

ALBERTA SECURITIES COMMISSION

Request for Comment

Notice of Proposed ASC Rule 45-509 *Offering Memorandum for Real Estate Securities*

April 16, 2004

This Notice accompanies the following documents, which the Alberta Securities Commission (“ASC”) is publishing for a 60-day comment period:

- ASC Rule 45-509 *Offering Memorandum for Real Estate Securities* (“Proposed Rule”),
- Form 45-509 *Offering Memorandum for Real Estate Securities* (“Proposed Form”) and
- Companion Policy 45-509CP to ASC Rule 45-509 *Offering Memorandum for Real Estate Securities* (“Proposed Companion Policy”).

The comment period ends **June 18, 2004**.

The purpose of the Proposed Rule is to require issuers to use a form of offering memorandum tailored specifically to offerings of “real estate securities” if they sell these securities using the offering memorandum exemption set out in Multilateral Instrument 45-103 *Capital Raising Exemptions* (MI 45-103). The Proposed Rule sets out a definition of “real estate security”.

Background

On March 26, 2002 the ASC released Reasons for Decision *In the Matter of the Land Development Company Inc. and Phil Archer* (the “LDC Decision”). The issue in that decision was whether the undivided interests in undeveloped land sold to Alberta investors by the Land Development Company Inc. and Phil Archer were “securities” within the meaning of the *Securities Act* (Alberta) (the “Act”). The ASC found that those investments were securities, not simply interests in real estate, because they fit within the “investment contract” branch of the Act’s definition of a “security”. Accordingly, the ASC concluded that the trades in those securities by Land Development Company Inc. and Phil Archer were made contrary to the Act. Neither Land Development Company Inc. nor Phil Archer were registered under the Act, or filed a prospectus and the trades were completed without an exemption from the Act’s registration and prospectus requirements.

As a result of the LDC Decision and the subsequent publication on April 17, 2002 of ASC Staff Notice *Sale of Undivided Interests in Land*, industry became more aware that offerings of these types of investments must comply with the Act. That means, in short, that offerings of “real estate securities” must be conducted in accordance with the Act’s registration and prospectus requirements or in accordance with an exemption from those requirements.

One of the commonly used exemptions from the registration and prospectus requirements is the offering memorandum exemption. MI 45-103 sets out, in Part 4, the requirements for the use of this exemption. One of those requirements is that an offering memorandum be prepared in

accordance with Form 45-103F1 *Offering Memorandum for Non-Qualifying Issuers* (“Form 45-103F1”) or Form 45-103F2 *Offering Memorandum for Qualifying Issuers*.

The ASC is proposing to adopt a third form of offering memorandum to be used by those who wish to rely on the offering memorandum exemption for offerings of “real estate securities” as defined by the Proposed Rule. The Proposed Form requires disclosure that, while is similar to that required by Form 45-103F1, is tailored to require information that is more relevant for offerings of real estate securities.

During the course of developing the Proposed Rule, ASC staff held discussions with two industry focus groups, one a legal focus group and the other an accounting focus group. ASC staff working on this project benefited greatly from these discussions and appreciated the varied experience and knowledge of the members of the industry focus groups. The discussions during these sessions were thoughtful and engaging.

One of the issues that ASC staff spent considerable time discussing, both with the industry focus groups and among ourselves, is to what extent, if any, should independent appraisals be required. The Proposed Form currently requires an independent appraisal only if the real estate project is for the development of real property, for example undeveloped- land. We are requesting specific comment as to whether this requirement should be kept, or even expanded.

Summary of the Proposed Rule, Proposed Form and Proposed Companion Policy

1. The Proposed Rule

Section 8.1 of MI 45-103 requires that an offering memorandum be prepared in accordance with Form 45-103F1, or Form 45-103F2 if the issuer is a “qualifying issuer” as defined in MI 45-103. The Proposed Rule would require issuers of real estate securities who wish to rely on the offering memorandum exemptions in subsections 4.1(3) or (4) of MI 45-103 to prepare an offering memorandum in accordance with the Proposed Form rather than those forms listed in section 8.1.

The Proposed Rule defines the term “real estate security” and the Proposed Companion Policy provides some additional guidance. The definition has three components:

- the real estate security is an investment contract,
- the purchaser’s economic entitlement under the investment contract is to a material extent attributable to a real estate project, and
- the occupation or use by the purchaser of the real property that is the subject of the real estate project is prohibited or materially restricted.

The first component of the definition specifies that the security be an “investment contract”. If the issuer is offering another type of security, for example a common share of a company engaged in the real estate business, then that type of security would not come within the definition of a “real estate security”. Instead that issuer, like all issuers of common shares, would prepare its offering memorandum in accordance with Form 45-103F1.

The second component of the definition connects the investment contract to a real estate project. We have intentionally defined a “real estate project” broadly to capture a wide range of real estate projects – for example, from bare land development to an operating condominiumized hotel.

Although the Proposed Rule requires exempt offerings of real estate securities to use the Proposed Form, all other requirements of MI 45-103, and of securities legislation generally, continue to apply to these exempt offerings.

2. The Proposed Form

The Proposed Form requires issuers to disclose information that is specific to an offering of real estate securities. It expands on certain requirements of Form 45-103F1 and removes others we considered irrelevant for these types of offerings.

Financial Statements of the Issuer

One of the most notable differences between the Proposed Form and Form 45-103F1 is that the Proposed Form does not require an issuer, in certain circumstances, to include its financial statements in the offering memorandum. We believe that, in most circumstances, financial statements of an issuer who is offering real estate securities will have little relevance to an investor. Unlike an investor who is buying a common share to acquire an equity interest in the issuer, an investor who is buying a real estate security is not acquiring an equity interest in the issuer. Instead that investor is acquiring an interest in a real estate project (and perhaps the real property) and is relying on the issuer to complete the real estate project.

However, there may be some instances when the issuer should include its financial statements in the offering memorandum. The Proposed Form requires an issuer to include its financial statements if it needs to do so to prevent the offering memorandum from containing a misrepresentation. For example, an offering memorandum might be considered to contain a misrepresentation if an issuer represented in the offering memorandum that they have the financial wherewithal to complete the real estate project, and yet if they had included their financial statements in the offering memorandum, an investor would have been able to determine that that was not the case.

Financial Statements of the Real Estate Project

The Proposed Form requires financial statements for real estate projects that are operating businesses, such as hotels and resorts. Those real estate projects have a history of operations and therefore, as with all operating businesses, investors would consider historical financial statements of such real estate projects relevant. Conversely, the Proposed Form does not require financial statements for a real estate project that is in the development stage, for example, development of undeveloped land. Historical financial statements of development stage projects would be of limited use for investors because these projects would not yet have a history of operations.

Whether the real estate project is at a development stage or is an operating business, the Proposed Form requires detailed disclosure about the project's estimated costs including:

- the amounts,
- how they were estimated,
- when they will be incurred,
- how they will be funded,
- whether the investor will have to provide additional funds to cover the costs, and
- what might happen if the costs cannot be funded.

The People

The Proposed Form requires disclosure about more people than Form 45-103F1 requires. As with Form 45-103F1, the Proposed Form requires disclosure about directors, officers, control persons and promoters of the issuer. In addition, the Proposed Form requires disclosure about the promoters of the real estate project and the principal holders of the real estate securities. A "principal holder of real estate securities" is defined in the Proposed Form to mean "a holder of real estate securities who holds a sufficient number of real estate securities to affect materially the control of the real estate project". The required disclosure for these persons is similar to that required in Form 45-103F1: positions in the issuer, relevant experience, penalties and bankruptcies, and security holdings.

The Proposed Form also includes the following in the definition of "related party": promoters of the real estate project, principal holders of the real estate securities, and those related to either of them. This definition of related party captures a larger group than the definition of related party in Form 45-103F1.

The Real Estate Project and the Real Property

The Proposed Form requires disclosure about the real estate project, the real property and the role of the issuer in the real estate project.

For real estate projects that are proposals to develop or redevelop the real property, issuers are required to disclose a market value of the real property, as determined by an independent qualified appraiser. For any other type of real estate project, issuers are not required to disclose a value of the real property or the real estate project, but if they do, then the value must be supported by an independent appraisal. The appraiser must be a current member of the Appraisal Institute of Canada and be independent of the issuer, the real property and the real estate project.

Any disclosure of value of the real property or of the real estate project must be accompanied by disclosure that summarizes the appraisal and gives the author's name and credentials, date of appraisal and the basis on which the value was determined. A cautionary statement that alerts the reader to the limitations of such estimates must also be stated near the disclosure of the value. An issuer must give a copy of the appraisal to the purchaser on request.

The Proposed Form also requires issuers to disclose the ownership of the real property during the 5 years preceding the date of the offering memorandum. The disclosure must also state the amount and form of consideration exchanged each time the real property was transferred, and whether the owner was a related party as defined in the Proposed Form. If the owner was a

related party, the issuer must describe the nature of the relationship. If the owner was not a related party, the issuer need only state “arm’s length”.

Issuers must also provide details about required regulatory approvals and consequences if the approvals are not obtained. Similarly the issuer must discuss its short-term objectives (within 24 months) and long-term objectives, and consequences if the stated objectives are not met. As in other disclosure documents, such as prospectuses, information circulars, or management discussion and analysis, the issuer must describe any interest of management and other key people in material transactions.

3. Proposed Companion Policy

The Proposed Companion Policy provides guidance that is specific to the use of the Proposed Rule and Proposed Form. For guidance about the offering memorandum exemption in general, readers would refer to the companion policy to MI 45-103.

The discussion in the Proposed Companion Policy includes guidance about

- the meaning of “real estate security”, to help issuers determine when such a security has been created,
- the “issuer”, highlighting the fact that the issuer might include more than one person or company in some instances,
- the requirement for independent appraisals and disclosure of historical ownership,
- how an issuer can prepare a disclosure document that complies with the Proposed Form if they also have to prepare a disclosure document that complies with other legislation, for example the *Real Estate Act*, and
- divisional and carve-out financial information because, in some cases, financial statements for a real estate project may have to be taken from the financial statements of another business.

Request for Written Comment

In addition to any comments you wish to make about the Proposed Rule, Proposed Form and Proposed Companion Policy, we request written comments on the following specific questions:

1. To what extent should independent appraisals of the real property or real estate project be required to support values that an issuer discloses in an offering memorandum?
2. Should issuers be required to disclose the historical ownership of the real property and, if so, for how long? Should this information be required in addition to, or perhaps instead of, disclosure of market values that are supported by independent appraisals?

How to Send Your Written Comments

Please send your written comments prior to **June 18, 2004**. We will be publishing comment letters received on our website and therefore cannot maintain confidentiality of submissions.

Address your submission to:

Alberta Securities Commission
4th Floor, 300 – 5th Avenue S.W.
Calgary, Alberta T2P 3C4

Attention: Jo-Anne Bund, Legal Counsel
Shawn Taylor, Legal Counsel

Submissions may be sent by e-mail, fax or mail as follows:

By e-mail: joanne.bund@seccom.ab.ca or shawn.taylor@seccom.ab.ca

By Fax: (403) 297-3679

By Mail: 4th Floor, 300 – 5th Avenue S.W.
Calgary, Alberta T2P 3C4

If you are not sending your comments by e-mail, please send a diskette containing your comments (in DOS or Windows format, preferably Word).

Alberta Securities Commission

Proposed ASC Rule 45-509 *Offering Memorandum for Real Estate Securities*

1. Definitions

In this Instrument,

- (a) “real estate project” means
 - (i) a business or undertaking that is proposed primarily to generate for investors income, gain or other return, or funds distributable on dissolution or sale, the amount of which is primarily dependent on the use or management of real property by persons other than the investors, or
 - (ii) real property that is proposed to be developed or redeveloped for use in a business or undertaking described in (i) or for resale, and
- (b) “real estate security” is an investment contract under which
 - (i) the purchaser’s economic entitlement is to a material extent attributable to a real estate project, and
 - (ii) the occupation or use by the purchaser of the real property that is the subject of the real estate project is prohibited or materially restricted.

2. Required Form of Offering Memorandum

Despite section 8.1 of Multilateral Instrument 45-103 *Capital Raising Exemptions*, an issuer of a real estate security relying on the offering memorandum exemptions set out in subsections 4.1(3) or (4) of MI 45-103 must prepare an offering memorandum in accordance with Form 45-509 *Offering Memorandum for Real Estate Securities*.

3. Effective Date

This Rule comes into force on •, 2004.

Proposed Form 45-509
Offering Memorandum for Real Estate Securities

Table of Contents

General Instructions and Interpretation

Contents of the Offering Memorandum

Item 1	Cover Page
1.1	Mandatory Disclosure on the Cover Page
Item 2	The Real Estate Security
2.1	Real Estate Security
2.2	Purchaser's Interest in Real Property
2.3	Subscription Procedure
Item 3	The Real Estate Project
3.1	Real Estate Project
3.2	Real Property
3.3	Values to be Supported by Independent Appraisals
3.4	History of Ownership of the Real Property
3.5	Approvals
3.6	Capital Requirements of the Real Estate Project
3.7	Objectives
3.8	Material Agreements
3.9	Interest of Management and Others in Material Transactions
Item 4	The Offering
4.1	Net Proceeds
4.2	Use of Net Proceeds
4.3	Insufficient Proceeds
4.4	Future Cash Calls
Item 5	Risk Factors
5.1	Mandatory Statement
5.2	Risks Factors
Item 6	Prior Sales
Item 7	The Issuer
7.1	Description of the Issuer
7.2	Business of the Issuer
7.3	Role of the Issuer in the Real Estate Project
Item 8	Directors, Officers and Promoters
8.1	Directors, Officers, Promoters and Control Persons of the Issuer

- 8.2 Promoters of the Real Estate Project and Principal Holders of the Real Estate Securities

- Item 9 Compensation Paid to Sellers and Finders
 - 9.1 General Compensation
 - 9.2 Compensation Paid in Real Estate Securities

- Item 10 Income Tax Consequences and RRSP Eligibility
 - 10.1 Income Tax Consequences
 - 10.2 RRSP Eligibility

- Item 11 Reporting to Purchasers
 - 11.1 Information to be Provided
 - 11.2 Cautionary Statement

- Item 12 Resale Restrictions

- Item 13 Purchaser's Rights
 - 13.1 Mandatory Statement

- Item 14 Financial Statements
 - 14.1 Financial Statements of the Real Estate Project
 - 14.2 Requirements for Other Financial Statements

- Item 15 Date and Certificate
 - 15.1 Mandatory Statement
 - 15.2 Signatories

Form 45-509
Offering Memorandum for Real Estate Securities

General Instructions and Interpretation

1. Required Form

An issuer must prepare its offering memorandum in accordance with this form if it is offering real estate securities using the offering memorandum exemption (OM Exemption) set out in subsections 4.1(3) and (4) of Multilateral Instrument 45-103 *Capital Raising Exemptions* (MI 45-103). See section 2 of ASC Rule 45-509 *Offering Memorandum for Real Estate Securities* for this requirement.

Although the issuer must prepare the offering memorandum in accordance with this form and not those set out in MI 45-103, such offerings of real estate securities must still comply with all of the other requirements pertaining to the OM Exemption that are set out in MI 45-103. Issuers should refer to Part 4 of MI 45-103 for those requirements and to its companion policy for guidance relating to the use of the OM Exemption. See section 2 of Companion Policy 45-509CP for additional guidance about the interaction of MI 45-103 and ASC Rule 45-509.

2. Use of this Form

- (a) Draft the offering memorandum so that it is easy to read and understand. Be concise and use clear, plain language. Avoid technical terms; if technical terms are necessary, provide definitions.
- (b) Address the items required by this form; however, it is not necessary to provide disclosure about an item that does not apply.
- (c) You must disclose the information required by item 1 on the cover page of the offering memorandum and the certificate required by item 15 on the last page. Otherwise you do not have to use the order, numbering, or headings included in this form.
- (d) You may include additional information in the offering memorandum other than that specifically required by this form. However, the offering memorandum is generally not required to contain the level of detail and extent of disclosure required by a prospectus.
- (e) You may construct the offering memorandum using another form of disclosure document, by supplementing or “wrapping” the other disclosure document with the additional information and certificates required by this form, so that the complete document contains all of the information and certificates required by this form. The offering memorandum may provide a cross-reference to the page number or heading in the wrapped document where the relevant information is contained. The certificate to the offering memorandum must be modified to indicate that the offering memorandum, including the document around which it is wrapped, does not contain a misrepresentation.
- (f) It is an offence to make a misrepresentation in the offering memorandum. This applies both to information that is required by the form and to any additional information that is voluntarily provided.

3. Definitions

In this Form,

- (a) “principal holder of the real estate securities” means a holder of the real estate securities who holds a sufficient number of the real estate securities to affect materially the control of the real estate project;
- (b) “real estate project” means
 - (i) a business or undertaking that is proposed primarily to generate for investors, income, gain or other return, or funds distributable on dissolution or sale, the amount of which is primarily dependent on the use or management of real property by persons other than the investors, or
 - (ii) real property that is proposed to be developed or redeveloped for use in a business or undertaking described in (i) or for resale;
- (c) “real estate security” is an investment contract under which
 - (i) the purchaser’s economic entitlement is to a material extent attributable to a real estate project, and
 - (ii) the occupation or use by the purchaser of the real property that is the subject of the real estate project is prohibited or materially restricted; and
- (d) “related party” includes
 - (i) a director, officer, promoter or control person of the issuer,
 - (ii) a promoter of the real estate project or a principal holder of the real estate securities,
 - (iii) in regard to a person referred to in (i) or (ii), a child, parent, grandparent or sibling, or other relative living in the same residence,
 - (iv) in regard to a person referred to in (i), (ii), or (iii), his or her spouse or a person with whom he or she is living in a marriage-like relationship,
 - (v) an insider of the issuer (and if the issuer is not a reporting issuer, the reference to “insider” includes persons or companies who would be insiders of the issuer if that issuer were a reporting issuer),
 - (vi) a company controlled by one or more individuals referred to in (i) to (v), and
 - (vii) in the case of an insider, promoter, or control person of the issuer, or of a promoter of the real estate project or principal holder of the real estate securities, that is not an individual, any person or company that controls that entity.

4. Who is the issuer?

See section 4 of Companion Policy 45-509CP for guidance about determining who the issuer is.

5. Requirements for non-corporate issuers

- (a) If the issuer is a limited partnership,
 - (i) provide disclosure for the general partner(s) of the limited partnership where the offering memorandum form requires disclosure about directors of the issuer,
 - (ii) provide disclosure of the directors and senior officers of the general partner if the general partner is a corporation,
 - (iii) the general partner must sign the certificate as promoter of the issuer, and
 - (iv) the chief executive officer, chief financial officer and directors of the general partner must sign as the chief executive officer, chief financial officer and directors of the issuer if the general partner is a corporation.
- (b) If the issuer is a trust,
 - (i) provide disclosure for the trustee(s) and manager of the trust where the offering memorandum form requires disclosure about directors of the issuer,
 - (ii) provide disclosure of the directors and senior officers of the trustee if the trustee is a corporation,
 - (iii) provide disclosure of the directors and senior officers of the manager of the trust if the manager of the trust is a corporation,
 - (iv) each trustee and the manager of the trust must sign the certificate as promoters of the issuer,
 - (v) the signing officers of the trustee must also sign the certificate as promoters of the issuer if the trustee is a corporation, and
 - (vi) the chief executive officer, chief financial officer and directors of the manager must sign as the chief executive officer, chief financial officer and directors of the issuer if the manager of the trust is a corporation.
- (c) See section 5 of the Companion Policy 45-509CP for guidance for non-corporate issuers.

Contents of the Offering Memorandum

Item 1 Cover Page

1.1 Mandatory Disclosure on the Cover Page

- (1) The information required by this section 1.1 must be disclosed on the first page of the offering memorandum.
- (2) At the top of the cover page state in bold:
“No securities regulatory authority has assessed the merits of this offering or reviewed this offering memorandum. Any representation to the contrary is an offence.

The information disclosed on this page is a summary only. Purchasers should read the entire offering memorandum for full details about the offering.

This is a risky investment. You could lose all the money you invest.”

- (3) State the date of the offering memorandum, which must be the same date as on the certificate page.
- (4) State the issuer’s full legal name, addresses of the issuer’s head office and registered office, phone number, fax number and e-mail address.
- (5) Provide a summary of the offering including the following information:
 - (a) describe the real estate security including its price and key terms;
 - (b) state whether there is a minimum and maximum to the offering, and if there is no minimum, state “There is no minimum and you may be the only purchaser.”;
 - (c) state the proposed closing date(s);
 - (d) describe any tax consequences and cross-reference to the information disclosed under item 10; and
 - (e) state the name of the selling agent.
- (6) State in bold:
“You have 2 business days to cancel your agreement to purchase these real estate securities. If there is a misrepresentation in this offering memorandum, you have the right to sue either for damages or to cancel the agreement. See “Purchaser’s Rights” on page ?”.

You will not be able to sell these securities except in very limited circumstances. You may never be able to resell these real estate securities. See “Resale Restrictions” on page ?”.

Item 2 The Real Estate Security

2.1 Real Estate Security

Describe the material terms of the real estate security, including the material terms of all agreements that the purchaser must enter into with the issuer.

2.2 Purchaser's Interest in Real Property

- (1) If the purchaser will acquire an interest in real property under the investment contract, disclose the following:
 - (a) what the interest is;
 - (b) how the ownership of that interest will be evidenced;
 - (c) any existing or anticipated encumbrances on that interest; and
 - (d) any risks that pertain to owning that interest.
- (2) If the purchaser will not acquire an interest in real property under the investment contract, disclose that fact.

2.3 Subscription Procedure

- (1) Describe how a purchaser can subscribe for the real estate securities and the method of payment.
- (2) State that the consideration will be held in trust and for how long it will be held in trust. The consideration must be held in trust for at least two business days pursuant to section 4.6 of MI 45-103.
- (3) Disclose any conditions of closing. If there is a minimum offering, disclose when the consideration will be returned to purchasers if the minimum is not met.

Item 3 The Real Estate Project

3.1 Real Estate Project

Describe the real estate project.

3.2 Real Property

Describe the real property pertaining to the real estate project, including the following:

- (a) its location, both legal and descriptive;
- (b) ownership as described on legal title;
- (c) a summary of encumbrances, covenants and conditions relating to the real property and a description of how they may affect the real estate project and the purchaser's investment;
- (d) present use of the real property;
- (e) proposed use of the real property and why the issuer considers the real property to be suitable for the real estate project;
- (f) if utilities and services are currently being provided, disclose who provides them and if they are not being provided, describe how they will be provided and who will provide them;
- (g) any environmental liabilities and hazards; and
- (h) any tax arrears.

3.3 Values to be Supported by Independent Appraisals

- (1) If the real estate project is a proposal to develop or redevelop real property for use in a business or undertaking, disclose the market value of the real property based on the current permitted use of the real property.
- (2) The value that issuers must disclose under section (1), and any other value of the real property or real estate project disclosed in the offering memorandum, must be determined by a qualified appraiser who is independent of the issuer, the real property and the real estate project.
- (3) For the purpose of section (2), an appraiser
 - (a) is “qualified” if the person is a current member of the Appraisal Institute of Canada and any of its provincial associations, and
 - (b) is “not independent” if the appraiser has, or expects to have, any agreement, arrangement, understanding, employment or other relationship with, or any interest in, any person or company, the real estate project, the real property or any adjacent property, that a reasonable person would consider to be an influence on the appraiser’s judgement.
- (4) Disclosure of value of the real property or the real estate project must be accompanied by disclosure that includes the following:
 - (a) a summary of the appraisal;
 - (b) the author’s name and credentials;
 - (c) the date of the appraisal;
 - (d) the basis on which the value was determined; and
 - (e) the following cautionary statement:
 “The stated value for [the real property or the real estate project] is an estimate only. The amount that a purchaser might actually receive if [the real property or the real estate project] were sold may vary materially from this value because the value of real estate is inherently volatile and is subject to numerous market conditions.”
- (5) The issuer must provide a copy of the appraisal to the purchaser upon the purchaser’s request.

3.4 History of Ownership of the Real Property

Using the following table and starting with the most recent owner, for the 5 years before the date of the offering memorandum, disclose the following:

- (a) the date of any transfer of the real property;
- (b) whether the transfer was to a related party, and if not, state “arm’s length”;
- (c) if the transfer was to a related party, state the name of the related party and describe the relationship to the issuer, the real estate project or the real property; and
- (d) the amount and form of consideration exchanged for each transfer.

Date of Transfer	Arm’s Length or Related Party Transfer	Name and Relationship (if Related Party)	Amount and Form of Consideration Exchanged

3.5 Approvals

- (1) Disclose any approvals - municipal, provincial or otherwise - anticipated to be required for the real estate project.
- (2) Describe how the approvals will be obtained, including anticipated cost and timing.
- (3) Describe any reports that may be required, including anticipated cost and timing.
- (4) Discuss what will happen if the approvals are not obtained, including the effect on the following:
 - (a) the real estate project;
 - (b) the purchaser's investment; and
 - (c) the purchaser's interest in the real property.

3.6 Capital Requirements of the Real Estate Project

Disclose the following:

- (a) estimated costs to complete the real estate project;
- (b) material assumptions that underlie the cost estimates; and
- (c) when major costs will be incurred.

3.7 Objectives

- (1) Disclose the short-term objectives for the real estate project over the next 24 months, including the following:
 - (a) when and how the issuer intends to meet those short-term objectives;
 - (b) what the estimated costs will be; and
 - (c) how the issuer will fund those costs.
- (2) Disclose the long-term objectives for the real estate project, including the following:
 - (a) a timeline for meeting those long-term objectives; and
 - (b) if the long-term objectives are to be completed in phases, provide details about each phase.
- (3) Discuss what might happen if any of the stated objectives are not met, including the effect on the following:
 - (a) the real estate project;
 - (b) the purchaser's investment; and
 - (c) the purchaser's interest in the real property.

3.8 Material Agreements

- (1) Disclose all material agreements in connection to the real estate project that have been entered into, or reasonably expected to be entered into, including any agreement that the purchaser may have to enter into.
- (2) For each material agreement referred to in section 3.7(1) disclose the following:
 - (a) the effective date;
 - (b) the parties' names and relationship with the issuer or real estate project;
 - (c) summary of obligations of each party;
 - (d) any direct and any indirect compensation paid or payable including acquisition fees, development fees, construction fees, management fees, and fees paid in the form of equity or participating interests;

- (e) the purchase price and payment terms for any asset, property or interest in an asset or property that has been or will be acquired, disposed of, leased or under option;
- (f) the principal amount, repayment terms, security, due date and interest rate for any credit agreement, mortgage, debenture or loan;
- (g) the amount of any finder's fee or commission paid or payable;
- (h) how each party can terminate the agreement including any costs associated with terminating the agreement; and
- (i) the consequences if the agreement is breached or becomes unenforceable.

3.9 Interest of Management and Others in Material Transactions

- (1) Describe the material terms, including the amount and form of consideration paid or payable, of any material interest, direct or indirect, of any related party in any transaction within the 36 months before the date of the offering memorandum, or in any proposed transaction, that has affected or will materially affect the issuer, the real property or the real estate project.
- (2) The disclosure required under section (1) must include the following:
 - (a) a description of the material transaction;
 - (b) the name of each related party;
 - (c) the nature of the relationship to the issuer, the real property and the real estate project; and
 - (d) for any transaction involving the purchase of assets by, or sale of assets to, the issuer or the real estate project, state the cost of the assets to the purchaser, and the cost of the assets to the seller if acquired by the seller within 36 months before the transaction.
- (3) For the purpose of section (1) the materiality of an interest is to be determined on the basis of the significance of the information to investors in light of all the circumstances of the particular case. The importance of the interest to the person having the interest, the relationship of the parties to the transaction with each other and the amount involved are among the factors to be considered in determining the significance of the information to investors.

Item 4 The Offering

4.1 Net Proceeds

Using the following table, disclose the net proceeds of the offering. If there is no minimum to the offering, state "\$0" as the minimum.

	Assuming minimum offering	Assuming maximum offering
Amount to be raised by this offering	\$	\$
Selling commissions and fees	\$	\$
Estimated offering costs (e.g. legal, accounting, audit)	\$	\$
Net proceeds	\$	\$

4.2 Use of Net Proceeds

- (1) Using the following table, provide a detailed breakdown of how the issuer will use the net proceeds.

Description of intended use of net proceeds	Assuming minimum offering	Assuming maximum offering
	\$	\$
	\$	\$

- (2) If any of the net proceeds will be paid to a related party, disclose in a note to the table the name of the related party, its relationship to the issuer or the real estate project, and the amount.

4.3 Insufficient Proceeds

- (1) Disclose whether the net proceeds of the minimum offering will be sufficient to accomplish all of the issuer's proposed short-term objectives that are stated under section 3.6(1).
- (2) If the net proceeds are insufficient to accomplish those short-term objectives
- state in bold:
“The net proceeds of this offering are insufficient to meet all of our proposed short-term objectives and there is no assurance that additional financing will be available.”
 - disclose how the issuer plans to fund the proposed short-term objectives,
 - disclose the following if additional financing has been arranged:
 - the parties;
 - if the parties are related parties, describe the relationship; and
 - the key terms; and
 - discuss the effect on the purchaser's investment and on the purchaser's interest in the real property if the issuer is unable to obtain additional financing.

4.4 Future Cash Calls

Disclose whether the real estate security requires the purchaser to contribute additional funds in the future and if so, disclose the following:

- how much the purchaser will be required to contribute;
- when the purchaser will be required to contribute; and
- the effect on the purchaser's investment and the purchaser's interest in the real property if
 - the purchaser fails to contribute, and
 - if the purchaser contributes, but other purchasers fail to contribute.

Item 5 Risk Factors

5.1 Mandatory Statement

State in bold:

“Your rights under an agreement that pertains to real property may be construed under the laws of the province, or other jurisdiction in which the real property is

located. Therefore, it is prudent to consult a lawyer who is familiar with such laws before entering into an agreement to purchase the real estate securities.

All real estate investment is subject to significant risk arising from rapidly changing market conditions.”

5.2 Risks Factors

- (1) Disclose risk factors material to the real estate project that would most likely influence a reasonable purchaser’s decision to purchase the real estate securities.
- (2) If a risk factor has been disclosed under another item, there is no need to repeat the disclosure about that risk factor under this item; however, the issuer may provide a cross-reference to that disclosure.
- (3) The disclosure about a risk factor should describe how the risk factor could affect, where applicable, the following:
 - (a) the real estate project;
 - (b) the purchaser’s investment; and
 - (c) the purchaser’s interest in the real property.
- (4) The following are examples of risk factors that might be material to the real estate project:
 - (a) risks that are particular to the type of real estate project, for example industry risks associated with
 - (i) the development of undivided land into subdivisions, or
 - (ii) the operation of rental or time-share businesses,
 - (b) risks associated with encumbrances, conditions, or covenants on the real property that could affect
 - (i) the purchaser’s interest in the real property, and
 - (ii) the completion of the real estate project,
 - (c) risks pertaining to the management of the real estate project, for example,
 - (i) rights of the purchaser in the management and control of the real estate project, and
 - (ii) right of the purchaser to change the manager or developer of the real estate project, and
 - (d) risks particular to ownership of the real property, for example, potential liability for
 - (i) environmental damage, and
 - (ii) unpaid obligations to builders, contractors and trades.

Item 6 Prior Sales

Using the following table, disclose prior sales of the real estate securities. If real estate securities were previously issued in exchange for assets or services, describe in a note to the table the assets or services that were exchanged.

Date of issuance	Number of subscribers	Number of real estate securities issued	Price per real estate security	Total funds received

Item 7 The Issuer**7.1 Description of the Issuer**

Disclose the business structure (e.g., partnership, corporation or trust), the statute and the province or other jurisdiction under which the issuer is incorporated, continued or organized, and the date of incorporation, continuance or organization.

7.2 Business of the Issuer

Describe the principal business of the issuer during the past 5 years. This may include principal projects, services, operations, market and strategies.

7.3 Role of the Issuer in the Real Estate Project

Disclose the following if the issuer has provided, or will provide, assets or services to the real estate project:

- (a) what assets or services the issuer has provided or will provide; and
- (b) what consideration has been paid, or will be payable, to the issuer for providing such assets or services.

Item 8 Directors, Officers and Promoters**8.1 Directors, Officers, Promoters and Control Persons of the Issuer**

- (1) Using the following table disclose the specified information about each director, officer, promoter and control person of the issuer:

Name ¹ and municipality of principal residence	Positions held in the issuer and the date the position was obtained	Number, type and percentage of securities of the issuer held	Number and percentage of real estate securities held	
			Minimum offering	Maximum offering

Note to the table:

1. If a promoter or control person of the issuer is not an individual, state the name of any person or company that
 - (a) beneficially owns or controls, directly or indirectly, more than 50% of the voting rights of that promoter or control person, or
 - (b) is one of a combination of persons or companies acting in concert that hold collectively more than 50% of the voting rights of that promoter or control person.
- (2) Disclose the following about each director, senior officer and promoter of the issuer:
- (a) the person's principal occupations over the past five years;

- (b) any relevant experience in a business similar to the issuer's and in a project similar to the real estate project; and
 - (c) if the person has no such experience, state that fact.
- (3) Penalties, Sanctions and Bankruptcy
- (a) Describe the penalties or sanctions imposed and the grounds on which they were imposed, or the terms of any settlement agreement and the circumstances that gave rise to the settlement agreement, if a director, senior officer, promoter or control person of the issuer has been subject to
 - (i) any penalties or sanctions imposed by a court relating to securities legislation or by a securities regulatory authority, or has entered into a settlement agreement with a securities regulatory authority, or
 - (ii) any other penalties or sanctions imposed by a court or regulatory body that would likely be considered important to a reasonable purchaser in making an investment decision.
 - (b) Disclose if a director, senior officer, promoter or control person of the issuer, within 10 years before the date of the offering memorandum,
 - (i) became bankrupt,
 - (ii) made a proposal under any legislation relating to bankruptcy or insolvency,
 - (iii) became subject to or instituted any proceedings, arrangement or compromise with creditors, or
 - (iv) had a receiver, receiver manager or trustee appointed to hold the assets of the director, officer or shareholder.
 - (c) Describe the basis on which an order was made and whether the order is still in effect if a director, senior officer, promoter or control person of the issuer is, or has been within 10 years before the date of the offering memorandum, a director, senior officer or promoter of any issuer that, while the person was acting in that capacity,
 - (i) was the subject of a cease trade order or a similar order, or an order that denied that issuer access to any exemption under securities legislation, for a period of more than 30 consecutive days, or
 - (ii) was subject to an event that resulted in that issuer being the subject of a cease trade order or a similar order, or an order that denied that issuer access to any exemption under securities legislation, for a period of more than 30 consecutive days, after the person ceased to act in that capacity.
 - (d) Disclose if a director, senior officer, promoter or control person of the issuer is, or has been within 10 years before the date of the offering memorandum, a director, senior officer or promoter of any issuer that
 - (i) became bankrupt,
 - (ii) made a proposal under any legislation relating to bankruptcy or insolvency,
 - (iii) was subject to or instituted any proceedings, arrangement or compromise with creditors, or

- (iv) had a receiver, receiver manager or trustee appointed to hold its assets,
while the person was acting in that capacity, or within one year of the person ceasing to act in that capacity.

8.2 Promoters of the Real Estate Project and Principal Holders of the Real Estate Securities

- (1) Using the following table, disclose the specified information for each
 - (a) promoter of the real estate project, and
 - (b) principal holder of the real estate securities.

Name ¹ and municipality of principal residence	Number and percentage of the real estate securities held	
	Minimum offering	Maximum offering

Note to the table:

- 1. If a promoter of the real estate project or principal holder of the real estate securities is not an individual, state the name of any person or company that
 - (a) beneficially owns or controls, directly or indirectly, more than 50% of the voting rights of that promoter or principal holder, or
 - (b) is one of a combination of persons or companies acting in concert that hold collectively more than 50% of the voting rights of that promoter or principal holder.
- (2) Disclose the following for each promoter of the real estate project:
 - (a) the person’s principal occupations over the past five years;
 - (b) any relevant experience in a project similar to the real estate project; and
 - (c) if the person has no such experience, disclose that fact.
- (3) Penalties, Sanctions and Bankruptcy
 - (a) Describe the penalties or sanctions imposed and the grounds on which they were imposed, or the terms of any settlement agreement and the circumstances that gave rise to the settlement agreement, if a promoter of the real estate project or a principal holder of real estate securities has been subject to
 - (i) any penalties or sanctions imposed by a court relating to securities legislation or by a securities regulatory authority, or has entered into a settlement agreement with a securities regulatory authority, or
 - (ii) any other penalties or sanctions imposed by a court or regulatory body that would likely be considered important to a reasonable purchaser in making an investment decision.
 - (b) Disclose if a promoter of the real estate project or a principal holder of real estate securities, within 10 years before the date of the offering memorandum
 - (i) became bankrupt,

- (ii) made a proposal under any legislation relating to bankruptcy or insolvency,
 - (iii) became subject to or instituted any proceedings, arrangement or compromise with creditors, or
 - (iv) had a receiver, receiver manager or trustee appointed to hold the assets of the director, officer or shareholder.
- (c) Describe the basis on which an order was made and whether the order is still in effect if a promoter of the real estate project or a principal holder of the real estate securities is, or has been within 10 years before the date of the offering memorandum, a director, senior officer or promoter of any issuer that, while the person was acting in that capacity,
- (i) was the subject of a cease trade order or a similar order, or an order that denied that issuer access to any exemption under securities legislation, for a period of more than 30 consecutive days, or
 - (ii) was subject to an event that resulted in that issuer being the subject of a cease trade order or a similar order, or an order that denied that issuer access to any exemption under securities legislation, for a period of more than 30 consecutive days, after the person ceased to act in that capacity.
- (d) Disclose if a promoter of the real estate project or a principal holder of real estate securities is, or has been within 10 years before the date of the offering memorandum, a director, senior officer or promoter of any issuer that
- (i) became bankrupt,
 - (ii) made a proposal under any legislation relating to bankruptcy or insolvency,
 - (iii) was subject to or instituted any proceedings, arrangement or compromise with creditors, or
 - (iv) had a receiver, receiver manager or trustee appointed to hold its assets,
- while the person was acting in that capacity, or within one year of the person ceasing to act in that capacity.

Item 9 Compensation Paid to Sellers and Finders

9.1 General Compensation

Disclose the following for each person or company that acts as a seller or finder and has received, or will receive, any compensation in connection with the offering:

- (a) the person's relationship with the issuer;
- (b) the type and estimated amount of the compensation to be paid; and
- (c) if a commission is being paid, the percentage that the commission will represent of the gross proceeds of the offering based on both the minimum and maximum offering.

9.2 Compensation Paid in Real Estate Securities

- (1) If any portion of the compensation will be paid in real estate securities, disclose details about the aggregate number and price of the real estate securities to be paid.
- (2) If any portion of the compensation will be paid as an option, or other right to acquire a real estate security, disclose its conversion terms including the exercise price, expiry date and the aggregate number of real estate securities to be acquired.

Item 10 Income Tax Consequences and RRSP Eligibility

10.1 Income Tax Consequences

- (1) State in bold:
“You should consult your own professional advisers to obtain advice on the tax consequences that apply to you.”
- (2) If income tax consequences are a material aspect of the real estate securities being offered disclose the following:
 - (a) a summary of the significant income tax consequences to Canadian residents; and
 - (b) the name of the person or company providing the tax disclosure in (a).

10.2 RRSP Eligibility

Provide advice regarding the RRSP eligibility of the real estate securities and the name of the person or company providing the advice, or state:

“Not all securities are eligible for investment in a registered retirement savings plan (RRSP). You should consult your own professional advisers to obtain advice on the RRSP eligibility of these real estate securities.”

Item 11 Reporting to Purchasers

11.1 Information to be Provided

- (1) Describe what and when documents relating to the real estate project will be sent to the purchaser on an ongoing basis, or if no documents will be sent, state that fact.
- (2) If future oriented financial information is included in the offering memorandum, state that the purchaser will receive annually a comparison of the future oriented financial information to the actual results for the same period.

11.2 Cautionary Statement

State in bold:

“Any documents or financial information relating to the real estate project provided to you in the future may not be adequate for your individual needs.”

Item 12 Resale Restrictions

- (1) State in bold:
“These real estate securities are subject to resale restrictions. You will not be able to trade the real estate securities unless you are eligible to rely on an exemption from the prospectus and registration requirements under Alberta securities legislation. For information about these resale restrictions you should consult a lawyer.”
- (2) Other Restrictions
- (a) Describe any restrictions on reselling the real estate securities that arise under the terms of the material agreements.
 - (b) State any restrictions on the purchaser’s right to assign any agreements that the purchaser is a party to.

Item 13 Purchaser’s Rights

13.1 Mandatory Statement

State the following:

“If you purchase these real estate securities you will have certain rights, some of which are described below. For information about your rights you should consult a lawyer.

1. *Two-Day Cancellation Right* - You can cancel your agreement to purchase these real estate securities. To do so you must send a written notice to us by midnight on the 2nd day, exclusive of Saturdays and holidays, after you sign the agreement to buy the real estate securities. This right is set out in section 209.1 of the *Securities Act* (Alberta).
2. *Rights of Action in the Event of a Misrepresentation* - If this offering memorandum contains a misrepresentation, you have a right to sue
 - (a) [name of issuer or other term used to refer to issuer] to cancel your agreement to buy these real estate securities, or
 - (b) [state the name of issuer or other term used to refer to issuer and the name and title of any other person or company against whom the rights are available] for damages.

These rights are set out in section 204 of the *Securities Act* (Alberta).

If you elect to sue to cancel your agreement, then you will no longer have a right to sue for damages against a person or company referred to in (b) above.

You have these rights to sue whether or not you relied on the misrepresentation. However, there are various defences available to the persons or companies that you have a right to sue. In particular, they have a defence if you knew of the misrepresentation when you purchased the real estate securities.

If you intend to rely on the rights described in 2(a) or (b) above, you must do so within strict time limitations. You must commence your action to cancel the agreement within 180 days after you signed the agreement to purchase the real estate securities. You must commence your action for damages within the earlier of 180 days after learning of the misrepresentation and 3 years after you signed the agreement to purchase the real estate securities.”

Item 14 Financial Statements

14.1 Financial Statements of the Real Estate Project

- (1) Include in the offering memorandum financial statements of a real estate project that
 - (a) is currently an operating business, or
 - (b) has been an operating business within the 12 consecutive months prior to the date of the offering memorandum.
- (2) Appendix A sets out specific requirements for the financials statements that are required under section 14.1(1).

14.2 Requirements for Other Financial Statements

Financial statements of a real estate project that does not meet the criteria in section 14.1(1), or of an issuer, are not required to be included in the offering memorandum, unless it is necessary to do so to prevent the offering memorandum from containing a misrepresentation.

Item 15 Date and Certificate

15.1 Mandatory Statement

The last page of the offering memorandum must contain a certificate that states the following:

“Dated [insert the date the certificate page of the offering memorandum is signed].

This offering memorandum does not contain a misrepresentation.”

15.2 Signatories

- (1) The certificate must be signed by the following:
 - (a) the chief executive officer and the chief financial officer of the issuer, or if the issuer does not have a chief executive officer or a chief financial officer, a person acting in that capacity for the issuer;
 - (b) on behalf of the directors of the issuer
 - (i) by any two directors who are authorized to sign other than the persons referred to in paragraph (a), or
 - (ii) by all the directors of the issuer, in the event that the issuer has only three directors;
 - (c) by each promoter of the issuer; and

- (d) by each promoter of the real estate project.
- (2) For non-corporate issuers see instruction 5 under “General Instructions and Interpretation” above.

APPENDIX A

Financial Statement Requirements

1. If the real estate project has not completed one financial year, include the following financial statements for that real estate project:
 - (a) statements of income, retained earnings and cash flows for the period from inception to a date not more than 60 days before the date of the offering memorandum; and
 - (b) a balance sheet dated as at the ending date of the statements required by paragraph (a) above.
2. If the real estate project has completed one or more financial years, include the following financial statements for that real estate project:
 - (a) statements of income, retained earnings and cash flows for the most recently completed financial year that ended more than 120 days before the date of the offering memorandum;
 - (b) a balance sheet as at the last day of the most recently completed financial year that ended more than 120 days before the date of the offering memorandum;
 - (c) statements of income, retained earnings and cash flows for the most recently completed interim period ending 9, 6, or 3 months before the end of the financial year, if that interim period ended more than 60 days before the date of the offering memorandum and ended after the date of any financial statements required under paragraph 2(a); and
 - (d) a balance sheet dated as at the ending date of the statements required by paragraph 2(c).
3. If financial statements of the real estate project for a more recent annual or interim period than those required by sections 1 or 2 have been prepared, include those more recent financial statements in the offering memorandum.
4. Despite paragraph 2(c), if the real estate project has changed its financial year-end, interim financial statements are not required for any period in its transition year that ends within one month
 - (a) after the last day of the old financial year, or
 - (b) before the first day of the new financial year.
5. If the real estate project has completed two or more financial years that ended more than 120 days from the date of the offering memorandum, the annual financial statements required under paragraphs 2(a) and (b) must include comparatives for the prior year. The interim financial statements required under paragraphs 2(c) and (d) may exclude comparatives if financial statements for the comparative periods were not previously prepared.
6. The annual financial statements required under paragraphs 2(a) and (b) must be audited in accordance with the requirements of National Instrument 52-107 *Acceptable*

Accounting Principles, Auditing Standards and Reporting Currency (NI 52-107). The audit report must be included in the offering memorandum. Refer to National Instrument 52-108 *Auditor Oversight* for requirements for auditors.

7. The financial statements required under section 1, paragraphs 2(c) and (d), section 3 and the comparatives required by section 5 may be unaudited. However, if any of those financial statements have been audited, the audit report on them must be included in the offering memorandum. All unaudited financial statements must indicate in bold that the financial statements have not been audited.
8. If the offering memorandum does not contain audited financial statements for the real estate project's most recently completed financial year, update the offering memorandum to include the audited annual financial statements and the audit report as soon as the issuer has approved the audited financial statements, but in any event no later than the 120th day following the financial year end.
9. The offering memorandum does not have to be updated to include interim financial statements for periods completed within 60 days before the date of the offering memorandum unless it is necessary to do so to prevent the offering memorandum from containing a misrepresentation.
10. The board of directors of the issuer must approve all financial statements included in the offering memorandum. To fulfill its requirement to approve interim financial statements, the board of directors may delegate approval of interim financial statements to its audit committee.
11. All financial statements included in the offering memorandum must comply with NI 52-107.
12. If future oriented financial information (FOFI) is included in the offering memorandum
 - (a) refer to National Policy 48 *Future Oriented Financial Information* (NP 48),
 - (b) if no audited financial statements are included with the offering memorandum, FOFI need not be accompanied by an auditor's report thereon, andupdate the offering memorandum to identify material changes resulting from events that have occurred since the FOFI was prepared.

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Proposed ASC Companion Policy 45-509CP
To Proposed ASC Rule 45-509
Offering Memorandum for Real Estate Securities

1. Background

Securities legislation applies to any trade of a security, whether or not the issuer of the security is a reporting issuer in that jurisdiction. The dealer registration requirement prohibits a person or company from trading in a security unless the person or company is registered in the appropriate category. The prospectus requirement requires the use of a prospectus for any distribution of securities. Securities legislation also provides exemptions from the dealer registration requirement and prospectus requirement in certain circumstances.

One of the exemptions from the dealer registration requirement and the prospectus requirement is the offering memorandum exemption (“OM Exemption”) under Part 4 of Multilateral Instrument 45-103 *Capital Raising Exemptions* (“MI 45-103”). Section 4.2 of MI 45-103 states that the offering memorandum delivered under section 4.1 of MI 45-103 must be prepared in accordance with one of the required forms. The required forms are listed in section 8.1 of MI 45-103.

However, the Alberta Securities Commission has adopted local rule 45-509 *Offering Memorandum for Real Estate Securities* (“Rule 45-509”) that prescribes a third form of offering memorandum tailored for offerings of real estate securities.

2. Interaction with MI 45-103

An issuer that wants to use the OM Exemption to sell equity or debt securities of itself must still prepare its offering memorandum in accordance with Form 45-103F1 *Offering Memorandum for Non-Qualifying Issuers* or Form 45-103F2 *Offering Memorandum for Qualifying Issuers*, as applicable, even if that issuer is engaged in a business relating to real estate. An issuer that wants to use the OM Exemption to sell real estate securities must prepare its offering memorandum in accordance with Form 45-509 *Offering Memorandum for Real Estate Securities*.

Notwithstanding the application of Form 45-509, other requirements pertaining to the OM Exemption set out in securities legislation still apply to offerings of real estate securities that use the OM Exemption. For example, under Part 4 of MI 45-103, purchasers must complete Form 45-103F3 *Risk Acknowledgment*, and issuers must hold the consideration in trust for two business days. Issuers must file their offering memorandum and a report in the form of Form 45-103F4 *Report on Exempt Distribution* with the Alberta Securities Commission within the prescribed time periods set out in MI 45-103. The *Securities Act* (Alberta) (“Act”) gives purchasers certain statutory rights. They have the right to cancel the agreement to purchase the real estate securities within 2 business days (section 209.1) and they have certain rights of action if the offering memorandum contains a misrepresentation (section 204).

This companion policy provides guidance regarding the application of Rule 45-509 and the use of Form 45-509. For guidance regarding the use of the OM exemption, as well as other exemptions listed in MI 45-103, issuers should refer to Companion Policy 45-103CP *Capital Raising Exemptions*.

3. What is a Real Estate Security?

Rule 45-509 defines a real estate security to be

an investment contract under which

- (a) the purchaser's economic entitlement is to a material extent attributable to a real estate project, and
- (b) the occupation or use by the purchaser of the real property that is the subject of the real estate project, is prohibited or materially restricted.

Although the Act defines a "security" to include "any investment contract", it does not, in turn, define "investment contract". Nevertheless, there is a considerable body of case law¹ on the question of what constitutes an investment contract. As result, issuers and their legal counsel must determine on a case-by-case basis whether the issuer is offering investments that would be an interest in real estate, or would constitute an investment contract.

At a minimum, the issuer should ask itself:

Is this a contract, transaction or scheme whereby a person invests his money in a "common enterprise" and is lead to expect profits (i) solely from the efforts of the promoter or a third party, or (ii) if not solely from the efforts of a promoter or third party, then the efforts of the promoter or third party are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise?

The key components of the question are:

1. Will the purchaser be making an investment of money with the intention to earn a profit?
2. Will there be a "common enterprise" – an enterprise in which the fortunes of the purchaser are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties?
3. Do the purchasers expect to make a profit
 - (a) based solely on the efforts of others, or
 - (b) based on the efforts of others where the efforts of those others are expected to be undeniably significant and will be the managerial efforts essential to the success or failure of the enterprise?

In considering the matter, the issuer must look to the substance of the transaction, not the form. The fact that an enterprise is referred to as a "joint venture" or "partnership" does not prevent a

¹ For example, see Reasons for Decision of the Alberta Securities Commission *In the Matter of the Land Development Company Inc. and Phil Archer* dated March 26, 2002.

conclusion that a purchaser is, in fact, dependent upon the efforts of the issuer or a third party. Factors that suggest that the purchaser is dependent include the following:

- the purchaser has limited legal rights;
- the purchaser's practical ability to exercise its legal rights is limited;
- the purchaser lacks the capability to intelligently exercise its powers,
- the purchaser's role is intended to be passive;
- the purchaser is lacking experience or knowledge in business affairs generally;
- the purchaser is reliant on the promoter's efforts because of lack of business knowledge, finances or control over the operation;
- the promoter or manager has unique entrepreneurial or management abilities on which the purchaser is dependent; and
- the purchaser cannot, looking at practical realities, remove the manager.

4. Who is the "Issuer"?

The issuer in respect of a real estate security is determined by considering the substance and economics of the investment contract. Depending on the terms and circumstances of the investment contract, the issuer may include any person or company, acting alone or in concert with others, who was instrumental in the founding, development, management, or operation of the real estate project. Depending on the real estate security, the issuer could be or include any one or more of the following: the promoter, developer, manager, seller or other similar party.

5. Non-Corporate Issuers

The form requires an issuer to include a certificate in the prescribed form signed by the chief executive officer and the chief financial officer or, if no such officers have been appointed, a person acting in that capacity on behalf of the issuer. For a non-corporate issuer, this certificate should be signed by those who perform functions on behalf of the issuer similar to those of a chief executive officer and a chief financial officer.

The certificate must also be signed on behalf of the board of directors by two directors of the issuer other than the persons referred to above. Non-corporate issuers are directed to the definition of "director" in the Act to determine the appropriate signatories to the certificate.

Section 5 of the "General Instructions and Interpretation" of Form 45-509 provides requirements for non-corporate issuers that are limited partnerships or trusts. Issuers that are not companies, as defined in the Act, are directed to the definition of "person" in the Act.

6. What is included in the Real Estate Project?

The definition of a real estate project includes a range of real estate projects, from the development of bare land to the operation of a business such as a hotel or resort.

The first prong of the definition refers to "a business or undertaking that is proposed primarily to generate for investors, income, gain or other return, or funds distributable on dissolution or

sale...” The definition is not intended to include condominium units that are sold to the general public for residential purposes.

7. Appraisals and Disclosure about Values

The second prong of the definition of real estate projects refers to projects that propose to develop or redevelop real property for use in a business or undertaking described in the first prong, or for resale. In brief, these are real estate projects that propose to develop undeveloped land.

For these projects, issuers are required to disclose a value of the real property determined by a qualified appraiser who is independent of the issuer, the real property and the real estate project. Issuers are not required to disclose a value for any other type of real estate project, for example an operating business. If they do disclose a value, however, it must be determined by a independent qualified appraiser.

Section 3 requires that the appraiser be a member of the Appraisal Institute of Canada and any of its provincial associations. It also sets out when an appraiser would not be considered independent.

Section 3.4 requires disclosure about the history of the title within the 5 years before the date of the offering memorandum.

An issuer must state in the second column whether the transfer was to a related party or was non-arm’s length. The reference to “related party” in paragraph 3.4(b) does not refer to the nature of the relationship between the transferor and the transferee, who may or may not have been at arm’s length with each other. “Related party” is a person or company that comes within the definition of section 3 of the General Instructions and Interpretation of the Form. If either the transferor or the transferee were a related party as defined in that section, state “related party” in column 2 of the table and, in column 3, state the names and the relationships. Conversely, if neither the transferor nor the transferee were a related party, state “arm’s length” in column 2 and “n/a” in column 3. In either case, the consideration exchanged in the transaction must be disclosed in column 4. For transactions of real property located in Alberta, this amount can be what is stated on the certificate of title or in the affidavit of value that is filed with the Land Titles Office.

8. Interaction with other Legislation

Depending on the nature of the transaction, an offering of real estate securities may not only have to comply with the *Securities Act* (Alberta), but it may also have to comply with other legislation, for example, the *Real Estate Act* (Alberta), the *Condominium Property Act* (Alberta) or legislation of another jurisdiction.

If the issuer is required to prepare an offering document to comply with other legislative requirements, the issuer may use that offering document to construct the offering memorandum. Section 2(e) of “General Instructions and Interpretation” of Form 45-509 states that the offering

memorandum can be wrapped around another offering document so that the complete document contains all of the information and certificates required by Form 45-509. To avoid repetition in the offering document, the offering memorandum can contain a cross-reference to information required by Form 45-509 that is set out in the wrapped document.

Form 45-509 prescribes the minimum information that must be in an offering memorandum for offerings of real estate securities. The offering memorandum may therefore contain information required by other legislation but not required by Form 45-509. For example, Item 13 of Form 45-509 requires disclosure about the purchaser's right under the *Securities Act* (Alberta), which includes a right to cancel the purchase within 2 business days under section 209.1. The purchaser may also have a right to cancel the agreement under other legislation and they may have that right for a longer period. The issuer should disclose all such purchaser's rights and identify which legislation gives rise to that right.

Although Form 45-509 sets out its requirements using headings and a particular order, issuers are not required to use those headings or that order. There are only two exceptions to this. The information prescribed by Item 1 must be set out on the cover page of the offering memorandum, and the certificate required by Item 15 must be set out as the last page of the offering memorandum. Issuers may therefore present the information required by Form 45-509 using different headings or a different order. This flexibility in the presentation of information should make it easier for issuers of real estate securities to prepare an offering document that meets the requirements of Form 45-509 even though if the document must meet disclosure requirements of other legislation.

9. Divisional and Carve-out Financial Statements

Financial statements are required for a real estate project that is an operating business or that has been an operating business within the 12 consecutive months prior to the date of the offering memorandum (collectively, for the purposes of this section, a "business"). In some cases, where that business was a division or some lesser component of another person or company (the "parent"), the financial statements may have to be extracted or "carved-out" of the financial statements of the parent.

The terms "divisional" and "carve-out" financial statements are often used interchangeably although a distinction is possible. Some companies maintain separate financial records and financial statements for a business activity or unit that is operated as a division. Financial statements prepared from these financial records are often referred to as "divisional" financial statements. In other circumstances, no separate financial records for a business activity are maintained; they are simply consolidated with the parent's records. In these cases, if the parent's financial records are sufficiently detailed, it is possible to extract or "carve-out" the information specific to the business activity in order to prepare separate financial statements of that business. Financial statements prepared in this manner are commonly referred to as "carve-out" financial statements. The guidance in this section applies to the preparation of both divisional and carve-out financial statements unless otherwise stated.

Preparation of Divisional and Carve-Out Financial Statements

- (a) When complete financial records of the business have been maintained, those records should be used for preparing and auditing the financial statements of the business. For the purposes of this section, it is presumed that the parent maintains separate financial records for its divisions.
- (b) When complete financial records of the business do not exist, carve-out financial statements should generally be prepared in accordance with the following guidelines:
 - (i) *Allocation of Assets and Liabilities* – A balance sheet should include all assets and liabilities directly attributable to the business.
 - (ii) *Allocation of Revenues and Expenses* – Income statements should include all revenues and expenses directly attributable to the business. Some fundamental expenditures may be shared by the business and its parent in which case the parent’s management must determine a reasonable basis for allocating a share of these common expenses to the business. Examples of such common expenses include salaries, rent, depreciation, professional fees, general and administration.
 - (iii) *Calculation of Income and Capital Taxes* – Income and capital taxes should be calculated as if the entity had been a separate legal entity and filed a separate tax return for the period presented.
 - (iv) *Disclosure of Basis of Preparation* – The financial statements should include a note describing the basis of preparation. If expenses have been allocated as discussed in subparagraph (b)(ii), the financial statements should include a note describing the method of allocation for each significant line item, at a minimum.

Statements of Assets and Liabilities and Statements of Operations

When it is impracticable to prepare carve-out financial statements of a business, include an audited statement of assets and liabilities and a statement of operations of the business. The statement of operations should exclude only those indirect operating costs not directly attributable to the business, such as corporate overhead. If indirect operating costs were previously allocated to the business and there is a reasonable basis of allocation, they should not be excluded.

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