

6.1.5 CSA Notice 81-405 - Request for Comment on Proposed Exemptions for Certain Capital Accumulation Plans

CSA NOTICE 81-405 - REQUEST FOR COMMENT ON PROPOSED EXEMPTIONS FOR CERTAIN CAPITAL ACCUMULATION PLANS

Introduction and background

We, the members of the Canadian Securities Administrators (CSA or we), are publishing for comment a proposed registration and prospectus exemption for certain capital accumulation plans (the proposed exemption). This proposed exemption will implement certain parts of the Guidelines for Capital Accumulation Plans (the guidelines), which were developed by the Joint Forum of Financial Market Regulators (the Joint Forum), and approved for publication by the CSA, the Canadian Council of Insurance Regulators (CCIR), and the Canadian Association of Pension Supervisory Authorities (CAPSA).

The guidelines apply to tax assisted capital accumulation plans such as defined contribution pension plans where plan members make investment choices, and group registered retirement savings plans.

Together with the Joint Forum, in April 2001 the CSA published for comment *Proposed Regulatory Principles for Capital Accumulation Plans* (the principles). The Joint Forum received 44 submissions. Following on from these principles, the Joint Forum developed the detailed guidelines describing standards for operating certain capital accumulation plans. Together with the Joint Forum, we published *Proposed Guidelines for Capital Accumulation Plans* for comment in April 2003, and received 26 written submissions. The Joint Forum also held 12 focus group sessions with 126 plan sponsors, service providers and plan members attending, to obtain further comments about the guidelines.

After considering the comments, and making a number of changes to the guidelines, the Joint Forum has today published the final guidelines, which were approved for publication by the CSA, CCIR, and CAPSA. The regulators expect that plan sponsors, and service providers would follow the guidelines by December 2005. A copy of the guidelines can be found on the websites of CAPSA (www.capsa-acor.org), CCIR (www.ccir-ccrra.org) and the Joint Forum (www.jointforum.ca) websites, and the websites of certain securities regulators including British Columbia, Ontario, Alberta, Saskatchewan and Québec.

Securities laws implications

In most provinces, existing securities laws require a plan member to receive investment advice from a person registered to trade under securities legislation, and to receive a prospectus in connection with the distribution of many different securities, such as mutual funds, that the member could acquire through participating in a plan.

The guidelines address many of the regulatory concerns that the CSA has about how plan members can get adequate information and tools to help them make informed investment decisions. We believe it is appropriate to provide certain dealer registration and prospectus exemptions for trades in mutual funds that occur in tax-assisted capital accumulation plans, provided that there is compliance with the parts of the guidelines that substitute for receiving advice from a registrant, and prospectus disclosure.

Form of the proposed exemption

In most provinces, we expect to adopt the proposed exemption in the form of a blanket exemption from the dealer registration and the prospectus requirements for certain trades in mutual fund securities. In Ontario, the conditions described in this proposed exemption will form the basis of a staff notice. That staff notice will set out the circumstances in which Ontario staff expects they could recommend that the securities regulator grant discretionary relief to a person who applied.

The CSA is working on a harmonized national exemptions rule, which it expects to publish some time this year. We are contemplating that at some point this proposed exemption might be incorporated into that proposed national instrument.

Summary of the proposed exemption

The proposed exemption would:

- apply only to mutual fund securities
- harmonize the treatment of mutual funds and segregated funds as investments within a capital accumulation plan
- ensure that plan members receive information that is appropriate for them, about the mutual funds they can acquire through the plan

- require plan sponsors (or someone they have contracted with to provide this service) to provide certain information, tools and documents to plan members to enable informed decision making
- exempt mutual funds from the prospectus requirements for mutual funds sold to members of certain capital accumulation plans, provided that the funds comply with certain investment restrictions
- remove existing barriers to trading mutual fund securities with members of capital accumulation plans where there is no valid regulatory reason for doing so.

Related securities legislation

In some CSA jurisdictions, such as Nova Scotia and Saskatchewan, the information and documents that members may receive under the proposed exemption to enable them to make informed decisions, may constitute an offering memorandum as defined in the securities legislation of those jurisdictions. That definition includes a document that provides information concerning the business and affairs of an issuer and has been prepared to assist purchasers to make an investment decision where the securities are sold in reliance on a prospectus exemption.

In Nova Scotia, the definition does not include documents whose content is prescribed by statute or a regulation. If the plan sponsor provides members with the mutual fund's prospectus or a prescribed form of offering memorandum to satisfy the requirements in the proposed exemption, these documents would not likely constitute an offering memorandum as defined in Nova Scotia's securities legislation.

In addition, some provinces, such as Saskatchewan, have filing requirements for these documents.

If the documentation that a plan sponsor provides is an offering memorandum, the documentation must include a statement that describes:

- the statutory rights of rescission or damages for a misrepresentation that are available under that legislation, and
- the time limits within which a member must commence an action to enforce these rights.

In addition, certain jurisdictions, such as Alberta and Ontario have existing rules for capital accumulation plans. The Alberta Securities Commission (ASC) expects to repeal its existing rule and replace it with the proposed exemption. The Ontario Securities Commission expects to retain its existing exemption.

Specific questions of the ASC concerning its existing exemption for capital accumulation plans

As mentioned above the ASC is proposing to repeal its current exemption for capital accumulation plans namely, sections 68 and 123 of the ASC Rules (General) and ASC Policy 5.5 *Capital Accumulation Plans*. Under this exemption a capital accumulation plan must consist of an "approved security". An approved security is a security of the employer or an affiliate of the employer, a security identified as exempt security under the *Securities Act* (Alberta) or a security that at the time of purchase is permitted to be purchased by a registered insurance company or trust company.

The ASC invites comments from those who have made use of the Alberta exemption as to whether the replacement of the proposed exemption would constitute an improvement or could give rise to concern.

Specific questions of the CSA concerning the proposed exemption for certain capital accumulation plans

1. Sub-paragraph 2.1(d) of the proposed exemption requires that the plan sponsor provide an explanation to members about any fees or costs associated with making an investment decision. The guidelines provide in the textbox in section 4.4 that a sponsor can, where appropriate, aggregate fees and expenses when reporting to members.

The CSA invite comments on whether plan sponsors should be able to aggregate fees when reporting to plan members. If the answer is yes, under what circumstances.

2. Staff in Québec have concerns about the impact of the proposed exemption on the protection generally afforded to investors under securities legislation. For example, the Québec *Securities Act* provides for different types of recourse that normally flow from the dealer registration and prospectus requirements under the Act. This includes recourse in damages for misrepresentation in a prospectus. This recourse, in certain cases, may no longer be applicable for members that acquired mutual fund securities through a capital accumulation plan. In these circumstances, members would only be able to rely on the general recourses available under the *Civil Code of Québec*.

Request for Comments

In addition, members of a capital accumulation plan that acquire securities under the proposed prospectus exemption would not have certain other rights, such as the right of withdrawal from a purchase of securities pursuant to a prospectus.

Finally, other mechanisms that investors may use when there are issues of dealer misconduct such as mediation and investor protection funds, in some instances may also not be available to members of capital accumulation plans.

The CSA would welcome comments on these specific investor protection issues.

Request for comments

We welcome your comments on the proposed exemption.

Please submit your comments in writing on or before July 30, 2004. If you are not sending your comments by email, also forward a diskette containing the submissions (in Windows format, Word).

Address your submission to the following CSA member commissions:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Newfoundland and Labrador Securities Commission
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

Deliver your comments **only** to the address that follows. Your comments will be forwarded to the remaining CSA member jurisdictions.

Noreen Bent
Manager and Senior Legal Counsel, Legal and Market Initiatives
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, BC Canada V7Y 1L2
e-mail: nbent@bcsc.bc.ca

and to

Anne-Marie Beaudoin
Directrice du secrétariat
Autorité des marchés financiers
800, square Victoria, 22nd floor
P.O. Box 246, Tour de la Bourse
Montreal, Quebec
H4Z 1G3
e-mail: consultation-en-cours@lautorité.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.

Questions

Please refer your questions to any of:

Noreen Bent
Manager and Senior Legal Counsel, Legal and Market Initiatives
British Columbia Securities Commission
Tel: (604) 899-6741 or (800) 373-6393 (in B.C. and Alberta)
Fax: (604) 899-6814
e-mail: nbent@bcsc.bc.ca

Melinda Ando
Senior Legal Counsel
Alberta Securities Commission
Tel: (403) 297-2079
Fax: (403) 297-6156
e-mail: melinda.ando@seccom.ab.ca

Mark Mulima
Legal Counsel
Investment Funds Branch
Ontario Securities Commission
Tel: (416) 593-8276
Fax: (416) 593-3699
e-mail: mmulima@osc.gov.on.ca

Sharon Kelly
Analyste en réglementation
Direction des politiques, de la réglementation et des relations extérieures
Autorité des marchés financiers
Tel: (514) 395-0337, ext. 2407
Fax: (514) 873-7455
e-mail: sharon.kelly@lautorite.qc.ca

François Proulx
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Autorité des marchés financiers
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Fax: (418) 528-0835
e-mail: francois.proulx@lautorite.qc.ca

The text of the proposed exemption and the distribution report follows or can be found elsewhere on a CSA member website.

May 28, 2004.

Proposed Registration and Prospectus Exemption for Trades in Certain Capital Accumulation Plans

PART 1 DEFINITIONS

“**capital accumulation plan**” means a tax assisted investment or savings plan, including a defined contribution registered pension plan, a group registered retirement savings plan, a group registered education savings plan, or a deferred profit sharing plan, established by a plan sponsor that permits a member to make investment decisions among two or more investment options offered within the plan.

“**member**” means a current or former employee of an employer, or a person who belongs, or did belong to a trade union or association, or

- (a) his or her spouse,
- (b) a trustee, custodian or administrator who is acting on his or her behalf, or for his or her benefit, or on behalf of, or for the benefit of, his or her spouse, or
- (c) his or her holding entity, or a holding entity of his or her spouse,

that has assets in a capital accumulation plan.

“**plan sponsor**” means an employer, trustee, trade union or association or a combination of them that establishes a capital accumulation plan.

PART 2 EXEMPTIONS

2.1 The dealer registration requirement does not apply to a person or company with respect to a trade¹ in a security of a mutual fund to a capital accumulation plan, or to a member of a capital accumulation plan as part of the member's participation in the capital accumulation plan, if the following conditions are met:

- (a) the plan sponsor selects the mutual funds that members will be able to invest in under the capital accumulation plan,
- (b) the plan sponsor establishes a policy, and provides members with a copy of the policy and any amendments to it, describing what happens if a member does not make an investment decision,
- (c) in addition to any other information that the plan sponsor believes is reasonably necessary for the member to make an investment decision within the capital accumulation plan, the plan sponsor provides each member with the following information about each mutual fund the member may invest in,
 - (i) the name of the mutual fund,
 - (ii) the name of the manager of the mutual fund and its portfolio adviser
 - (iii) the investment objective of the mutual fund,
 - (iv) the types of investments the mutual fund may hold,
 - (v) a description of the risks associated with investing in the mutual fund,
 - (vi) where a member can obtain more information about each mutual fund's portfolio holdings
 - (vii) where a member can obtain more information generally about each mutual fund, including any continuous disclosure, and
 - (viii) whether the mutual fund is considered foreign property for income tax purposes, and if so, a summary of the implications of that status for a member who invested in that mutual fund,

¹ The dealer registration exemption will be adapted in Québec to conform with the “business trigger” for registration applicable in this jurisdiction.

- (d) the plan sponsor provides an explanation to members about any fees or costs associated with making an investment decision, including any fees or costs associated with each mutual fund the members may invest in,
- (e) at least annually, the plan sponsor provides members with, or informs members how they can obtain, performance information about each mutual fund the members may invest in, including,
 - (i) the name of the mutual fund for which the performance is being reported,
 - (ii) the performance of the mutual fund, including historical performance for one, three, five and 10 years if available,
 - (iii) a performance calculation that is net of investment management fees and mutual fund expenses,
 - (iv) the method used to calculate the mutual fund's performance return calculation,
 - (v) the name and description of a broad-based securities market index, selected in accordance with NI 81-102 *Mutual Funds*, or when in force, NI 81-106 *Investment Fund Continuous Disclosure*, for the mutual fund, and corresponding performance information for that index, and
 - (vi) a statement that past performance of the mutual fund is not necessarily an indication of future performance.
- (f) the plan sponsor informs members at least annually of any changes in the mutual funds that members may invest in and where there is a change, provides information about what members must do to change their investment decision, or make a new investment, and
- (g) the plan sponsor provides members with investment decision-making tools that the plan sponsor reasonably believes are sufficient to assist them in making an investment decision within the capital accumulation plan.

2.2 If the plan sponsor makes investment advice from a registrant available to members, the plan sponsor must provide members with information about how they can contact the registrant.

2.3 The prospectus requirement does not apply to a distribution of a security of a mutual fund that complies with the conditions set out in section 2.1, provided that

- (i) the mutual fund also complies with the investment restrictions in National Instrument 81-102 *Mutual Funds*, and
- (ii) the mutual fund is also advised, in whole or in part, by a registrant or a person who is not required to be registered under securities legislation.

Part 3 FILING REQUIREMENTS

3.1 A mutual fund that distributes a security under the exemption in section 2.3, must file a report in the form found in Appendix A in the jurisdiction in which the distribution takes place, on or before the 30th day after the end of the calendar year in which the distribution takes place.

Appendix A

Report of Exempt Distribution for Certain Mutual Fund Securities under the Capital Accumulations Plan Exemption

Issuer information

1. State the full name, address and telephone number of the mutual fund that distributed the security. Include former name if it has changed since the last report.
2. State whether the mutual fund is or is not a reporting issuer and, if reporting, each of the jurisdictions in which it is reporting.

Details of distribution

3. State the total number of securities distributed.
4. Provide details of the distribution by completing the attached schedule.
5. Complete the following table for each Canadian jurisdiction where the plan sponsor is established or where members of the plan who have purchased securities reside. Provide a total dollar value of all securities distributed in all jurisdictions.

Each jurisdiction where the plan sponsor is established or where members of the plan who have purchased securities reside.	Total dollar value of securities acquired by members in the jurisdiction (Canadian \$)
Total dollar value of distribution to all plan members in all jurisdictions (Canadian \$)	

Certificate

On behalf of the mutual fund, I certify that the statements made in this report and in each schedule to this report are true.

Date: _____

Name of mutual fund (please print)

Print name and position of person signing

Signature

Schedule

Provide the following information on a separate page attached to the report for the mutual fund. **No securities regulatory authority will place the information in this schedule on its public file.**

Full name and address of plan sponsor	Type of capital accumulation plan	Number of securities of that mutual fund purchased by all members of this plan	Total purchase price (Canadian \$)

It is an offence to make a misrepresentation in this report.

Instruction:

File this report with the securities regulatory authority in each jurisdiction in which the mutual fund has distributed securities on or before the **30th day after end of the calendar year** in which the mutual fund distributed the security.

Notice - Collection and use of personal information

The securities regulatory authorities collect the personal information required under this form for the purposes of the administration and enforcement of the securities legislation. Freedom of information legislation in certain jurisdictions may require the securities regulatory authority to make this information available if requested. As a result, the public may be able to obtain access to the information.

If you have any questions about the collection and use of this information, contact the securities regulatory authorities in the jurisdictions where the mutual fund files this form, at the address (es) set out below.

Alberta Securities Commission

4th Floor, 300 – 5th Avenue SW
Calgary, AB T2P 3C4
Telephone: (403) 297-6454
Facsimile: (403) 297-6156

British Columbia Securities Commission

P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, BC V7Y 1L2
Telephone: (604) 899-6854
Toll free in British Columbia and Alberta 1-800-373-6393
Facsimile: (604) 899-6506

The Manitoba Securities Commission

1130 – 405 Broadway Avenue
Winnipeg, MB R3C 3L6
Telephone: (204) 945-2548
Facsimile: (204) 945-0330

Securities Commission of Newfoundland

P.O. Box 8700
2nd Floor, West Block
Confederation Building
St. John's, NFLD A1B 4J6
Telephone: (709) 729-4189
Facsimile: (709) 729-6187

Government of the Northwest Territories

Department of Justice
Securities Registry
1st Floor Stuart M. Hodgson Building
5009 – 49th Street
Yellowknife, NT X1A 2L9
Telephone: (867) 920-3318
Facsimile: (867) 873-0243

Nova Scotia Securities Commission

2nd Floor, Joseph Howe Building
1690 Hollis Street
Halifax, NS B3J 3J9
Telephone: (902) 424-7768
Facsimile: (902) 424-4625

Government of Nunavut

Department of Justice
Legal Registries Division
P.O. Box 1000 – Station 570
1st Floor, Brown Building
Iqaluit NU X0A 0H0
Telephone: (867) 975-6190
Facsimile: (867) 975-6194

Prince Edward Island Securities Office

95 Rochford Street, P.O. Box 2000
Charlottetown, PE C1A 7N8
Telephone: (902) 368-4569
Facsimile: (902) 368-5283

Saskatchewan Financial Services Commission

6th Floor
1919 Saskatchewan Drive
Regina, SK S4P 3V7
Telephone: (306) 787-5879
Facsimile: (306) 787-5899

Autorité des marchés financiers

800, Square Victoria, 22^e étage
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Montréal (Québec) H4Z 1G3
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Facsimile: (514) 873-7455

Ontario Securities Commission

20 Queen Street West
Suite 1900, Box 55
Toronto, ON M5H 3S8
Telephone: (416) 593-8314
Facsimile: (416) 593-8122