

**NOTICE AND REQUEST FOR COMMENT
PROPOSED AMENDMENTS TO
NATIONAL INSTRUMENT 33-105 *UNDERWRITING CONFLICTS***

November 28, 2013

Introduction

The Canadian Securities Administrators (CSA or we) are publishing for a 90-day comment period proposed amendments to National Instrument 33-105 *Underwriting Conflicts* (NI 33-105).

Objective of the proposed amendments

The proposed amendments to NI 33-105 (the Proposed Amendments) will provide limited relief from the requirement to include connected and related issuer disclosure in an offering document used to distribute securities under a prospectus exemption in the context of foreign private placements offered to sophisticated investors in Canada.

Proposed text

We invite comment on the Proposed Amendments set out in Appendix A.

Background

(a) Connected and related issuer disclosure requirements

The purpose of the Proposed Amendments is to eliminate one of the disclosure requirements that results in the preparation of a “wrapper” when foreign securities are offered to sophisticated Canadian investors under a prospectus exemption.¹

The Proposed Amendments only apply to offerings of foreign securities sold to permitted clients. Permitted clients are sophisticated, usually institutional, investors that will be able to understand the limited nature of the disclosure exemption that will apply to such offerings.

A foreign offering document, if delivered to a Canadian purchaser, generally constitutes an “offering memorandum” or other prescribed offering document which is subject to certain securities law disclosure requirements, depending on the jurisdiction. As a result, in order to have the prescribed Canadian disclosure included in the foreign offering document, the foreign offering document may either be amended to include the prescribed Canadian disclosure, or, more commonly, a supplemental document known as a “wrapper” with the prescribed Canadian disclosure and other optional disclosure is prepared by one or more underwriters and attached to the face of the foreign offering document. The wrapper together with the foreign offering document thus form one Canadian offering document for the purposes of offering securities in Canada.

NI 33-105 requires that detailed disclosure on the relationships and conflicts of interest that exist between underwriters and issuers or selling securityholders be included in a document provided in connection with a distribution. Specifically, section 2.1 of NI 33-105 requires disclosure in a document where a specified firm registrant acts as a direct underwriter in a distribution of securities of or by an issuer that meets the definition of “connected issuer” or “related issuer”. The required disclosure is specified in Appendix C of NI 33-105 (Connected

¹ Other proposed amendments are related to this initiative. Also being published for comment today is Multilateral Instrument 45-107 *Listing Representation and Right of Action Disclosure Exemptions* (MI 45-107). The Ontario Securities Commission previously published for comment, on April 25, 2013, proposed amendments to OSC Rule 45-501 *Ontario Prospectus and Registration Exemptions* and an Ontario-only amendment to Form 45-106F1. See “Related Amendments” for additional information.

and Related Issuer Disclosure Requirements), some of which must be included on the front page of the relevant document.

The definition of “connected issuer” under NI 33-105 means, for a “specified firm registrant” (as defined in NI 33-105) an issuer that has a relationship with certain identified parties (including the specified firm registrant involved in the offering) such that a “reasonable prospective purchaser” may question whether the issuer and the specified firm registrant are independent of each other for purposes of the distribution.

The definition of related issuer focuses on the ownership of securities of an issuer that enables a party to cast more than 20 per cent of the votes for the election or removal of directors of an issuer.

Once either definition is triggered, Appendix C of NI 33-105 requires detailed disclosure to be included in an offering document. For example, disclosure must be included in the document that describes, among other things:

- the nature of the relationship between the issuer and specified firm registrant
- whether the relationship is due to indebtedness, and if so, “the extent to which” the issuer is in compliance with the terms of the agreement governing the indebtedness, and
- “the extent to which the financial position of the issuer...or the value of the security has changed since the indebtedness was incurred.”

Market participants have submitted that the breadth of the “connected issuer” test, which hinges on the viewpoint of a “reasonable prospective purchaser”, makes complying with the Connected and Related Issuer Disclosure Requirements difficult in the context of foreign offerings. A significant amount of additional information needs to be obtained from a foreign issuer and each underwriter involved in the offering if either of the initial triggering definitions is met.

Market participants have suggested that, in the context of United States and other global offerings of foreign securities, the time and expense associated with retaining counsel and preparing a “wrapper” to meet Canadian disclosure requirements discourages some foreign issuers and underwriters from extending foreign offerings into Canada pursuant to a private placement.

(b) U.S. disclosure requirements on conflicts of interest between issuers and underwriters

United States disclosure requirements with respect to underwriting conflicts of interest can be found in Regulation S-K under the United States *Securities Act of 1933* (Reg S-K) section 229.508 (Item 508) – *Plan of Distribution* and the Financial Industry Regulatory Authority (FINRA) Rule 5121 – *Public Offerings of Securities With Conflicts of Interest* (Rule 5121).

Under Item 508 of Reg S-K, an offering document must identify each underwriter that has a “material relationship” with the issuer and state the nature of the relationship.

Under FINRA Rule 5121, no member that has a conflict of interest may participate in a public offering unless the offering complies with certain mandated disclosure requirements.

Together, these provisions require prominent disclosure in an offering document of a material conflict of interest between an underwriter and an issuer in respect of an offering of securities.

Substance and purpose of the Proposed Amendments

The Proposed Amendments will eliminate the requirement to provide connected and related issuer disclosure in the context of offerings of securities that qualify as “designated foreign securities”. Designated foreign securities are defined in the proposed amendments as securities offered primarily in a foreign jurisdiction that are:

- securities that are 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 outside of Canada, or
- securities that are issued or guaranteed by the government of a foreign jurisdiction.

The Proposed Amendments further provide that the purchaser of the securities must be a permitted client (as defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103)). As noted above, permitted clients are generally sophisticated, usually institutional investors.

The Proposed Amendments will apply to offerings by both non-investment funds and non-redeemable investment funds that meet the above criteria. Under current subsection 1.3(b) of NI 33-105, the rule does not apply to a distribution of mutual funds securities. Non-Canadian issuers that are investment funds are reminded that there are other Canadian regulatory requirements specific to investment funds, such as investment fund manager registration, that may still apply. Permitted clients (as defined in NI 31-103) that are investment funds are reminded that other Canadian regulatory requirements, such as fund on fund restrictions, may restrict a Canadian investment fund's ability to purchase securities of a non-Canadian issuer that is an investment fund.

Summary of the Proposed Amendments

The Proposed Amendments will provide for relief from the Connected and Related Issuer Disclosure Requirements set out in subsection 2.1(1) of NI 33-105 and related Appendix C, for distributions of designated foreign securities offered on a private placement basis into Canada under a prospectus exemption to permitted clients, provided that an offering document is delivered to purchasers that complies with U.S. disclosure requirements on conflicts of interest between issuers and underwriters.

In addition, the Proposed Amendments will provide limited relief from the disclosure required by NI 33-105 in the case of foreign government offerings that do not include comparable U.S. disclosure.

First, the Proposed Amendments will provide relief from the connected issuer disclosure requirements in their entirety in the case of foreign government offerings.

Second, where the requirement to include related issuer disclosure is triggered for an offering of designated foreign government securities, the Proposed Amendments will provide relief from the requirement to include certain statements on the cover page of the offering document. However, the offering document will still need to contain all of the disclosure required to be included in the body of the document. We are satisfied that permitted clients do not need the added protection of duplicative cover page disclosure.

In addition, a specified firm registrant involved in offerings of designated foreign securities will have to provide to a permitted client that proposes to acquire such foreign securities, alternative notification of any conflicts of interest that would otherwise trigger a disclosure obligation under NI 33-105. The Proposed Amendments provide for a number of ways in which this disclosure can be provided to clients.

In particular, the Proposed Amendments indicate that a specified firm registrant will have the option of providing a one-time notice which explains that any offering document provided in the context of future foreign private placements made in reliance on these provisions, for U.S. registered offerings, will comply with U.S. federal securities law requirements on conflicts of interest instead of the specific disclosure requirements set out in NI 33-105, or in the case of offerings of foreign government securities, will explain the information that can be excluded.

Finally, the Proposed Amendments will not apply to a distribution if a prospectus has been filed with any Canadian securities regulatory authority, as these provisions are intended to relate solely to private placements made to

investors that qualify as permitted clients.

Alternatives considered

In spring 2013, time-limited exemptive relief was first granted to a number of large institutional Canadian and foreign dealers from Canadian-specific disclosure requirements that must be included in a wrapper. Similar decisions have since been issued with respect to other applicants.

The relief in each case is subject to a “sunset” clause that results in the termination of each decision on the earlier of: (i) three years after the date of the decision, or (ii) the date that amendments to the legislation become effective that provide for substantially the same relief as the decision.

The relief will be addressed by making rule amendments that will place all market participants in a similar position.

No other alternatives were considered.

Related amendments

Also being published for comment today is Multilateral Instrument 45-107 *Listing Representation and Right of Action Disclosure Exemptions* (MI 45-107). The purpose of MI 45-107 is to provide for exemptions from other securities law disclosure requirements that also generally apply with respect to offerings of designated foreign securities.

The proposed exemptions relate to disclosure of statutory rights of action and restrictions on the making of representations that securities will be listed or quoted on an exchange or quotation system. All jurisdictions except British Columbia and Ontario are participating in MI 45-107. The Ontario Securities Commission previously published for comment, on April 25, 2013, proposed amendments to OSC Rule 45-501 *Ontario Prospectus and Registration Exemptions* that address the same issues. The British Columbia Securities Commission is not participating because it has previously issued a blanket order to address one of these disclosure requirements and the other does not apply in that jurisdiction.

More information on the proposed Ontario amendments can be found at Appendix B.

Impact on investors

Many institutional investors as well as underwriters involved in foreign offerings have expressed frustration at the current requirements, which they believe restrict investor access to foreign investment opportunities.

We anticipate that the Proposed Amendments will facilitate participation by sophisticated Canadian investors that qualify as permitted clients in foreign securities offerings, including offerings by foreign corporations and governments. As a result, this may provide some investors with a wider range of investment opportunities than were previously available.

Anticipated costs and benefits

By implementing the Proposed Amendments, we aim to simplify the process for offering foreign securities into Canada to permitted clients on an exempt basis. These changes will reduce the regulatory burden associated with these offerings and may expand investment opportunities for sophisticated investors. As a result, we consider the benefits of the Proposed Amendments to potentially be significant.

Local Matters

Where applicable, Appendix B is being published in any local jurisdiction that is making related changes to local securities laws, including local notices or other policy instruments in that jurisdiction. It also includes any additional information that is relevant to that jurisdiction only.

Request for Comments

We welcome your comments on the Proposed Amendments.

All comments will be posted on the Ontario Securities Commission (OSC) website at www.osc.gov.on.ca and on the Autorité des marchés financiers website at www.lautorite.qc.ca.

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period.

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:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Ontario 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.

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
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Fax: (416) 593-2318
E-mail: comments@osc.gov.on.ca

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Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22^e étage
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Fax : 514-864-6381

E-mail: consultation-en-cours@lautorite.qc.ca

Content of Appendices

Appendix A sets out the Proposed Amendments to NI 33-105

Appendix B sets out local matters

Questions

Please refer your questions to any of:

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November 28, 2013.

APPENDIX A

Proposed Amendments to National Instrument 33-105 *Underwriting Conflicts*

1. ***National Instrument 33-105 Underwriting Conflicts is amended by this Instrument.***
2. ***The following Part is added:***

PART 3A – NON-DISCRETIONARY EXEMPTIONS - DESIGNATED FOREIGN SECURITIES

3A.1 Definitions - In this Part,

“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, Ontario and Saskatchewan, an offering memorandum as defined under the securities legislation of that jurisdiction, and
- (b) in all other jurisdictions, a document including any amendments to the document, if the document
 - (i) describe 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;

“FINRA Rule 5121” means Rule 5121 – *Public Offerings of Securities with Conflicts of Interest* of the United States Financial Industry Regulatory Authority, as amended from time to time;

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

3A.2 Exemption based on U.S. disclosure - Subsection 2.1(1) does not apply to a distribution of a designated foreign security if all of the following apply:

- (a) the distribution is made to a permitted client by a specified firm registrant;
- (b) an exempt offering document prepared with respect to the distribution is delivered to the permitted client;
- (c) the exempt offering document complies with the requirements of section 229.508 of SEC Regulation S-K under the 1933 Act and FINRA Rule 5121, whether or not those requirements apply to the distribution.

3A.3 Exemption for foreign government securities - Subsection 2.1(1) does not apply to a distribution of a designated foreign security if all of the following apply:

- (a) the distribution is made to a permitted client by a specified firm registrant;
- (b) the issuer is a connected issuer but not a related issuer of the specified firm registrant; and
- (c) the designated foreign security is issued or guaranteed by the government of a foreign jurisdiction.

3A.4 Relief from front page disclosure requirements - The requirement in subsection 2.1(1) to provide the information specified in items 1, 2 and 3 of Appendix C does not apply to a distribution of a designated foreign security if all of the following apply:

- (a) the distribution is made to a permitted client by a specified firm registrant;
- (b) the issuer is a related issuer of the specified firm registrant; and
- (c) the designated foreign security is issued or guaranteed by the government of a foreign jurisdiction.

3A.5 Notice to permitted clients - A specified firm registrant that intends to rely on one or more of the exemptions described in sections 3A.2, 3A.3 or 3A.4 must deliver a notice to a permitted client, prior to or contemporaneously with the distribution of a designated foreign security to the permitted client, that describes the terms and conditions of the exemptions being relied on.

3A.6 Manner of notice - The notice requirement under section 3A.5 is satisfied if either of the following apply:

- (a) the specified firm registrant provides notice that the specified firm registrant intends to rely on the exemptions in section 3A.2, 3A.3 or 3A.4 for a distribution of a designated foreign security, including any future distributions of a designated foreign security, to the permitted client;
- (b) If the notice referred to in subsection (a) is not provided to the permitted client,
 - (i) the specified firm registrant provides the notice required under section 3A.5 in the

exempt offering document delivered to the permitted client for a distribution of a designated foreign security, or

- (ii) the specified firm registrant provides the notice required under section 3A.5 in a document delivered to the permitted client that accompanies, but does not form part of, the exempt offering document.

3A.7 Application - This Part does not apply to a distribution if a prospectus has been filed with a Canadian securities regulatory authority for the distribution.

3. *This Instrument comes into force on •.*

APPENDIX B

Additional Notice Requirements in Ontario

Unpublished materials

In proposing the Proposed Amendments, we have not relied on any significant unpublished study, report or other written materials.

Rule-making authority

The following provision of the Act provides the Commission with authority to adopt the Proposed Amendments:

- paragraph 143(1)49 authorizes the Commission to make rules permitting or requiring, or varying the Act to permit or require, methods of filing or delivery, to or by the Commission, issuers, registrants, security holders or others, of documents, information, notices, books, records, things, reports, orders, authorizations or other communications required under or governed by Ontario securities laws.

Related Ontario local amendments

On April 25, 2013 the OSC published for comment proposed amendments to the following rules (the Ontario local amendments):

- Ontario Securities Commission Rule 45-501 *Ontario Prospectus and Registration Exemptions* (OSC Rule 45-501), and
- An Ontario-specific amendment to National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106).

The comment period expired on July 24, 2013 and we have considered the comments received.

The purpose of the Ontario local amendments is to amend specific Ontario disclosure requirements that are currently required to be included in an offering memorandum to distribute securities under a prospectus exemption in the context of foreign private placements offered to sophisticated investors in Ontario.

Together with the amendments to NI 33-105 proposed by this instrument, the Ontario local amendments are intended to eliminate the need for a wrapper to be prepared when foreign securities are offered to sophisticated Ontario investors under a prospectus exemption. Certain of the disclosure requirements that apply to foreign disclosure documents in these circumstances are found in local rules or legislation, apart from the requirements of NI 33-105. As a result, it was necessary for the OSC to propose the Ontario local amendments to ensure that the goal of eliminating the wrapper requirement was achieved in Ontario.

Also being published for comment today by all jurisdictions except Ontario and British Columbia is MI 45-107. The purpose of MI 45-107 is to provide for exemptions from securities law disclosure requirements that are substantially similar to those that were addressed in the Ontario local amendments.

A copy of the Ontario local amendments can be found on the OSC's website at the following link http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20130425_45-501_rfc-pro-amend.htm.