

Note: [08 Mar 2023] – Changes to 45-106CP. Refer to Annex C of the CSA Notice announcing changes to 45-106CP dated 08 Dec 2022.

CHANGES TO COMPANION POLICY 45-106CP PROSPECTUS EXEMPTIONS

- 1. *Companion Policy 45-106CP Prospectus Exemptions is changed by this Document.***
- 2. *The following sections are added after section 2.9:***

2.10 Real estate activities

We consider the following non-exhaustive list to be examples of instances in which an issuer is engaged in “real estate activities” as defined in section 1.1 of NI 45-106:

- An issuer that is developing or redeveloping real property for sale as commercial or industrial space, residential building lots or homes, or condominiums;
- An issuer that is developing or redeveloping real property for lease;
- An issuer that owns real property for lease;
- An issuer that buys, holds or sells real property, with a view to making a gain or income;
- An issuer of an interest in real property that is a security.

If an issuer (the first issuer) is engaged in real estate activities through one or more of its subsidiaries, we consider the first issuer to be engaged in real estate activities.

2.11 Collective investment vehicle

We are of the view that the definition of “collective investment vehicle” applies to mortgage investment entities, issuers that act as lender for a portfolio of non-mortgage loans, and in certain circumstances, issuers that invest in receivables.

If an issuer (the first issuer) satisfies the definition of “collective investment vehicle” through the actions of one or more its subsidiaries, we consider the first issuer to be a collective investment vehicle..

- 3. *Subsection 3.8(3) is replaced with the following:***

- (3) Standard of disclosure for an offering memorandum, amending an offering memorandum and related matters
 - (a) Standard of disclosure for an offering memorandum

There are three elements that make up the standard of disclosure for an offering memorandum. Subsection 2.9(13.1) of the Instrument provides

that an issuer must not make a misrepresentation in its offering memorandum. A statement can only be or not be a misrepresentation when it is made, which for an offering memorandum is the date of the offering memorandum. As provided at the beginning of the offering memorandum form, the date of the offering memorandum is the date of the certificate. A statement that is not a misrepresentation when it is made cannot become a misrepresentation later, irrespective of whether circumstances have changed to render the statement inaccurate. However, with respect to ongoing events for the issuer, we refer issuers to subsections 2.9(13.3) and (13.2) of the Instrument.

Under subsection 2.9(13.3) of the Instrument, an issuer must not deliver an offering memorandum under the section unless it provides a reasonable purchaser with sufficient information to make an informed investment decision.

Subsection 2.9(13.2) of the Instrument provides that if a material change with respect to the issuer occurs after the certificate for the offering memorandum or amended offering memorandum is signed, and before the issuer accepts an agreement to purchase the security from the purchaser, the issuer must amend the offering memorandum to reflect the material change and deliver the amended offering memorandum to the purchaser.

(b) Amending an offering memorandum

Instruction B.14 of Form 45-106F2 provides that if a distribution is ongoing, an issuer must, after a certain period, amend its offering memorandum to include financial statements for its most recently completed financial year.

There are a number of requirements in Form 45-106F2 that refer to a completed financial year or years. As a result, each time an issuer amends its offering memorandum to include financial statements for a financial year, it is required to ensure that any disclosure that is in response to a requirement that references a financial year is revised if necessary.

With respect to an interim period, if an issuer amends its offering memorandum to include a further interim financial report, the same analysis applies. That is, there are a number of requirements in Form 45-106F2 that refer to a completed interim period, and the issuer is required to ensure that any disclosure that is in response to a requirement that references an interim period is revised if necessary.

It is not necessary for an offering memorandum to contain annual financial statements or an interim financial report for more financial years or interim periods than are required by B. of the instructions to Form

45-106F2. Accordingly, an issuer amending its offering memorandum to include more recent annual financial statements or a more recent interim financial report may exclude, in its amended offering memorandum, any annual financial statements or interim financial report for a financial year or interim period that is no longer required.

As discussed in paragraph (a), an issuer is also required to amend its offering memorandum if a material change occurs after the certificate is signed, and before the issuer accepts an agreement to purchase the security from the purchaser. See subsection 2.9(13.2) of the Instrument. Material change is defined in provincial and territorial securities legislation.

In making materiality judgments it is necessary to consider a number of factors that cannot be captured in a simple bright-line test. National Policy 51-201 *Disclosure Standards* provides guidance regarding materiality determinations by reporting issuers.

Most of the issuers that rely on the offering memorandum exemption are not reporting issuers. Accordingly, materiality determinations must be assessed in the context of their specific circumstances and the overall disclosure to investors, including the offering memorandum and related documents. For example, if an issuer's offering memorandum discloses prospective operations and its financial statements reflect only an opening balance sheet, the raising of significant funds and commencing operations may constitute a material change. Similarly, where a collective investment vehicle such as a mortgage investment entity does not have a portfolio of mortgage loans at the time of its offering memorandum, the activity of deploying funds in a portfolio of mortgages could constitute a material change, particularly if the portfolio has characteristics and risks that have not been disclosed.

With respect to the requirement in paragraph 2.9(19.5)(a) of the Instrument to provide an appraisal in connection with a proposed acquisition from a related party, we note that issuers carrying out ongoing distributions could trigger this requirement after the date the certificate is signed.

If the proposed acquisition is not a material change, issuers should consider whether under subsection 2.9(13.3) of the Instrument the offering memorandum is required to be amended prior to delivery to reflect the proposed acquisition, so that the offering memorandum contains sufficient information for a reasonable investor to make an investment decision.

If a distribution is ongoing and an issuer becomes subject to instruction C.1 of Form 45-106F2 with respect to the acquisition or proposed acquisition of a business, and the financial statements required by that

instruction are not contained in the offering memorandum, the issuer is required to amend its offering memorandum to include them.

For each delivery of an offering memorandum, we remind issuers of subsection 2.9(13.3) of the Instrument, which is discussed in paragraph (a). It may be necessary to amend an offering memorandum to meet this requirement.

We also note that an issuer may voluntarily amend its offering memorandum.

Finally, we note that marketing materials were never intended to be a means of amending an offering memorandum.

(c) New certificate

Each time an issuer amends its offering memorandum, it is required under subsection 2.9(14.1) of the Instrument to include a newly dated certificate in the amended offering memorandum. We also note that the date of the offering memorandum is the date of the certificate.

There are certain offering memorandum requirements that refer to the date of the offering memorandum. As a result, each time an issuer includes a new certificate in its offering memorandum, it is required to ensure that any disclosure in response to a requirement that references the date of the offering memorandum is revised if necessary.

The certificate referred to in this subsection is the certificate required by Form 45-106F2 item 15, or Form 45-106F3 item 12, as applicable..

4. Section 3.8 is changed by adding the following after subsection 3.8(3):

(3.1) Certificate of promoter

“Promoter” is defined differently in provincial and territorial securities legislation across CSA jurisdictions. It is generally defined as meaning a person who has taken the initiative in founding, organizing or substantially reorganizing the business of the issuer or who has received consideration over a prescribed amount for services or property or both in connection with founding, organizing or substantially reorganizing the issuer. “Promoter” has not been defined in the *Securities Act* (Québec) and a broad interpretation is taken in Québec in determining who would be considered a promoter.

Under securities legislation, persons who receive consideration solely as underwriting commissions or in consideration of property and who do not otherwise take part in the founding, organizing or substantially reorganizing the

issuer are not promoters. Simply selling securities, or in some way facilitating sales in securities, does not make a person a promoter under the offering memorandum exemption..

5. ***Section 3.8 is changed by adding the following after subsection 3.8(4):***

(4.1) Appraisal requirement

We remind issuers carrying out ongoing distributions under an offering memorandum that it is possible to trigger the appraisal requirement under subsection 2.9(19.5) of the Instrument after the date of the certificate of the offering memorandum. In this case, for all subsequent purchasers, the issuer is required pursuant to subsection 2.9(19.6) of the Instrument to deliver the appraisal at the same time or before it delivers its offering memorandum..

6. ***Subsection 3.8(13) is changed***

(a) by deleting “for syndicated mortgages”, and

(b) by replacing “the issuer of a syndicated mortgage” with “an issuer”.

7. ***Subsection 3.8(14) is changed by adding “of property subject to a syndicated mortgage” after “Appraisals”.***

8. ***Section 3.8 is changed by adding the following after subsection 3.8(14):***

(15) Collective investment vehicles - disclosure

An issuer that is a collective investment vehicle should consider the complexity of its offering and determine whether appropriate and sufficient information can be provided under its offering memorandum, as these distributions can be made to less sophisticated investors. Disclosure should be clear and described in plain language, avoiding technical terms as much as possible. If the disclosure will be complex or contains technical terms that are difficult to easily describe, the issuer should consider whether a distribution under the offering memorandum exemption is appropriate..

9. ***Section 5.3 is deleted.***

10. These changes become effective on March 8, 2023.