

Multilateral CSA Notice and Request for Comment**Proposed Multilateral Instrument 45-107 *Listing Representation and Statutory Rights of Action Disclosure Exemptions***

November 28, 2013

Introduction

All of the members of the Canadian Securities Administrators (the **CSA**), other than the securities regulatory authorities in Ontario and British Columbia (the **participating jurisdictions** or **we**), are publishing for a 90-day comment period proposed Multilateral Instrument 45-107 *Listing Representation and Statutory Rights of Action Disclosure Exemptions* (**proposed MI 45-107**).

Proposed MI 45-107 is not being proposed in Ontario and British Columbia as in those jurisdictions existing¹ or proposed² local instruments address or are expected to address the issues discussed below, as necessary.

Substance and purpose of proposed MI 45-107

Proposed MI 45-107 proposes exemptions from certain requirements of the securities legislation of the participating jurisdictions that apply in the context of prospectus exempt financings, conducted by issuers and by investment dealers or international dealers acting as underwriters, offered to institutional and other sophisticated investors in Canada.

The purpose of proposed MI 45-107 is two-fold. First, in the context of the international financings referred to above, it provides an exemption from the statutory prohibition against making a representation about the intention to list securities on an exchange or market. Second, it provides an exemption from the requirement that applies in some of the participating jurisdictions, that an offering document used in connection with a prospectus exempt distribution include a prescribed statement with respect to certain statutory rights of action.

Proposed MI 45-107 will codify certain discretionary exemptive relief that the CSA has been granting in the context of U.S. and international offerings of securities to Canadian institutional and other sophisticated investors and consequently alleviate the need for these discretionary exemption applications.

¹ See <http://www.bcsc.bc.ca/policy.aspx?id=1266&cat=>

² See the Notice and Request for Comment regarding Ontario Securities Commission rule 45-501 *Ontario Prospectus and Registration Exemptions* at: http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20130425_45-501_rfc-pro-amend.htm

Background

(a) Listing representation prohibition

We are proposing an exemption from the requirement in the securities legislation of each of the participating jurisdictions that prohibits a person or company, with the intention of effecting a trade in a security, from making a representation that the security will be listed on an exchange or quoted on a quotation and trade reporting system, or that application has been or will be made to list the security, unless consent or authorization, as applicable, is first obtained (the **listing representation prohibition**).

Certain exceptions to this prohibition currently exist in most jurisdictions. These include:

- where an application has already been made to list or quote the securities and other securities of the same issuer are already listed on an exchange or quoted on a quotation and trade reporting system, or
- where the exchange or quotation and trade reporting system has granted approval to the listing or quoting of the securities, conditional or otherwise, or has consented to, or indicated that it does not object to, the representation.

We understand that foreign securities laws do not generally prohibit the making of listing representations, provided that the representations are factually correct. We also understand that many foreign exchanges and markets do not provide consent, conditional approval or non-objection regarding a proposed listing. Consequently, foreign issuers cannot typically rely on the existing statutory exceptions permitting a listing representation and must make an application to each of the securities regulators in Canada for relief from this prohibition.

Given the typically short timeframe for U.S. and international offerings, it may be difficult to obtain express consent in each applicable jurisdiction of Canada before a foreign offering document can be used in those jurisdictions. Making such applications also adds to the time and cost associated with extending a foreign offering into Canada.

(b) Offering document disclosure

Securities legislation in New Brunswick, Nova Scotia and Saskatchewan requires that, where an “offering memorandum” (as defined in the securities legislation of those jurisdictions) is provided to a prospective purchaser in connection with a distribution to which statutory rights of action apply, these statutory rights must be described in the offering memorandum (the **statutory rights of action disclosure requirement**). Where an offering memorandum contains a misrepresentation, a purchaser who purchased a security offered by the offering memorandum during the period of distribution has a right of action for damages or rescission against the issuer or selling securityholder.

In the context of offerings conducted by issuers and by investment dealers or international dealers acting as underwriters, an offering document is prepared in accordance with foreign securities laws, and then the statutory rights of action disclosure requirement is typically addressed either by amending the offering document for sales to investors in that jurisdiction of

Canada or, more commonly, a supplemental document known as a “wrapper” is prepared and attached as the cover page to the foreign offering document. The wrapper together with the foreign offering document then forms the offering document for purposes of offering securities in Canada.

Market participants have suggested that, in the context of offerings conducted by U.S. issuers and dealers or other global offerings of foreign securities, the time and expense associated with retaining counsel and preparing a “wrapper” to meet these local requirements in Canada or, alternatively, making applications for relief from these requirements discourages some foreign issuers and underwriters from extending foreign offerings into Canada. Because these offerings are being made only to institutional and other sophisticated investors, Canadian securities regulators have been prepared to provide discretionary exemptive relief to permit the disclosure to be made in an alternative form. Proposed MI 45-107 would remove the need to make such applications.

Summary of proposed MI 45-107

(a) Relief from listing representation prohibition

Proposed MI 45-107 would provide an exemption from the listing representation prohibition provided that the offering is an offering of “designated foreign securities” made only to “permitted clients”.

Designated foreign securities are defined in proposed MI 45-107 as securities offered primarily in a foreign jurisdiction that are either:

- issued by an issuer that
 - is incorporated, formed or created under the laws of a foreign jurisdiction
 - is not a reporting issuer in a jurisdiction of Canada,
 - has its head office outside of Canada, and
 - has a majority of its executive officers and directors resident outside of Canada;
- securities that are issued or guaranteed by the government of a foreign jurisdiction.

The term “permitted client” has the same meaning as in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*.

(b) Relief from statutory rights of action disclosure requirement

Proposed MI 45-107 would provide an exemption from the statutory rights of action disclosure requirement in the following circumstances:

- The offering is an offering of “designated foreign securities”
- It is made only to “permitted clients”, and
- Certain alternative disclosure of these rights of action is provided.

The exemption from the statutory rights of action disclosure requirement is conditional on the disclosure being provided in alternative ways. The disclosure can be provided in a one-time

notice that has been delivered to the permitted client by an investment dealer or international dealer acting as underwriter that is signed by the permitted client. This notice will explain that, with respect to the current and future distributions of designated foreign securities by the foreign issuer, the purchaser will have certain statutory rights in the event of a misrepresentation. In the case of a one-time notice, a description of such rights will not be provided at the time of each offering of designated foreign securities by the foreign issuer to the purchaser.

Proposed MI 45-107 does not affect the statutory rights of action available to purchasers of securities in the applicable jurisdictions.

(c) Considerations for investment funds

Investment funds offering securities in reliance on proposed MI 45-107 would continue to be subject to other securities regulatory requirements, if applicable, such as investment fund manager registration.

Investment funds investing in offerings made in reliance on proposed MI 45-107 would continue to be subject to investment restrictions such as fund on fund restrictions that may limit the ability to purchase securities of a foreign issuer that is an investment fund.

Related amendments

The CSA is also proposing amendments to National Instrument 33-105 *Underwriting Conflicts (NI 33-105)* to provide relief, in the context of these same U.S. and international offerings to institutional and other sophisticated investors, from the requirement in NI 33-105 to provide disclosure relating to connected and related issuers in a prospectus-exempt disclosure document. The proposed exemption from NI 33-105 will only apply where offerings by foreign issuers provide comparable alternative disclosure to purchasers.

Alternatives considered

We could continue granting time-limited exemptive relief, but are of the view that this would result in repeated expense and time commitment for applicants. We have also considered granting blanket order relief in each of the jurisdictions, but are of the view that a multilateral instrument would be easier and more efficient for market participants.

How to provide your comments

Please provide your comments in writing by **February 26, 2014**. Regardless of whether you are sending your comments by email, you should also send or attach your submissions in an electronic file in Microsoft Word, Windows format.

Please address your submission to the CSA as follows:

Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan

The Manitoba Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Deliver your comments **only** to the two addresses that follow. Your comments will be distributed to the other CSA member jurisdictions.

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Please note that comments received during the comment period will be made publicly available. We will post all comments to the Alberta Securities Commission and Autorité des marchés financiers websites at www.albertasecurities.com and www.lautorite.qc.ca, respectively.

Content of Appendix

Appendix A sets out proposed MI 45-107

Questions

Please refer your questions to any of:

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Appendix A

PROPOSED MULTILATERAL INSTRUMENT 45-107 LISTING REPRESENTATION AND STATUTORY RIGHTS OF ACTION DISCLOSURE EXEMPTIONS

Definitions

1. In this Instrument

“designated foreign security” means a security offered primarily in a foreign jurisdiction in either of the following circumstances:

- (a) the security is issued by an issuer that
 - (i) is incorporated, formed or created under the laws of a foreign jurisdiction,
 - (ii) is not a reporting issuer in a jurisdiction of Canada,
 - (iii) has its head office outside of Canada, and
 - (iv) has a majority of its executive officers and directors resident outside of Canada;
- (b) the security is issued or guaranteed by the government of a foreign jurisdiction;

“executive officer” means, for an issuer, an individual who is

- (a) a chair, vice-chair or president,
- (b) a chief executive officer or chief financial officer,
- (c) a vice-president in charge of a principal business unit, division or function including sales, finance or production, or
- (d) performing a policy-making function in respect of the issuer;

“exempt offering document” means:

- (a) in New Brunswick, Nova Scotia and Saskatchewan, an offering memorandum as defined under the securities legislation of that jurisdiction;
- (b) in all other jurisdictions, a document including any amendments to the document, if the document
 - (i) describes the business and affairs of an issuer, and
 - (ii) has been prepared primarily for delivery to and review by a prospective purchaser to assist the prospective purchaser in making an investment

decision in respect of securities being distributed pursuant to an exemption from the prospectus requirement;

“listing representation” means a representation that a security will be listed on an exchange or quoted on a quotation and trade reporting system, or that application has been or will be made to list the security on an exchange or quote the security on a quotation and trade reporting system located in a foreign jurisdiction;

“listing representation prohibition” means the prohibition in the securities legislation set out in Appendix A;

“permitted client” has the same meaning as in section 1.1 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

“specified firm registrant” has the same meaning as in section 1.1 of National Instrument 33-105 *Underwriting Conflicts*;

“statutory rights of action disclosure requirement” means the provision in the securities legislation set out in Appendix B.

Exemption from Listing Representation Prohibition

2. The listing representation prohibition does not apply to a listing representation made in an exempt offering document in connection with a distribution of a designated foreign security if
 - (a) the distribution is made to a permitted client by a specified firm registrant acting as an underwriter,
 - (b) the listing representation does not contain a misrepresentation, and
 - (c) the listing representation is made in compliance with the by-laws and rules of the exchange or quotation and trade reporting system referred to in the listing representation.

Alternative Disclosure of Statutory Rights

3. In New Brunswick, Nova Scotia and Saskatchewan, the statutory rights of action disclosure requirement is satisfied in respect of a prospective purchaser that is a permitted client in connection with a distribution of a designated foreign security if the specified firm registrant either
 - (a) provides the required statutory rights of action disclosure at the same time that it provides an exempt offering document to the permitted client, or
 - (b) has previously provided written notice to the permitted client describing the applicable rights of action and advising that the specified firm registrant may,

from time to time, distribute securities to the permitted client and that the statutory rights of action apply in respect of each such distribution.

Limitation of Application

4. Sections 2 and 3 do not apply to a distribution of a designated foreign security if a prospectus has been filed with a Canadian securities regulatory authority for the distribution.

Effective Date

5. This Instrument comes into force on ●.

Appendix A

to Proposed Multilateral Instrument 45-107 *Listing Representation and Statutory Rights of Action Disclosure Exemptions*

Listing Representation Prohibition

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|----------------------------|---|
| Alberta: | Subsection 92(3) of the <i>Securities Act</i> (Alberta) |
| Manitoba: | Subsection 69(3) of the <i>Securities Act</i> (Manitoba) |
| New Brunswick: | Subsection 58(3) of the <i>Securities Act</i> (New Brunswick) |
| Newfoundland and Labrador: | Subsection 39(3) of the <i>Securities Act</i> (Newfoundland and Labrador) |
| Northwest Territories: | Subsection 147(1) <i>Securities Act</i> (Northwest Territories) |
| Nova Scotia: | Subsection 44(3) of the <i>Securities Act</i> (Nova Scotia) |
| Nunavut: | Subsection 147(1) of the <i>Securities Act</i> (Nunavut) |
| Prince Edward Island: | Subsection 147(1) of the <i>Securities Act</i> (Prince Edward Island) |
| Quebec: | Subsection 199(4) of the <i>Securities Act</i> (Quebec) |
| Saskatchewan: | Subsection 44(3) of the <i>Securities Act</i> (Saskatchewan) |
| Yukon: | Subsection 147(1) of the <i>Securities Act</i> (Yukon) |

Appendix B

**to Proposed Multilateral Instrument 45-107 *Listing Representation
and Statutory Rights of Action Disclosure Exemptions***

Statutory Rights of Action Disclosure Requirement

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| New Brunswick: | Section 2.2 of Local Rule 45-802 <i>Implementing National Instrument 45-106 – Prospectus and Registration Exemptions</i> |
| Nova Scotia: | Subsection 65(3) of the <i>Securities Act</i> (Nova Scotia) |
| Saskatchewan: | Subsection 80.2(1) of the <i>Securities Act</i> (Saskatchewan) |