subject to statutory secondary market civil liability in the event of misrepresentation. In the event of a misrepresentation, purchasers under the Listed Issuer Financing Exemption would have two options:

- a) rights of action as under secondary market civil liability; or
- b) a contractual right of rescission against the issuer.

Restrictions on use of proceeds

An issuer would not be able to make use of the Listed Issuer Financing Exemption if the proceeds are to be used to finance a significant acquisition or restructuring transaction, such that the issuer would be required to provide additional financial statements under the prospectus requirements.

Securities

Securities must be listed equity securities or securities convertible into listed equity securities. Given one of the conditions to use the proposed Listed Issuer Financing Exemption is that the issuer must have been a reporting issuer for 12 months, this means that, for practical purposes, securities distributed under the Listed Issuer Financing Exemption would not be subject to a hold period.

Underwriter/registration involvement

Although investment dealers and exempt market dealers may participate, there is no requirement for underwriters to be involved. There would be no exemption from the registration requirement, so dealers would still be required to satisfy their obligations, including suitability, to place clients in offerings under the Listed Issuer Financing Exemption.

Report of exempt distribution

The issuer would be required to report use of the Listed Issuer Financing Exemption by filing a Form 45-106F1, Report of Exempt Distribution. The issuer would not, however, be required to complete Schedule 1 – Confidential Purchaser Information.

Resources

The CSA's Notice and Request for Comment – Proposed Amendments to National Instrument 45-106, *Prospectus Exemptions* to introduce the Listed Issuer Financing Exemption is available [here](#).

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