

Chapter 6

Request for Comments

6.1.1 Notice and Request for Comment - Securities Act Amendments and Consequential Amendments to National Instrument 45-106 Prospectus and Registration Exemptions, National Instrument 45-102 Resale of Securities, and OSC Rule 45-501 Ontario Prospectus and Registration Exemptions

SECURITIES ACT AMENDMENTS AND CONSEQUENTIAL AMENDMENTS TO NATIONAL INSTRUMENT 45-106 *PROSPECTUS AND REGISTRATION EXEMPTIONS*, NATIONAL INSTRUMENT 45-102 *RESALE OF SECURITIES*, AND OSC RULE 45-501 *ONTARIO PROSPECTUS AND REGISTRATION EXEMPTIONS*

1. Introduction

The Ontario Securities Commission (the **OSC** or **Commission**) is publishing for a 30-day comment period changes (the **Proposed Modifications**) to proposed National Instrument amendments and Ontario rule amendments that were originally published for comment on February 29, 2008 (the **Proposed Rule Amendments**).

The Proposed Rule Amendments affect prospectus and registration exemptions, and resale provisions for securities distributed under the prospectus exemptions. The Proposed Rule Amendments are related to proposed National Instrument 31-103 *Registration Requirements (NI 31-103)* and the Canadian Securities Administrators' (the **CSA**) registration reform initiative.

On March 26, 2009, the Government of Ontario introduced Bill 162 *An Act respecting the budget measures and other matters (Bill 162)*, which includes amendments (the **Proposed OSA Amendments**) to the *Securities Act (Ontario)* (the **OSA**). Schedule 26 to Bill 162 sets out the Proposed OSA Amendments, which amend statutory provisions in the following areas:

- registration requirements for dealers, advisers and others,
- exemptions from the registration requirements,
- exemptions from the prospectus requirement, and
- resale of securities previously distributed under an exemption from the prospectus requirement.

As a result of the Proposed OSA Amendments, the OSC is publishing for comment the Proposed Modifications. This notice describes the Proposed Modifications.

The Proposed Modifications will be considered for adoption by the Commission only if Bill 162 is passed by the Legislative Assembly of Ontario and receives Royal Assent.

The text of the Proposed Modifications is found in Appendix A to this notice. A table of concordance between the Proposed Modifications and the Proposed OSA Amendments is found in Appendix B to this notice.

2. Background

(a) *The Proposed Rule Amendments*

On February 29, 2008, the CSA published for comment:

- the proposed repeal and replacement of National Instrument 45-106 *Prospectus and Registration Exemptions (NI 45-106)*, the related forms and Companion Policy, and
- proposed amendments to National Instrument 45-102 *Resale of Securities (NI 45-102)*, the related form and Companion Policy.

The OSC also published for comment the proposed repeal and replacement of OSC Rule 45-501 *Ontario Prospectus and Registration Exemptions (Rule 45-501)*, the related form and Companion Policy.

The notices accompanying the Proposed Rule Amendments indicated that the Government of Ontario was considering possible amendments to the OSA. It also stated that these possible OSA amendments could affect the Proposed Rule Amendments, which could result in the OSC having to publish a modified rule proposal in Ontario.

(b) Bill 162 and the Proposed OSA Amendments

On March 26, 2009, the Government of Ontario introduced Bill 162. Bill 162 contains certain amendments to the OSA which are necessary to implement NI 31-103 or to reflect substantive policy changes contained in NI 31-103.

If the relevant provisions of Bill 162 are passed and put into effect, the present registration and prospectus exemptions in the OSA will be replaced with a shorter list of statutory exemptions. The prospectus and registration exemptions that the Government of Ontario intends to maintain or include in the OSA relate to:

- securities subject to other provincial or federal regulatory regimes such as mortgages, securities evidencing indebtedness secured by or under a security agreement provided under personal property security legislation, and financial intermediaries and Schedule III banks,
- securities that Ontario Ministry of Finance (**MoF**) staff have advised are subject to securities regulatory considerations as well as broader public policy considerations such as specified debt, including government debt, and
- securities that MoF staff have advised relate to key government policy priorities such as school board debt, tax incentive securities and venture capital raising.

Some of the Proposed OSA Amendments relating to registration and prospectus exemptions, if enacted and proclaimed, will eliminate the need to include certain provisions in the Proposed Rule Amendments.

3. Explanation of the Proposed Modifications

The following is a summary of the Proposed Modifications:

(a) Proposed NI 45-106

The following prospectus and registration exemptions in proposed NI 45-106 are modified:

- specified debt (proposed sections 2.34 and 3.34),
- mortgages (proposed sections 2.36 and 3.36),
- securities evidencing indebtedness secured by or under a security agreement provided under personal property security legislation (proposed sections 2.37 and 3.37), and
- evidences of deposit issued by a Schedule III bank or an association governed by the *Cooperative Credit Associations Act* (Canada) (proposed sections 2.41 and 3.41).

These changes reflect provisions in the Proposed OSA Amendments that would supersede the corresponding provisions in proposed NI 45-106, in whole or in part, in Ontario.

(b) Proposed NI 45-102

References to resale provisions in section 72 of the OSA found in Appendix C to proposed NI 45-102 are modified to reflect proposed amendments to section 72 and new section 73.7 found in sections 11 and 13 of Schedule 26 to Bill 162.

(c) Proposed Rule 45-501

The prospectus and registration exemptions for school board debt (proposed sections 2.7 and 3.7) are deleted to reflect provisions in the Proposed OSA Amendments, which supersede these exemptions in Ontario. The relevant Proposed OSA Amendments are found in subsection 12(1) and section 5 of Schedule 26 to Bill 162.

Proposed section 4.1 provides a registration exemption for certain trades by a financial intermediary or Schedule III bank. This section is modified so that registration exemptions for trades by financial institutions under proposed subsection 35.1(1) of the OSA (set out in section 5 of Schedule 26 to Bill 162) apply rather than the registration exemption under section 4.1.

Proposed section 4.2 provides an adviser registration exemption for certain financial intermediaries and Schedule III banks. This section is deleted. A similar adviser registration exemption for these entities is provided under proposed section 35.1 of the OSA (also set out in section 5 of Schedule 26 to Bill 162).

Proposed section 5.1 removes several registration and prospectus exemptions referenced in section 34, subsections 35(1) and (2), subsection 72(1) and clauses 73(1)(a), (b) and (c) of the OSA. Proposed section 5.1 is deleted in light of the Proposed OSA Amendments amending the referenced OSA provisions (set out in sections 5, 11 and 12 of Schedule 26 to Bill 162).

4. Phased implementation of Proposed OSA Amendments¹

The Commission is advised that, if the Proposed OSA Amendments are passed by the Legislative Assembly of Ontario, MoF staff plan to seek proclamation of the Proposed OSA Amendments in two stages.

(a) Stage 1 OSA Prospectus Exemption Amendments

The Proposed Modifications only reflect the first set of the proposed prospectus exemption amendments (the **Stage 1 OSA Prospectus Exemption Amendments**) and related provisions. The Stage 1 OSA Prospectus Exemption Amendments contemplate that the statutory registration exemptions enacted upon the introduction of the registration regime contained in proposed NI 31-103 would be paralleled by statutory prospectus exemptions. Specifically, the Stage 1 OSA Prospectus Exemption Amendments include prospectus exemptions where the corresponding registration exemption would be in the OSA. They would maintain the substance of these exemptions when registration reform is introduced.

The Stage 1 OSA Prospectus Exemption Amendments are found in subsection 12(1) of Schedule 26 to Bill 162 and relate to section 73 of the OSA. Related provisions are found in sections 11 and 13 of Schedule 26 to Bill 162, and deal with section 72 and new section 73.7 of the OSA. Additional changes to the rule-making and regulation-making provisions in subsections 143(1), (2) and (9) of the OSA would be made by subsections 20(1) to (16) and 20(18) of Schedule 26 to Bill 162.

The Stage 1 OSA Prospectus Exemption Amendments are transitional. Subject to proclamation by the Lieutenant Governor in Council, it is intended that the Stage 1 OSA Prospectus Exemption Amendments (and related provisions), as well as the registration provisions of the Proposed OSA Amendments, would come into force on the same date as proposed NI 31-103. The target proclamation date that MoF staff plan to seek is currently expected to be near the end of September 2009.

(b) Stage 2 OSA Prospectus Exemption Amendments

MoF staff have advised the Commission that the remaining OSA prospectus exemption amendments in Bill 162 (the **Stage 2 OSA Prospectus Exemption Amendments**) are not intended to come into force on the same date as NI 31-103. They are intended to replace the prospectus exemptions enacted in Stage 1.

The Stage 2 OSA Prospectus Exemption Amendments include the same prospectus exemptions that were in Stage 1. In addition, they would add a limited number of prospectus exemptions to the OSA that would supersede the corresponding prospectus exemptions, or elements of them, that are now found in NI 45-106 and Rule 45-501. If the Stage 2 OSA Prospectus Exemption Amendments are enacted, the Commission will publish for comment at a later date new versions of NI 45-106 and Rule 45-501 which will reflect these amendments.

MoF staff have advised the Commission that, although the Stage 2 OSA Prospectus Exemption Amendments have been included in Bill 162, it is anticipated that proclamation will be sought for a later date than the rest of Bill 162. This later proclamation date is intended to allow additional time for consultation on the further rule changes that would be required for the OSC's rules to work effectively in conjunction with the Stage 2 OSA Prospectus Exemption Amendments. MoF staff also have advised the Commission that the Government of Ontario intends to work with the OSC so that the implementation of these changes in NI 45-106, Rule 45-501 and the OSA are coordinated and there is a smooth transition for market participants.

The Stage 2 OSA Prospectus Exemption Amendments are found at subsection 12(2) of Schedule 26 to Bill 162 and related regulation-making powers are found at subsection 20(17) of that Schedule.

5. Timing

It is currently contemplated that the OSC will be asked in July to approve a final version of the Proposed Rule Amendments. It is expected that these final versions would include the Proposed Modifications, as well as non-material updates to the Proposed Rule Amendments. However, the Proposed Modifications will be included in the final versions for which Commission approval is sought only if Royal Assent has been given to Bill 162.

¹ This discussion does not apply to the Proposed OSA Amendment affecting evidences of deposit issued by a Schedule III bank or an association governed by the *Cooperative Credit Associations Act* (Canada). This Proposed OSA Amendment would become effective if Bill 162 is passed by the Legislative Assembly of Ontario.

6. Comments

If you have comments on the Proposed OSA Amendments, please contact the Government of Ontario directly:

Colin Nickerson,
Senior Manager, Industrial and Financial Policy Branch, Ministry of Finance
95 Grosvenor Street, 4th Floor
Toronto, Ontario
M7A 1Z1
Fax: (416) 325-1187
Email: Colin.Nickerson@ontario.ca

The Proposed OSA Amendments can be found at http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2166.

If you have comments on the Proposed Modifications, please address them to the Commission on or before June 22, 2009:

John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario
M5H 3S8
Fax: (416) 593-2318
Email: jstevenson@osc.gov.on.ca

Comments received by the Commission will be made publicly available and posted at www.osc.gov.on.ca.

The Commission will consider comments received on the Proposed Modifications in conjunction with the comments received in response to the Proposed Rule Amendments published on February 29, 2008.

7. Questions

Please refer any questions regarding this notice to:

Jo-Anne Matear
Assistant Manager, Corporate Finance
Ontario Securities Commission
(416) 593-2323
jmatear@osc.gov.on.ca

Winnie Sanjoto
Senior Legal Counsel, Corporate Finance
Ontario Securities Commission
(416) 593-8119
wsanjoto@osc.gov.on.ca

Robert F. Kohl
Senior Legal Counsel, Compliance and Registrant Regulation
Ontario Securities Commission
(416) 593-8233
rkohl@osc.gov.on.ca

May 22, 2009

**APPENDIX A
PROPOSED MODIFICATIONS**

The following are the Proposed Modifications to the Proposed Rule Amendments, published for comment on February 29, 2008. The Proposed Modifications will be included in the final version of the Proposed Rule Amendments if certain Proposed OSA Amendments are enacted and proclaimed. For more information, please refer to the accompanying notice and Appendix B.

Text boxes in this Appendix A will not form part of the instruments.

1. Amendments to Proposed NI 45-106

(a) Specified debt

(i) *Proposed subsection 2.34(2) is deleted and the following substituted:*

- 2.34(2)** The prospectus requirement does not apply to a distribution of
- (a) a debt security of or guaranteed by the Government of Canada or the government of a jurisdiction of Canada,
 - (b) a debt security of or guaranteed by a government of a foreign jurisdiction if the debt security has an approved credit rating from an approved credit rating organization,
 - (c) a debt security of or guaranteed by any municipal corporation in Canada, or secured by or payable out of rates or taxes levied under the law of a jurisdiction of Canada on property in the jurisdiction and to be collected by or through the municipality in which the property is situated,
 - (d) a debt security of or guaranteed by a Canadian financial institution or a Schedule III bank, other than debt securities that are subordinate in right of payment to deposits held by the issuer or guarantor of those debt securities,
 - (d.1) in Ontario, a debt security of or guaranteed by a loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of a jurisdiction of Canada other than Ontario to carry on business in a jurisdiction of Canada, other than debt securities that are subordinate in right of payment to deposits held by the issuer or guarantor of those debt securities,
 - (e) a debt security of the Comité de gestion de la taxe scolaire de l'île de Montréal, or
 - (f) a debt security of or guaranteed by a permitted supranational agency if the debt securities are payable in the currency of Canada or the United States of America.
- (3)** Paragraphs (2)(a), (c) and (d) do not apply in Ontario.

Note: In Ontario, proposed paragraph 73(1)(a) of the *Securities Act* (Ontario) would provide similar exemptions.

(ii) *The following is added after proposed subsection 3.34(2)*

- (3)** Paragraphs (2)(a) and (c) do not apply in Ontario.

Note: In Ontario, proposed paragraphs 35(1)1 and 35(1)2 of the *Securities Act* (Ontario) would provide similar exemptions.

(b) Mortgages

(i) *Proposed subsection 2.36(2) is deleted and the following substituted:*

- 2.36(2)** Except in Ontario, and subject to subsection (3), the prospectus requirement does not apply to a distribution of a mortgage on real property in a jurisdiction by a person who is registered or licensed, or exempted from registration or licensing, under mortgage brokerage or mortgage dealer legislation of that jurisdiction.

Note: In Ontario, proposed paragraph 73(1)(a) of the *Securities Act* (Ontario) would provide a similar exemption.

(ii) ***Proposed subsection 3.36(2) is deleted and the following substituted:***

3.36(2) Except in Ontario, and subject to subsection (3), the dealer registration requirement does not apply in respect of a trade in a mortgage on real property in a jurisdiction by a person who is registered or licensed, or exempted from registration or licensing, under mortgage brokerage or mortgage dealer legislation of that jurisdiction.

Note: In Ontario, proposed subsection 35(4) of the *Securities Act* (Ontario) would provide a similar exemption.

(c) **Personal property security legislation**

(i) ***Proposed section 2.37 is deleted and the following substituted:***

2.37 Except in Ontario, the prospectus requirement does not apply to a distribution of a security evidencing indebtedness secured by or under a security agreement provided for under personal property security legislation of a jurisdiction providing for the granting of security in personal property if the security is not offered for sale to an individual.

Note: In Ontario, proposed paragraph 73(1)(a) of the *Securities Act* (Ontario) would provide a similar exemption.

(ii) ***Proposed section 3.37 is deleted and the following substituted:***

3.37 Except in Ontario, the dealer registration requirement does not apply in respect of a trade in a security evidencing indebtedness secured by or under a security agreement provided for under personal property security legislation of a jurisdiction providing for the granting of security in personal property if the security is not offered for sale to an individual.

Note: In Ontario, proposed subsection 35(2) of the *Securities Act* (Ontario) would provide a similar exemption.

(d) **Schedule III banks and cooperative associations – evidence of deposit**

(i) ***Proposed section 2.41 is deleted and the following substituted:***

2.41 Except in Ontario, the prospectus requirement does not apply to a distribution of an evidence of deposit issued by a Schedule III bank or an association governed by the *Cooperative Credit Associations Act* (Canada).

(ii) ***Proposed section 3.41 is deleted and the following substituted:***

3.41 Except in Ontario, the dealer registration requirement does not apply in respect of a trade in an evidence of deposit issued by a Schedule III bank or an association governed by the *Cooperative Credit Associations Act* (Canada).

Note: In Ontario, proposed clause (e) of the definition of “security” in subsection 1(1) of the *Securities Act* (Ontario) would exclude these evidences of deposit from the definition of “security”.

2. Amendments to Proposed NI 45-102

6.1 Appendix C is amended by deleting the following text:

Ontario Subsections 72(4), 72(5), 72(6) as it relates to clause 72(1)(r), and 72(7) of the *Securities Act* (Ontario)

and substituting the following:

Ontario Subsections 72(4), 72(5), 72(6) as it relates to clause 72(1)(r), and 72(7) of the *Securities Act* (Ontario), in each case prior to section 11 of Schedule 26 of the *Budget Measures Act, 2009* being proclaimed in force.

3. Amendments to Proposed Rule 45-501

(a) School board debt

(i) *Proposed section 2.7 is deleted in its entirety.*

(ii) *Proposed section 3.7 is deleted in its entirety.*

(b) Registration Exemptions for Financial Intermediaries and Schedule III Banks

(i) *Proposed subsection 4.1(1) is amended by deleting the text in subsection (1) before clause (a) and substituting the following:*

(1) Subject to subsections (2), (3) and (4), the registration requirement does not apply to a trade by a financial intermediary or a Schedule III bank.

(ii) *The following is added after proposed subsection 4.1(3):*

(4) Subsection 4.1(1) does not apply to a trade by a financial institution referred to in subsection 35.1(1) of the *Securities Act* in the circumstances to which that subsection applies.

(iii) *Proposed section 4.2 is deleted in its entirety.*

(c) Removal of Exemptions

(i) *Proposed section 5.1 is deleted in its entirety.*

**APPENDIX B
TABLE OF CONCORDANCE**

The following table summarizes how the prospectus and registration exemptions in proposed NI 45-106 and proposed Rule 45-501 would be changed if the Proposed OSA Amendments were to come into force.

The left column lists the provisions in NI 45-106 that would not apply in Ontario or the provisions in Rule 45-501 that would be repealed. The right column lists the corresponding provisions of the OSA or other instruments that would apply in Ontario.

Provisions in proposed NI 45-106 that would not apply in Ontario or provisions in proposed Rule 45-501 that would be repealed	Corresponding provision of the OSA and other instruments that would apply in Ontario
Proposed NI 45-106 – prospectus exemptions	
s. 2.34(2)(a) of NI 45-106 [Specified debt – debt security of or guaranteed by the Government of Canada or the government of a jurisdiction of Canada]	Proposed s. 73(1)(a) of the OSA
s. 2.34(2)(c) of NI 45-106 [Specified debt – debt security of or guaranteed by any municipal corporation in Canada, or secured by or payable out of rates or taxes levied under the law of a jurisdiction of Canada on property in the jurisdiction and to be collected by or through the municipality in which the property is situated]	Proposed s. 73(1)(a) of the OSA
s. 2.34(2)(d) of NI 45-106 [Specified debt - debt security of or guaranteed by a Canadian financial institution or a Schedule III bank]	Proposed s. 73(1)(b) of the OSA Proposed s. 2.34(2)(d.1) of NI 45-106 (as set out in Appendix A)
s. 2.36(2) of NI 45-106 [Mortgages]	Proposed s. 73(1)(a) of the OSA
s. 2.37 of NI 45-106 [Personal property securities legislation]	Proposed s. 73(1)(a) of the OSA
s. 2.41 of NI 45-106 [Schedule III banks and cooperative associations – evidences of deposit]	Proposed clause (e) of definition of “security” in s. 1(1) of the OSA would exclude these evidences of deposit from the definition of “security”
Proposed NI 45-106 – registration exemptions	
s. 3.34(2)(a) of NI 45-106 [Specified debt – debt security of or guaranteed by the Government of Canada or the government of a jurisdiction of Canada]	Proposed s. 35(1)1 of the OSA

Provisions in proposed NI 45-106 that would not apply in Ontario or provisions in proposed Rule 45-501 that would be repealed	Corresponding provision of the OSA and other instruments that would apply in Ontario
s. 3.34(2)(c) of NI 45-106 <i>[Specified debt – debt security of or guaranteed by any municipal corporation in Canada, or secured by or payable out of rates or taxes levied under the law of a jurisdiction of Canada on property in the jurisdiction and to be collected by or through the municipality in which the property is situated]</i>	Proposed s. 35(1)2 of the OSA
s. 3.36(2) of NI 45-106 <i>[Mortgages]</i>	Proposed s. 35(4) of the OSA
s. 3.37 of NI 45-106 <i>[Personal property securities legislation]</i>	Proposed ss. 35(2) and (3) of the OSA
s. 3.41 of NI 45-106 <i>[Schedule III banks and cooperative associations – evidences of deposit]</i>	Proposed clause (e) of definition of “security” in s. 1(1) of the OSA would exclude these evidences of deposit from the definition of “security”
Proposed Rule 45-501 – prospectus exemptions	
s. 2.7 of OSC Rule 45-501 <i>[School board debt]</i>	Proposed s. 73(1)(a) of the OSA
Proposed Rule 45-501 – registration exemptions	
s. 3.7 of Rule 45-501 <i>[School board debt]</i>	Proposed s. 35(1)3 of the OSA
s. 4.1(1) of Rule 45-501, as it applies to a trade by a financial institution referred to in s.35.1(1) of the OSA <i>[Certain trades by financial intermediaries and Schedule III banks]</i>	Proposed s. 35.1(1) of the OSA
s. 4.2 of Rule 45-501 <i>[Financial intermediary that is regulated by the federal Office of the Superintendent of Financial Institutions if the financial intermediary is acting as an adviser in accordance with the legislation of the Parliament of Canada governing the financial intermediary, or Schedule III bank if the Schedule III bank is acting as an adviser in accordance with the Bank Act (Canada).]</i>	s. 209(1) of Regulation 1015 and proposed s. 35.1(1) of the OSA