

July 18, 2003

DELIVERED BY COURIER

Ontario Securities Commission
c/o John Stevenson
Secretary
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario
M5H 3S8

Dear Mr. Stevenson:

Re: Proposed Amendment and Restatement of Rule 45-501 Exempt Distributions

I am writing to comment on certain aspects of the proposed amendment and restatement of Ontario Securities Commission Rule 45-501 *Exempt Distributions* ("Rule 45-501") released for comment on April 18, 2003. These comments are limited to issues affecting the managed assets business.

Subsection 1.1(v)

Section 1.1(v) of Rule 45-501 provides that accredited investors include mutual funds or non-redeemable investments funds that, in Ontario, distribute their securities only to persons or companies that are accredited investors. However, in Ontario such funds may distribute their securities on a prospectus exempt basis both to accredited investors and, pursuant to section 2.12 of Rule 45-501, to purchasers making investments of not less than the minimum provided for therein. They may also distribute securities pursuant to exemption orders, for example to permit top-up investments in a fund in circumstances not satisfying the requirements of paragraph 2.12(b) of Rule 45-501. Prior to implementation of Section 2.12 of Rule 45-501, the securities of such funds were sold to Ontario purchasers on a prospectus exempt basis either pursuant to provisions of the *Securities Act* (Ontario) (the "Act") or pursuant to exemption orders, on conditions substantially similar to those set out in section 2.12(b) of Rule 45-501. We do not see a policy rationale for disqualifying funds whose Ontario investors include investors who purchase their securities of the funds pursuant to predecessor prospectus exemptions or exemption orders or who purchase securities of the funds pursuant to the exemptions in Section 2.12 of Rule 45-501 or exemption orders from the definition of accredited investors.

Accordingly, we suggest that Section 1.1(v) be amended to read:

“(v) a mutual fund or non-redeemable investment fund that, in Ontario, distributes its securities only to persons or companies that are accredited investors or pursuant to an exemption orders or pursuant to Section 2.12 (or, prior to the implementation of section 2.12, distributed its securities pursuant to section 72(1)(d) of the Securities Act or its predecessors);”

Subsection 1.1 (y)

Amendments are proposed to the definition of accredited investor in Subsection (y) of Rule 45-501 to refer to accounts managed by trust corporations registered under the *Trust and Loan Companies Act* (Canada) and comparable legislation in other jurisdictions in Canada. We suggest that the subsection be further amended to add references to trust corporations authorized to carry on business under such legislation or comparable legislation of a foreign jurisdiction so that it reads:

“(y) an account that is fully managed by a trust corporation registered or authorized to carry on business under the Loan and Trust Corporations Act or under the Trust and Loan Companies Act (Canada), or under comparable legislation in any other jurisdiction or a foreign jurisdiction;”]

This would make the exemption completely consistent with the equivalent exemption under Multilateral Instrument 45-103 (“MI45-103”).

Subsection 2.12(1)(c)

The effect of Subsection 2.12(1)(c) of Rule 45-501 is that the top-up relief provided by that section is only available for funds managed by a portfolio adviser (defined to include portfolio managers registered with the Ontario Securities Commission (the “Commission”) or certain brokers or dealers exempt from registration under section 148(1) of the Regulation). Section 2.4 of Companion Policy 45-501 indicates that funds managed by a person or company relying on Part 7 of OSC Rule 35-502 must apply for relief. While we can understand why the Commission might want to require funds managed by advisors not resident in Canada to apply for specific top-up relief, we believe that it would be appropriate for Rule 45-501 to provide the top-up relief to funds managed by portfolio managers or trust corporations resident and registered in another Canadian jurisdiction.

Accordingly we suggest that this section be amended to read:

“(c) the mutual fund or non-redeemable investment fund is managed by a portfolio adviser or by a portfolio manager resident in a jurisdiction and registered or exempt from registration under securities legislation of that jurisdiction or a trust corporation registered or authorized to carry on business under the Loan and Trust Corporations Act or under the Trust and Loan Companies Act (Canada), or under comparable legislation in any other jurisdiction.”

This amendment would permit funds managed by Canadian resident portfolio advisers or trust corporations based in other Canadian jurisdictions to have the benefit of the

exemption where the securities of the funds are acquired by investors in Ontario, without having to apply for additional relief.

Section 4.3

We believe that Section 4.3 of Rule 45-501 should be amended to permit an offering memorandum to be delivered to the Commission once in respect of all trades to purchasers provided with that offering memorandum. An offering memorandum should only be required to be filed at the time of the report of the first trade which utilized that offering memorandum and refiled only if there has been an amendment to the offering memorandum already filed.

The current word of Section 4.3 of Rule 45-501 seems to require that an offering memorandum be delivered to the Commission “within 10 days of a trade” even though the offering memorandum has already been delivered to the Commission. This interpretation of Section 4.3 is consistent with the relief recently granted to Olympus United Funds Corporation (2003) 26 OSCB 2952, which gave relief from a requirement to file an offering memorandum with the Commission after each trade.

We believe that a requirement to file and refile an offering memorandum within 10 days of each trade is difficult to understand from a policy perspective if the offering memorandum has already been filed with the Commission, is inconsistent with previous regulatory requirements in Ontario and with industry practice, and is in conflict with other filing requirements applicable to mutual funds and non- redeemable investment funds.

Section 32(4) of the Regulation to the Act, the predecessor to Section 4.3, provided that an offering memorandum had to be filed with the Commission “concurrently with or before the report of the trade”. The equivalent section in the first version of OSC Rule 45-501, published October 17, 1999, provided that a seller had to file a copy of the offering memorandum “concurrently with or before the date on which a report of the trade referred to in subsection 72(3) of the Act or subsection 7.5(1) is filed with the Commission”. Section 4.3 was amended to its current wording in the draft of Rule 45-501 published in September 2002. The notice that accompanied the publication of that draft stated that: “Section 4.3 provides that a copy of any offering memorandum provided shall be delivered to the Commission within 10 days of the trade.” The footnote which accompanied the publication of the revised section 4.3 stated that:

“This section is derived from section 4.3 of existing Rule 45-501. The reference to contractual rights of action has been deleted and the section now requires delivery to the Commission of a copy of an offering memorandum that is provided to a prospective investor in respect of a trade made in reliance upon the closely-held issuer, accredited investor or family member prospectus exemption.”

There was no discussion that the amended wording would now require an offering memorandum to be filed repeatedly following every trade, even where there has been no change to an offering memorandum previously filed with the Commission.

When Subsection 7.5(8) of Rule 45-501, which allows mutual funds and pooled funds to report trades on an annual basis, was introduced in the revisions to OSC Rule 45-501 published in April 2001, the accompanying notice stated that:

“New subsection 7.5(7) provides an exemption from the reporting requirement for trades in securities of mutual funds or non-redeemable investment funds if the seller of the securities reports the trades annually. The exemption codifies *ad hoc* relief the Commission has granted on a regular basis.”

No mention is made of the fact that a strict reading of Section 4.3 of OSC Rule 45-501 will nonetheless require a fund to deliver an offering memorandum to the Commission within 10 days of each trade even though report of trades made with the use of that offering memorandum need only be filed with the Commission on an annual basis.

The combined effect of Sections 7.5(8) and 7.7 of Rule 45-501 is that a mutual fund or non-redeemable investment fund is only required to report trades made pursuant to the exemptions in Section 2.3 or Section 2.12 of Rule 45-501 on an annual basis by filing a report not later than 30 days after the financial year end of the fund. Accordingly, funds relying on these exemptions are only be required to file a report in respect of the trade on a one time basis in each calendar year. We note, however, that in the case of the relief granted to Olympus United Funds Corporation, the fund is required to file an offering memorandum within 10 days of the first trade in each calendar year end and to file a trade report in Form 45-501F1 within 30 days of its calendar year end.

We suggest that Section 4.3 be amended amend to provide that:

“...the seller shall deliver to the Commission a copy of the offering memorandum or any amendment to a previously filed offering memorandum on or before 10 days of the date of the trade.”

This would make the requirement in Ontario similar to the filing concept set out in Section 4.7 of MI 45-103¹ and the current requirements in other jurisdictions² and consistent with what was required under Section 32(4) of the Regulation.

Form 45-501F1

Item 5 of Form 45-501 F1 provides that the names and municipalities and jurisdictions of residence of purchasers must be listed on the Form (with more detailed information about the purchasers maintained by the seller and provided to the Commission on request under section 6 of Form 45-501F1).

Although the names of purchasers are not necessarily published in the Ontario Securities Commission Bulletin (whether a name is listed seems to depend on the number of purchasers covered by a single Form 45-501), copies of Forms 45-501F1 which have been filed with the Commission are available from the Commission on request. We believe that there are privacy concerns which releasing such information does not address and that its release exposes purchasers in the exempt market as targets for unwarranted solicitations as well as other inappropriate attention. More sophisticated purchasers will be able to avoid this result by making their purchases through vehicles, such as trusts or personal holding companies, which will not result in unintended disclosure of their personal information. We note that Part A 1 of OSC Policy 13-601 *Public Availability of Material Filed Under the Securities Act* suggests that intimate financial and personal information might not be disclosed where the desirability of non-disclosure outweighs the general principle that material filed with the Commission be available to the public for inspection. As well, the equivalent form under MI 45-103, Form 45-103F4, provides that all information containing particulars of individual purchasers is provided as a schedule to the form, with a clear statement that the information in the schedule will not be placed on the public file of any securities regulatory authority. (We note that the Nova Scotia Securities Commission issued Blanket Order 45-801 on April 1, 2003 requiring that the information in that schedule be held in confidence.)

We believe that it would be appropriate for Form 45-501F1 to be amended to similarly provide that the name and municipality and jurisdiction of residence of a purchaser is not included in the Form but is provided as a schedule to the Form and that the Schedule will not be available to persons who request copies of a Form 45-501 from the Commission. In this way the confidentiality of personal information will be maintained.

¹ “Section 4.7 **Filing of Offering Memorandum**

The issuer must file a copy of an offering memorandum delivered under section 4.1 and of any update of a previously filed offering memorandum with the securities regulatory authority on or before the 10th day after each distribution under the offering memorandum or update of the offering memorandum.”

² See, for example Section 127.2 of the Alberta Securities Commission Rules, Section 92 of the Securities Regulation (Manitoba) and Section 77(3) of the *Securities Act* (Nova Scotia).

A diskette in Word format containing an electronic copy of the submissions is enclosed. I appreciate the opportunity to comment on the Rule and would be pleased to discuss any aspects of the submission with you.

Yours very truly,

Dawn V. Scott

DVS/chk
Enclosure