

**CSA Notice of
Amendments to National Instrument 45-106 *Prospectus Exemptions*
and
Changes to Companion Policy 45-106CP *Prospectus Exemptions*
Relating to the Offering Memorandum Prospectus Exemption**

December 8, 2022

Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are making amendments (the **Amendments**) to National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**).

The Amendments are set out in Annex B of this notice. Related changes (the **Changes**) to Companion Policy 45-106CP *Prospectus Exemptions* (**45-106CP**) are set out in Annex C.

Provided all necessary ministerial approvals are obtained, the Amendments will come into force on March 8, 2023.

Substance and Purpose

The Amendments set out new disclosure requirements for issuers that are engaged in “real estate activities” (**Real Estate Issuers**) and issuers that are “collective investment vehicles” (**CIVs**), when those issuers are preparing an offering memorandum (**OM**). Both definitions are new in NI 45-106. Many issuers using the OM Exemption (as defined below) are Real Estate Issuers or CIVs. The new requirements are intended to set out a clear disclosure framework for these issuers, giving them greater certainty as to what they must disclose, and giving better information to investors.

In addition, the Amendments include a number of general amendments (the **General Amendments**), which are meant to clarify or streamline parts of NI 45-106 or improve disclosure for investors.

Where the Amendments are to a form for an OM, they are to Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers* (**Form 45-106F2**).

Background

The offering memorandum prospectus exemption found in section 2.9 of NI 45-106 (the **OM Exemption**) was originally designed as a small business financing tool to help early stage and

small businesses raise capital from a large pool of investors without having to comply with the more costly prospectus regime. It was expected to be used by relatively simple issuers for relatively small amounts of capital, prior to becoming reporting issuers.

In practice, the use of the OM Exemption has evolved differently. To a significant extent, larger and more complex issuers than those originally envisioned are using it. In addition, issuers using the OM Exemption are often engaged in specific activities, for example as Real Estate Issuers, or as CIVs carrying out mortgage lending.

The Amendments were published for comment on September 17, 2020 (the **2020 Proposed Amendments**). For additional background and further detail, please refer to the 2020 Proposed Amendments.

Summary of Written Comments Received by the CSA

In response to the 2020 Proposed Amendments, we received submissions from 13 commenters. We have considered the comments received and thank the commenters for their input. The names of the commenters and a summary of their comments, together with our responses, are contained in Annex A of this notice.

Summary of Changes to the 2020 Proposed Amendments

The Amendments reflect changes to the 2020 Proposed Amendments that are in response to certain of the comments. Key changes to the 2020 Proposed Amendments are summarized below. As these changes are not material, we are not publishing the Amendments for a further comment period.

Six-Month Interim Financial Report

- In all jurisdictions other than Ontario, the requirement for ongoing distributions to amend the OM to include an interim financial report for the issuer's most recently completed six month period has been removed.
- In Ontario, the Ontario Securities Commission continues to be of the view that this requirement is appropriate. However, in response to comments, the Commission has added an exemption to the requirement. The exemption would allow issuers to not amend their OM to include an interim financial report for the issuer's most recently completed six month period if the issuer appends an additional certificate certifying that
 - the OM does not include a misrepresentation when read as of the date of the additional certificate,
 - there has been no material change in relation to the issuer that is not disclosed in the OM, and

- the OM, when read as of the date of the additional certificate, provides a reasonable purchaser with sufficient information to make an informed investment decision.

Appraisal Requirements

- Due to practical issues noted by commenters regarding paragraph 2.9(19.5)(c) of NI 45-106, which required an appraisal if a Real Estate Issuer were using a material amount of the proceeds of the offering to acquire an interest in real property, we have removed this paragraph. We have determined that this is appropriate, because the more significant investor protection concerns that we have seen are with property acquired from a related party as defined in NI 45-106 (**Related Party**).
- Regarding transactions with a Related Party, we have revised paragraph 2.9(19.5)(a) of NI 45-106 so that it no longer applies to completed acquisitions from a Related Party, and therefore only applies to proposed acquisitions from a Related Party. We note that Real Estate Issuers will still be required to disclose certain details about completed transactions with a Related Party under section 7 of Schedule 1 to Form 45-106F2.

Definitions

- We have made changes to make the definition of CIV more straightforward, and also to ensure that an issuer is not a CIV by virtue of owning securities of subsidiaries.
- We have removed the definition of “net asset value”, as we intended “net asset value” to have its generally accepted meaning.

Form 45-106F2

- We have modified the new provision of Item 1 in Form 45-106F2 that requires Form 45-106F2 disclosure for additional issuers in certain circumstances to narrow its scope to avoid unintended results, such as capturing management companies.

Schedule 1 to Form 45-106F2

- We have broadened paragraph 3(1)(a) to allow issuers more options to describe the location of the real property.
- We have added a materiality qualifier to paragraph 3(1)(c), subsection 3(3) and paragraph 8(a).
- Paragraph 3(1)(g) has been revised to narrow its application.
- To make the summarized disclosure permitted by subsection 3(2) a more useful accommodation, we have reduced the property threshold from 20 to 10.

Schedule 2 to Form 45-106F2

- We have added a new provision as paragraph (j) of subsection 3(3) that requires disclosure of accommodations made by an issuer to respond to financial difficulties of the borrower, if the accommodations would be material to a reasonable investor.

Coming into Force

As noted, all of the Amendments are expected to come into force on March 8, 2023 (the **Effective Date**).

However, the amending instrument for the Amendments contains a transition provision that subject to certain conditions, allows an issuer to continue using an OM that was prepared in accordance with the version of Form 45-106F2 that was in-force immediately prior to the Effective Date, until the OM is amended.

As indicated, the transition provision is only an accommodation relating to the pre-Amendments version of Form 45-106F2. There is no transition provision for any of the other Amendments.

Other Matters related to the Amendments

We are revising Multilateral CSA Staff Notice 45-309 *Guidance for Preparing and Filing an Offering Memorandum under National Instrument 45-106 Prospectus and Registration Exemptions (SN 45-309)* to make it consistent with the Amendments. We plan to publish revised SN 45-309 in conjunction with the effective date of the Amendments.

Impact on Investors

The Amendments are intended to give investors enhanced disclosure, and where the issuer is a Real Estate Issuer or a CIV, an investor will receive disclosure that is more tailored to the issuer. We anticipate that this enhanced and tailored disclosure will provide investors with better information, enabling them to make more informed investment decisions.

Local Matters

Annex D 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.

Contents of Annexes

Annex A – Summary of Comments and Responses

Annex B – Amendments to NI 45-106

Annex C – Changes to 45-106CP

Annex D – Local Matters

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