

CSA Staff Notice 45-308
*Guidance for Preparing and Filing Reports of Exempt Distribution
under National Instrument 45-106 Prospectus and
Registration Exemptions*

April 26, 2012

Introduction and Purpose

Staff of the Canadian Securities Administrators (Staff or we) are publishing this Staff Notice (the Notice) to highlight issues identified in some reports of exempt distribution filed in Form 45-106F1 *Report of Exempt Distribution* (the F1) under National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106). The Notice also provides guidance to issuers, underwriters and their advisors for preparing and filing the F1.

Background

Securities legislation prohibits issuers and underwriters from distributing securities without a prospectus for which a receipt has been issued. NI 45-106 contains a number of exemptions from the prospectus requirement. Part 6 of NI 45-106 requires issuers or underwriters relying on prospectus exemptions specified in that Part to report exempt distributions, and sets out the form required to be filed and the deadlines for filing. Responsibility for compliance with NI 45-106 rests with the issuer or underwriter purporting to rely on the applicable exemption(s).

The use of a prospectus exemption under NI 45-106 is subject to regulatory oversight and monitoring. Staff may review filings required by NI 45-106 and/or an issuer's or underwriter's reliance on a prospectus exemption as a result of planned compliance-monitoring programmes, observed market activity, or following specific complaints or referrals. Identified non-compliance may result in appropriate corrective action.

Guidance and Identified Issues

Outlined below are issues we have observed when reviewing F1s filed with us. We are communicating these issues to assist issuers, underwriters and their advisors in avoiding similar deficiencies when preparing and filing the F1.

1. Failing to use the correct form

The required form for a report of exempt distribution is the F1, except in British Columbia (BC). Effective October 3, 2011, the British Columbia Securities Commission (the BCSC) introduced a new form of report of exempt distribution, Form 45-106F6 *British Columbia Report of Exempt Distribution* (the F6).¹

We have seen instances of issuers or underwriters filing the F6 outside BC. The filing of the F6 is only accepted in BC.

If a distribution occurs in BC and elsewhere, the issuer or underwriter is required to file the F6 with the BCSC² and file the F1 in the other applicable jurisdictions.

2. Failing to file the F1 on time

Part 6 of NI 45-106 requires issuers or underwriters relying on certain prospectus exemptions to file the F1 in each applicable jurisdiction where the distribution takes place. Some (but not all) of these prospectus exemptions include:

- the accredited investor exemption (section 2.3 of NI 45-106)
- the family, friends and business associates exemption (section 2.5 of NI 45-106)
- the offering memorandum exemption (section 2.9 of NI 45-106, the OM exemption)
- the minimum amount investment exemption (section 2.10 of NI 45-106)
- the additional investment in investment funds exemption (section 2.19 of NI 45-106)

The deadline for filing the F1 is generally 10 days after the distribution.

Investment funds have the option of filing the F1 on an annual basis, within 30 days of their financial year-end, when relying on section 2.3, 2.10 or 2.19 of NI 45-106. **This option is not available for investment funds using the OM exemption** (in jurisdictions where such exemption is available).

Staff have observed that many issuers or underwriters have filed the F1 late and, in some cases, not at all.

3. Failing to pay the required fee

Some issuers or underwriters have filed the F1 with an incorrect fee or with no fee. Issuers or underwriters must pay the applicable fee in each jurisdiction in which a distribution is made, when the report is filed.

¹ In BC, the F6 generally must be filed electronically using the BCSC's E-services filing system. See BC Instrument 13-502 *Electronic filing of reports of exempt distribution*. Except in limited circumstances, the BCSC will not accept F6s delivered in paper or via other electronic means (such as a PDF attachment to an email).

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

4. Failing to include a complete list of purchasers in the F1

Some F1s filed by issuers or underwriters only identified purchasers from the jurisdiction in which the F1 was filed, even though the distribution included purchasers from other jurisdictions. If distributions are made in more than one jurisdiction, the issuer or underwriter must complete a single F1 identifying all purchasers, including purchasers that reside in the jurisdiction and those that do not, and file that report in each of the jurisdictions in which the distribution is made (see Instruction 2 of the F1).

5. Failing to reconcile information in the F1

Issuers or underwriters have frequently reported a different total number of securities distributed, total dollar value raised, number of purchasers and/or exemptions used in items 6 and 7 of the F1 when compared to Schedule I of the F1 (Schedule I). Information in items 5, 6, and 7 of the F1 must reconcile with the information in Schedule I (see Instruction 5 of the F1).

6. Incorrectly identifying the number of purchasers

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

7. Relying on unavailable exemptions

In certain instances, issuers distributing in more than one jurisdiction, have reported in the F1 distributions under an exemption that is not available in one of the jurisdictions. Issuers or underwriters should note that not all exemptions are available in all jurisdictions. For example, section 2.5 of NI 45-106 *Family, friends and business associates* (the 2.5 exemption) is not available in Ontario, although Ontario offers a similar exemption (section 2.7 of NI 45-106 *Founder, control person and family – Ontario*) (the 2.7 exemption).

An issuer or underwriter should indicate in Schedule I the appropriate exemption for each purchaser. This may require the issuer or underwriter to report (in Schedule I) multiple exemptions relied on for the same purchaser in circumstances where the distribution is made in more than one jurisdiction and the same exemption is not available in those jurisdictions. For example, an issuer or underwriter relying on the 2.5 exemption in Alberta and the 2.7 exemption in Ontario, for a distribution to the same purchaser, would identify both section 2.5 and section 2.7 in Schedule I as the applicable exemptions relied on for that purchaser.

8. Failing to disclose all commissions and finder's fees

We have observed that some issuers or underwriters are not reporting compensation paid in connection with a distribution. In some of these cases, the payment was not disclosed because it was not called a "commission" or a "finder's fee."

Item 8 of the F1 requires an issuer or underwriter to disclose 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, which result from a distribution of securities, regardless of what the payment is called. For example, a “brokerage fee” or “finance fee” for a syndicated mortgage is compensation in connection with a distribution. Compensation does not include payments for services incidental to the distribution (such as clerical, printing, legal or accounting services).

9. Failing to provide complete information regarding convertible or exchangeable securities distributed

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

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

10. Improperly reporting distributions under the minimum amount exemption

In order to rely on the prospectus exemption in section 2.10 *Minimum amount investment* of NI 45-106, 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 reported is at least that minimum amount. We also remind issuers or underwriters that it is not permitted to distribute securities under this exemption to multiple purchasers acting in concert or as a “syndicate” in order to pool individual purchases and reach the \$150,000 minimum.

11. Failing to certify the F1

We have received some reports with unsigned certificates. An issuer or underwriter must include the date and the signature of the person identified as signing the F1 in the certificate section of the F1.

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