

Notice and Request for Comment

Proposed National Policy 11-202 *Process for prospectus reviews in multiple jurisdictions* and National Policy 11-203 *Process for exemptive relief applications in multiple jurisdictions* and related repeals

August 31, 2007

This notice describes the proposed policies of the Canadian Securities Administrators (CSA) that would replace the existing mutual reliance review system policies for prospectuses and exemptive relief applications. The proposed policies describe new processes for making national regulatory decisions based on the operation of the proposed passport system and proposed interfaces between the passport jurisdictions and Ontario.

We are publishing the following:

- National Policy 11-202 *Process for prospectus reviews in multiple jurisdictions* (NP 11-202)
- National Policy 11-203 *Process for exemptive relief applications in multiple jurisdictions* (NP 11-203)

(collectively, the proposed policies)

We plan to publish a similar policy for registration in a few months.

We propose to repeal National Policy 12-201 *Mutual Reliance Review System for Exemptive Relief Applications* and National Policy 43-201 *Mutual Reliance Review System for Prospectuses*.

Overview of passport and comments received

CSA, except the Ontario Securities Commission (OSC), (the passport jurisdiction regulators) published proposed National Instrument 11-102 *Passport System* and its related form (passport rule) and companion policy (together, 11-102) for comment on March 28, 2007. The passport jurisdiction regulators designed 11-102 for adoption by all Canadian securities regulatory authorities to allow market participants to focus on how passport could operate to streamline Canadian securities regulation.

On that basis, the passport jurisdiction regulators also proposed repealing the current mutual reliance review systems¹ (except to deal with a few types of exemptive relief applications)

¹ National Policy (Notice, in Québec) 12-201 *Mutual Reliance Review System for Exemptive Relief Applications* (NP 12-201), National Policy (Notice, in Québec) 43-201 *Mutual Reliance Review System for Prospectuses* (NP 43-201), National Instrument 31-101 *National Registration System* (NI 31-101) and NP 31-201 *National Registration System* (NP 31-201).

because 11-102 would replace them. The publication notice for 11-102 did not address what would happen if a jurisdiction did not adopt it.

CSA received many comments on the impact of Ontario not adopting 11-102 and on the proposal to repeal the current mutual reliance review systems. The following brief summary highlights the main themes of these comments²:

- Some commenters were disappointed that the Ontario government and the OSC would not participate in passport and urged them to reconsider their position.
- The majority of commenters thought that, without Ontario, the passport system would not work, it should not proceed, or its benefits would be substantially reduced. The commenters said that these problems would arise because market participants would have to contend with two systems, the regulatory system would be more complicated than it is now, or market participants in the passport jurisdictions would have an unfair advantage. Some said that Ontario market participants should benefit from passport.
- Many commenters encouraged the regulators to work together to develop a system that all jurisdictions could adopt. One recommended CSA delay implementing 11-102 until that happens. However, another thought that, if there is substantive cooperation between Ontario and the passport jurisdictions, the proposed system will be an improvement.
- Many commenters disagreed with the passport jurisdictions' proposal to repeal the existing mutual reliance review systems. They thought the regulators should maintain these systems to provide an appropriate interface with Ontario, to ensure that market participants do not lose the benefits they provide, or to ensure no one, whether inside or outside Ontario, is disadvantaged.
- Two commenters recommended that CSA republish 11-102 for comment with the proposed interfaces and the national instruments on which passport depends because, otherwise, market participants would be commenting on an incomplete proposal. Another commenter also assumed that CSA would publish the proposed interfaces with Ontario for comment before implementing 11-102.

Ontario participation and proposed interfaces

The OSC will not be adopting 11-102. Nevertheless, CSA members in passport jurisdictions and the Council of Ministers established under the Memorandum of Understanding Regarding Securities Regulation have expressed their commitment to implementing passport, even without Ontario's participation. The Council of Ministers and Ontario's minister responsible for securities regulation have expressed their preference that we develop interfaces to make the securities regulatory system as efficient and effective as possible in the circumstances for all market participants who want to gain access to the capital markets in both passport jurisdictions and Ontario. The OSC has participated in developing the proposed interfaces between the passport jurisdictions and Ontario.

² The passport jurisdiction regulators received 17 comment letters, which are available on the ASC website. A detailed summary of all the comments and responses will be published early in 2008. Eight of the comment letters were also sent to the OSC and are posted on its website.

Plan to implement the passport system

A key foundation for the passport system is a set of nationally harmonized regulatory requirements. The implementation of 11-102 depends on the adoption of two new proposed national instruments that we have published for comment. They are National Instrument 31-103 *Registration Requirements* (NI 31-103) and National Instrument 41-101 *General Prospectus Requirements* (NI 41-101).

The passport jurisdiction regulators expect to implement 11-102 and the proposed interfaces in stages as we implement the related proposed national instruments.

The passport jurisdiction regulators plan to adopt the portion of 11-102 related to continuous disclosure, prospectuses and exemptive relief applications in time to implement passport in those areas concurrently with NI 41-101. CSA is targeting March 2008 for implementation of NI 41-101.

The passport jurisdiction regulators plan to adopt passport for registration later, at the same time as NI 31-103. CSA plans to republish NI 31-103 for a 90-day comment period in the fall, and to implement it in July 2008.

Provided the passport jurisdiction regulators do not need to make material changes to 11-102, we plan to publish the final version of 11-102 and a detailed summary of comments and responses, early in 2008. CSA plans to publish, at the same time, the final versions of NP 11-202 and NP 11-203 together with a summary of the comments we receive on the proposed policies and our responses.

Overview of interfaces and how we would implement them

We propose to implement the new processes for making national regulatory decisions through NP 11-202 and NP 11-203, which all jurisdictions would adopt. The proposed policies would work in tandem with the passport rule, which the passport jurisdictions would adopt. The processes will provide interfaces:

- for market participants from passport jurisdictions that wish to gain access to the Ontario market; and
- for Ontario market participants that wish to gain access to the markets in one or more passport jurisdictions.

The interfaces for passport jurisdiction market participants would be similar to the existing mutual reliance review systems. They would ensure that a passport jurisdiction market participant generally deals only with its principal regulator (PR) to gain access to Ontario.

The interfaces for Ontario market participants would provide direct access to passport jurisdictions under 11-102. An Ontario market participant would therefore be able to deal with the OSC as its PR to obtain a regulatory decision that automatically applies in passport jurisdictions.

A foreign market participant would be able to gain access to the Canadian capital markets through a principal regulator on the same basis as a market participant in that regulator's jurisdiction.

The processes would be set out in:

- 11-102, amended as necessary from the version published on March 28, 2007, and adopted as a multilateral instrument by the passport jurisdiction regulators,
- the proposed policies, adopted by all CSA members, which would set out the processes for multi-jurisdictional prospectus reviews and exemptive relief applications and would replace NP 12-201 and NP 43-201, and
- a similar policy for registration which we plan to publish in a few months.

CSA recognizes that market participants from passport jurisdictions would be disadvantaged in accessing the Ontario market in comparison with Ontario market participants accessing the markets of passport jurisdictions. The Council of Ministers and the passport jurisdiction regulators plan to review the direct access provided to Ontario market participants two years after the full implementation of passport if the OSC has not committed to adopt 11-102 by that time.

Summary of Passport System and Proposed Interfaces

Process for prospectus reviews in multiple jurisdictions

The process for national prospectus reviews is set out in NP 11-202. As under the existing MRRS policy, the filer would deal only with the PR for its prospectus filing and the PR would provide the receipt to the filer. The PR for an issuer under the policy would be the same as under the passport rule.

Even though the OSC will not adopt the passport rule, the rule would include Ontario in the list of principal jurisdictions for prospectus filings. That would give an Ontario prospectus-filer direct access to passport so it can get a deemed receipt in passport jurisdictions by dealing only with the OSC.

NP 11-202 would retain the elements of NP 43-201 that are necessary to ensure that a passport jurisdiction prospectus-filer has to deal only with its PR to obtain a receipt in Ontario.

The process for prospectus filings in multiple jurisdictions would work as follows:

- The market participant files its prospectus with the PR and with the non-principal regulator (NPR) in each other jurisdiction where it wishes to offer the securities.
- Filing the prospectus triggers, under the national prospectus requirements, the obligation to file all related documents and pay fees in each jurisdiction.
- The PR reviews the prospectus.
- If the OSC is an NPR, it coordinates its review with the PR, provides any comments to the PR, and advises when it is clear for final.

- Other NPRs do not review the prospectus, although the PR might consult them if there is a novel issue.
- The PR issues a receipt for the prospectus, which causes the issuance of a deemed receipt in each non-principal passport jurisdiction and, if the OSC is an NPR and has made the same decision, also evidences the OSC's receipt.

Process for exemptive relief applications in multiple jurisdictions

The process for national exemptive relief applications is set out in NP 11-203. As under the existing MRRS policy, the filer would deal only with the PR for its application and the PR would provide the exemption order to the filer. The PR for an application under the policy would be the same as under the passport rule.

Section 5.4 of the passport rule exempts a market participant from a provision of securities legislation in a non-principal jurisdiction if the PR exempts the market participant from the equivalent provision in the principal jurisdiction, the filer gives a notice of intention to rely on the exemption, and the persons relying on the exemption comply with the principal regulator's terms and conditions. Appendix E to the passport rule contains the list of equivalent provisions in each jurisdiction (if they exist). This eliminates the need to file an application in non-principal passport jurisdictions and pay fees in those jurisdictions.

NP 11-203 would retain the elements of NP 12-201 necessary to provide an interface for a passport jurisdiction filer to deal with its PR to obtain exemptive relief in Ontario from a provision listed in Appendix E to the passport rule. It refers to these as "dual applications". NP 11-203 would also retain the elements of NP 12-201 necessary to deal with exemptive relief applications that are outside the scope of 11-102 (e.g., an application to designate an issuer to be a reporting issuer). It refers to these as "coordinated review applications".

Even though the OSC will not adopt the passport rule, the rule would include Ontario in the list of principal jurisdictions for exemption applications. That would give an Ontario filer direct access to passport so it can get an automatic exemption in passport jurisdictions by dealing only with the OSC. NP 11-203 refers to these applications, and applications not made in Ontario where the securities regulatory authority or regulator in a passport jurisdiction is the PR, as passport applications.

The process for exemptive relief applications in multiple jurisdictions would vary depending on the type of application. For a passport application, the process would work as follows:

- The market participant files its application only with, and pays fees only to, the PR.
- The PR reviews the application.
- NPRs do not review the application, although the PR might consult them if there is a novel issue.
- The PR's exemptive relief decision results in an automatic exemption in each non-principal jurisdiction.

For a dual application, the process would work as follows:

- The market participant files its application with, and pays fees to, the PR and the OSC.
- The PR reviews the application.
- The OSC, as an NPR, coordinates its review with the PR, provides any comments to the PR and, if it agrees with the decision of the PR, makes the same decision.
- Other NPRs do not review the application, although the PR might consult them if there is a novel issue.
- The PR's exemptive relief decision results in an automatic exemption in each non-principal passport jurisdiction and, if the OSC has made the same decision, evidences the OSC's decision.

For applications that are outside the scope of the passport rule, the coordinated review process under NP 11-203 would work the same way as the existing mutual reliance review system for exemptive relief applications.

Process for registration in multiple jurisdictions

The interfaces for registration would be similar to those for prospectuses and exemptive relief applications. We would retain the elements of the national registration system (NRS) to ensure that a firm or individual in a passport jurisdiction deals only with its PR to register in Ontario. Similarly, we would give Ontario firms and individuals direct access to passport so that they have to deal only with the OSC to register in passport jurisdictions.

We will describe the interfaces in more detail when we publish the proposed national policy setting out the process for registration in multiple jurisdictions.

Request for Comment

We request comments on the proposed policies and generally on the proposed interfaces. We also ask for your comments on the table of equivalent provisions in Appendix E to the passport rule and whether other provisions could be added to that table or to the following other appendices to the rule:

- Appendix A *Non-harmonized continuous disclosure requirements*, and
- Appendix C *Non-harmonized prospectus requirements*.

The passport rule and the appendices to the passport rule are available at www.bsc.bc.ca and the websites of several other passport jurisdictions' regulators.

How to provide your comments

Please provide your comments by **October 30, 2007** by addressing your submission to the regulators listed below:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Nova Scotia Securities Commission
Office of the Attorney General, Prince Edward Island
Financial Services Regulation Division, Consumer and Commercial Affairs Branch, Department of Government Services, Newfoundland and Labrador
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

You do not need to deliver your comments to each of these regulators. Please deliver your comments to the two addresses that follow, and they will be distributed to the other jurisdictions:

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If you are not sending your comments by e-mail, please send a diskette or CD containing your comments in Word.

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

Questions

Please refer your questions to any of:

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