

Notice No. 45-718

NOVA SCOTIA SECURITIES COMMISSION STAFF NOTICE

IN THE MATTER OF THE *SECURITIES ACT*,
R. S. N. S. 1989, C. 418, AS AMENDED

- AND -

**PROSPECTUS AND REGISTRATION EXEMPTIONS RELATING
TO CERTAIN SYNDICATED MORTGAGES IN NOVA SCOTIA**

February 26, 2021

Introduction – Regulation of Syndicated Mortgages

Mortgages fall within the definition of “security” in the Nova Scotia *Securities Act*. However, because mortgages are regulated by the Registrar of Mortgages for Nova Scotia, Nova Scotia securities laws have, to date, exempted from the securities regulatory requirements distributions of all types of mortgages.

On August 6, 2020, the Canadian Securities Administrators (the CSA) previously published amendments to National Instrument 45-106 *Prospects Exemptions* (NI 45-106) and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) to bring syndicated mortgages into regulation under securities laws in Canada (the Mortgage Amendments). The Mortgage Amendments will be effective in Nova Scotia on March 1, 2021.

In the Mortgage Amendments, a “syndicated mortgage” is a mortgage in which two or more persons or companies participate, directly or indirectly, as lenders in the debt obligation secured by the mortgage.

As a result of the Mortgage Amendments:

1. the prospectus and registration exemptions under sections 2.36 of NI 45-106 and 8.12 of NI 31-103, respectively, (the Mortgage Exemptions) will no longer be available for syndicated mortgages;
2. the Private Issuer exemption under section 2.4 of NI 45-106, will no longer be available for syndicated mortgages; and
3. new prescribed disclosure will be required for distributions of syndicated mortgages in reliance on the Offering Memorandum exemption under section 2.9 of NI 45-106.

Also effective March 1, 2021, Blanket Order No. 45-528 *In the Matter of Relief from the Prospectus and Registration Requirements for Certain Syndicated Mortgages* (BO 45-528), will

provide for:

1. exemptions from the dealer registration and prospectus requirements for “qualified syndicated mortgages” which are more like conventional mortgages;
2. exemptions from the dealer registration and prospectus requirements for syndicated mortgages to a mortgage broker acting as principal that is licensed under legislation governing mortgage brokers in Nova Scotia; and
3. an exemption from the dealer registration requirement for the issuance of syndicated mortgages to “permitted clients” (see definition in Schedule A to this Notice).

The rationale for the exemptions referred to in 2 and 3 above is that licensed mortgage brokers and permitted clients investing in syndicated mortgages do not need the same level of protections provided by Nova Scotia securities laws that is afforded to retail investors in syndicated mortgages.

Substance and Purpose

The purpose of the Mortgage Amendments is to introduce additional investor protections related to the distribution of syndicated mortgages as well as increase harmonization regarding the regulatory framework for syndicated mortgages across Canada. In Nova Scotia, this will result in the transfer of primary oversight of syndicated mortgages, other than qualified syndicated mortgages, from the Registrar of Mortgages to the Nova Scotia Securities Commission (the Commission).

Qualified Syndicated Mortgages

A “qualified syndicated mortgage” (defined in BO 45-528, a copy of which is attached as Schedule B to this Notice) is a mortgage issued on real property that is primarily residential and is therefore similar to a conventional mortgage. The limit of \$2 million on the total debt obligation as well as the exclusion of syndicated mortgages for financing the construction or development of a property in the definition in BO 45-528 are key limitations intended to limit the risk of these mortgages. The definition also excludes mortgages with a loan-to-value ratio of greater than 90%. The qualified syndicated mortgage exemption from Nova Scotia securities laws requirements is only available if a party involved in a syndicated mortgage transaction is licensed under mortgage broker legislation or exempted from licensing (other than being exempt under subsection 3(i) of the Regulations Respecting Exemptions to the *Mortgage Regulation Act* (Nova Scotia)). There is no reporting requirement or resale restrictions under Nova Scotia securities laws in connection with this prospectus exemption.

The Commission, along with the securities regulatory authorities in Ontario, New Brunswick, and Newfoundland and Labrador have adopted or plan to adopt dealer registration and prospectus exemptions for qualified syndicated mortgages, similar to the exemptions already available in British Columbia under British Columbia Rule 45-501 *Mortgages*. The securities regulatory authorities in Alberta and Québec have adopted or plan to adopt only a prospectus exemption for qualified syndicated mortgages.

It should be noted however that the definition of qualified syndicated mortgage differs in each jurisdiction. The ability for an issuer to rely on the qualified syndicated mortgage exemption in connection with a distribution to an investor in one jurisdiction may not be available in connection with an investor in another jurisdiction involving the same syndicated mortgage. For example, where a syndicated mortgage involves investors in multiple Canadian jurisdictions, if the total debt obligation that the mortgage secures is more than \$2 million, then the issuer will not be able to rely on the qualified syndicated mortgage exemption in BO 45-528 for any Nova Scotia investors even if it is able to rely on the qualified syndicated mortgage exemption for investors in other jurisdictions.

Syndicated Mortgages Sold to Licensed Mortgage Brokers Acting as Principal

In order not to increase regulatory burden or reduce sources of available financing for small businesses and brokers that do not deal with retail investors, BO 45-528 also includes exemptions from the prospectus and dealer registration requirements for syndicated mortgages issued to mortgage brokers that are licensed under the mortgage broker legislation in Nova Scotia and investing as principal. Thus an issuer of a syndicated mortgage to one of more licensed mortgage brokers acting as principal will not need to file and deliver a prospectus, provided the issuer files a Report of Exempt Distribution (Form 45-106F1) with the Commission within ten days of the date of the distribution of the syndicated mortgage, and the first trade of such syndicated mortgage is a distribution and subject to resale restrictions.

Mortgage brokers and borrowers that deal in syndicated mortgages with only licensed mortgage brokers acting as principal or permitted clients, as discussed below, can rely on the dealer registration exemptions in BO 45-528 and will not be required to register with the Commission.

Syndicated Mortgages Sold to Permitted Clients

For the same reasons as those noted above, BO 45-528 also includes a dealer registration exemption for syndicated mortgages that are issued to permitted clients provided a person or company involved in the trade is licensed under mortgage broker legislation in Nova Scotia. The existing definition of permitted client in NI 31-103 was designed to capture investors that are permitted to waive the requirement for a registrant to take reasonable steps to ensure that the purchase or sale of a security is suitable for its client on the basis that permitted clients are institutional, sophisticated and high-net-worth investors. Accordingly, permitted clients do need the same level of investor protections as retail investors.

Mortgage brokers and borrowers that deal in syndicated mortgages with only permitted clients or licensed mortgage brokers acting as principal, as discussed under the preceding heading, can rely on the dealer registration exemptions in BO 45-528 and will not be required to register with the Commission.

An issuer distributing syndicated mortgages to permitted clients would be able to rely on the Accredited Investor exemption in section 2.3 of NI 45-106 from the prospectus requirements.

Impact on Nova Scotians

The Mortgage Amendments will not have any impact on borrowers and lenders that are parties to traditional mortgages.

Commencing March 1, 2021, when syndicated mortgages are involved in a transaction, borrowers and their mortgage brokers will be required to comply with prospectus and registration requirements in Nova Scotia securities laws. Accordingly, the onus will be on the borrower or the party that is syndicating the mortgage (i.e. the issuer of the syndicated mortgage) to ensure that there is an applicable prospectus exemption for each lender/investor in the mortgage product and to comply with applicable reporting requirements. In addition, if the party that is syndicating the mortgage would be considered to be in the business of trading mortgages, then that party may be required to register with the Commission or rely on an applicable exemption from the registration requirement under Nova Scotia securities laws.

Examples of Mortgage Transactions Affected

In all situations involving more than one lender where the debt obligation is secured by a mortgage, an analysis of applicable securities laws and compliance therewith is required.

The following examples illustrate the application of Nova Scotia securities laws to a syndicated mortgage transaction. These examples are not intended to be an exhaustive list of the types of syndicated mortgage transactions requiring compliance with Nova Scotia securities laws.

Example #1: A property developer arranges a loan secured by a mortgage with more than one lender (financial institutions and/or other lenders) for the purposes of constructing a building on a vacant building lot.

The developer is the issuer who is distributing the syndicated mortgage to each lender (investor).

Prospectus Requirement: As required by Nova Scotia securities laws, if a security (the syndicated mortgage in this case) is being distributed, a prospectus must be delivered to each investor or the issuer must be able to rely on an applicable exemption from the prospectus requirement in relation to each investor. As of March 1, 2021, the prospectus exemption in section 2.36 of NI 45-106 for mortgages, and the prospectus exemption in section 2.4 of NI 45-106 for private issuers, will not be applicable as this transaction involves a syndicated mortgage. The qualified syndicated mortgage exemption in BO 45-528 will also not be available because the mortgage in this transaction secures a debt obligation incurred for construction purposes, which is specifically excluded in the definition of qualified syndicated mortgage. However, the developer may be able to rely on other prospectus exemptions contained in NI 45-106 when distributing the syndicated mortgage securities, such as the Accredited Investor exemption in section 2.3, the Minimum \$150,000 Investment exemption in section 2.10, or the Offering Memorandum exemption in section 2.9, provided the conditions to the exemptions are satisfied. If a lender is a mortgage broker licensed under the mortgage legislation in Nova Scotia and is participating as principal,

then the prospectus exemption in section 2 of BO 45-528 is available. If relying on any of these exemptions, the developer will have to file a Report of Exempt Distribution (Form 46-106F1) with the Commission. In addition, if any of the lenders transfer their interest in the syndicated mortgage to another party, such transfer is considered a distribution under National Instrument 45-102 *Resale of Securities* (NI 45-102) and will require compliance with the prospectus requirement or another applicable prospectus exemption.

Registration Requirement: As required by Nova Scotia securities laws, a person or company that is considered to be in the business of trading securities (mortgages in this case) in Nova Scotia is required to be registered with the Commission unless the person or company can rely on an applicable exemption from the registration requirement. Factors to be considered when determining if the developer would be considered to be in the business of trading syndicated mortgage securities are set out in section 1.3 of the Companion Policy to NI 31-103, including if the developer is regularly, with repetition, soliciting and/or entering into mortgage transactions. If registration is required, as of March 1, 2021, the registration exemption in section 8.12(2) of NI 31-103 for mortgages will not be available, nor will the registration exemption for a qualified syndicated mortgage in section 1 of BO 45-528. However, depending on who the lenders are, the developer may be able to rely on the registration exemptions in sections 2 and/or 3 of BO 45-528 if the lenders are mortgage brokers participating as principal and/or permitted clients provided a person involved in the transaction is licensed under legislation governing mortgage brokers in Nova Scotia. Alternatively, there is also a registration exemption in section 8.5 of NI 31-103 for trades made through a registered dealer provided the developer does not solicit the trade directly, or to a registered dealer purchasing as principal.

Example #2: A borrower arranges a loan with two lenders (financial institutions or other lenders) to purchase a multi-level building, with retail space on street level and two apartments (one on each floor) above the retail space, for \$1.9 mil. The loan is secured by a mortgage on the property.

The borrower is the issuer who is distributing the syndicated mortgage to each lender (investor).

Prospectus Requirement: As of March 1, 2021, the borrower will be able to rely on the qualified syndicated mortgage exemption in section 1 of BO 45-528 if the rest of the definition of “qualified syndicated mortgage” is satisfied and a person or company involved in the transaction is licensed under legislation governing mortgage brokers in Nova Scotia, or is exempt from licensing under mortgage broker legislation in Nova Scotia other than being exempt under subsection 3(i) of the Regulations Respecting Exemptions to the *Mortgage Regulation Act* (Nova Scotia) (the Mortgage Regulations). In relying on the prospectus exemption in BO 45-528, the borrower is not subject to any filings with the Commission. In addition, the qualified syndicated mortgage can be subsequently transferred by the lender without further compliance with Nova Scotia securities laws as there are no resale restrictions.

Registration Requirement: The registration requirement will not be triggered for a one-off mortgage transaction by a borrower. However, if based on the factors in section 1.3 of the Companion Policy to NI 31-103, registration is required, and the mortgage meets the definition of a qualified syndicated mortgage, the borrower could also rely on the dealer registration exemption in section 1 of BO 45-528 provided the trade of the qualified syndicated mortgage involves persons

or companies that are licensed or exempt under legislation governing mortgage brokers in Nova Scotia other than being exempt under subsection 3(i) of the Mortgage Regulations.

Example #3: A borrower arranges a loan secured by a mortgage using a mortgage broker. The mortgage broker subsequently syndicates the mortgage to multiple lenders without the borrower being aware of the syndication.

The borrower's distribution of the mortgage initially is a traditional mortgage that would be exempt under section 2.36 of NI 45-106. However, the mortgage broker's subsequent syndication of the mortgage involves a detailed analysis of securities law requirements in Nova Scotia.

Prospectus Requirement: The mortgage broker, who in this case is distributing syndicated mortgage securities may be able to rely on the Accredited Investor exemption, the Minimum \$150,000 Investment exemption or the Offering Memorandum exemption in NI 45-106 if the conditions to those exemptions are satisfied. If a lender is a licensed mortgage broker in Nova Scotia and is investing as principal, then the mortgage broker may be able to rely on the prospectus exemption in section 2 of BO 45-528. If relying on any of these exemptions, the mortgage broker will have to file a Report of Exempt Distribution (Form 46-106F1) with the Commission. In addition, if any of the lenders transfer their interest in the syndicated mortgage to another party, such transfer is considered a distribution under NI 45-102 and will require compliance with the prospectus requirement or another prospectus exemption.

Registration Requirement of Mortgage Broker: The registration of the mortgage broker is triggered if the mortgage broker is in the business of brokering or dealing mortgages. As of March 1, 2021, the registration exemption in NI 31-103 for mortgages will not be available in connection with the syndication of the mortgage. However, depending on who the lenders are in the syndicate, the mortgage broker may be able to rely on the dealer registration exemptions in section 2 and/or 3 of BO 45-528 if the lenders are permitted clients and/or mortgage brokers participating as principal.

Questions

Any questions related to this Notice should be referred to:

H. Jane Anderson
Executive Director
Nova Scotia Securities Commission
Suite 400, Duke Tower 5251 Duke Street
Halifax, Nova Scotia B3J 1P3
Phone: (902) 424-0179
Email: jane.anderson@novascotia.ca

SCHEDULE A

Definitions

The following definition is set out in NI 45-106 and NI 31-103:

“syndicated mortgage” means a mortgage in which two or more persons or companies participate, directly or indirectly, as a lender in the debt obligation that is secured by the mortgage.

The following definition is set out in NI 31-103:

“permitted client” means any of the following:

- (a) a Canadian financial institution or a Schedule III bank;
- (b) the Business Development Bank of Canada incorporated under the Business Development Bank of Canada Act (Canada);
- (c) a subsidiary of any person or company referred to in paragraph (a) or (b), if the person or company owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of the subsidiary;
- (d) a person or company registered under the securities legislation of a jurisdiction of Canada as an adviser, investment dealer, mutual fund dealer or exempt market dealer;
- (e) a pension fund that is regulated by either the federal Office of the Superintendent of Financial Institutions or a pension commission or similar regulatory authority of a jurisdiction of Canada or a wholly-owned subsidiary of such a pension fund;
- (f) an entity organized in a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs (a) to (e);
- (g) the Government of Canada or a jurisdiction of Canada, or any Crown corporation, agency or wholly-owned entity of the Government of Canada or a jurisdiction of Canada;
- (h) any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government;
- (i) a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'île de Montréal or an intermunicipal management board in Québec;
- (j) a trust company or trust corporation registered or authorized to carry on business under the Trust and Loan Companies Act (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a managed account managed by the trust company or trust corporation, as the case may be;
- (k) a person or company acting on behalf of a managed account managed by the person or company, if the person or company is registered or authorized to carry on business as an adviser or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction;
- (l) an investment fund if one or both of the following apply:
 - (i) the fund is managed by a person or company registered as an investment fund manager under the securities legislation of a jurisdiction of Canada;
 - (ii) the fund is advised by a person or company authorized to act as an adviser under the securities legislation of a jurisdiction of Canada;
- (m) in respect of a dealer, a registered charity under the Income Tax Act (Canada) that obtains advice on the securities to be traded from an eligibility adviser, as defined in section 1.1 of National Instrument 45-106 Prospectus Exemptions, or an adviser registered under the securities legislation

- of the jurisdiction of the registered charity;
- (n) in respect of an adviser, a registered charity under the Income Tax Act (Canada) that is advised by an eligibility adviser, as defined in section 1.1 of National Instrument 45-106 Prospectus Exemptions, or an adviser registered under the securities legislation of the jurisdiction of the registered charity;
 - (o) an individual who beneficially owns financial assets, as defined in section 1.1 of National Instrument 45-106 Prospectus Exemptions, having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$5 million;
 - (p) a person or company that is entirely owned by an individual or individuals referred to in paragraph (o), who holds the beneficial ownership interest in the person or company directly or through a trust, the trustee of which is a trust company or trust corporation registered or authorized to carry on business under the Trust and Loan Companies Act (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction;
 - (q) a person or company, other than an individual or an investment fund, that has net assets of at least \$25 million as shown on its most recently prepared financial statements;
 - (r) a person or company that distributes securities of its own issue in Canada only to persons or companies referred to in paragraphs (a) to (q);

SCHEDULE B

Blanket Order No. 45-528

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED (the Act)

-AND-

IN THE MATTER OF
RELIEF FROM THE PROSPECTUS AND REGISTRATION REQUIREMENTS FOR
CERTAIN SYNDICATED MORTGAGES

ORDER
(SECTION 151A)

WHEREAS:

1. Unless otherwise defined in this Order, terms used in this Order that are defined in the Act, in National Instrument 14-101 *Definitions*, National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103), or National Instrument 45-106 *Prospects Exemptions* (NI 45-106) have the same meaning in this Order.
2. In this Order, the term "qualified syndicated mortgage" means a syndicated mortgage that satisfies all of the following:
 - (a) the syndicated mortgage secures a debt obligation on real property that satisfies all of the following:
 - i. more than 50 percent of the square footage of the real property is used for residential purposes;
 - ii. the real property includes no more than a total of four (4) residential occupancies;
 - iii. if used for both residential and non-residential purposes, the real property includes no more than one non-residential occupancy;
 - iv. the total debt obligation does not exceed \$2,000,000;
 - (b) the syndicated mortgage does not secure a debt obligation incurred for the construction or development of the real property;
 - (c) at the time the syndicated mortgage is arranged, the amount of the debt it secures, together with all other debt secured by mortgages on the real property that have

priority over, or the same priority as, the syndicated mortgage, assuming in all cases that the maximum amounts of any such mortgages are fully drawn, does not exceed ninety percent (90%) of the fair market value of the real property relating to the mortgage, excluding any value that may be attributed to proposed or pending development of the real property;

- (d) the syndicated mortgage cannot be subordinated to future financing without the consent of each lender;
 - (e) there is no existing agreement that requires lenders to consent to future subordination of the syndicated mortgage; and
 - (f) no person or company has the ability to consent to future subordination on behalf of the lenders of the syndicated mortgage without obtaining the consent of each lender.
3. The Nova Scotia Securities Commission (the Commission) is of the opinion that to order relief in these circumstances would not be prejudicial to the public interest.

IT IS ORDERED, pursuant to subsection 151A(1) of the Act, that:

1. The prospectus requirement in section 58 and the dealer registration requirement in section 31 of the Act do not apply to a distribution or trade of a qualified syndicated mortgage on real property in a jurisdiction of Canada if a person or company involved in the distribution or trade is licensed under legislation governing mortgage brokers in Nova Scotia or exempted from such licensing (other than being exempt under subsection 3(i) of the Regulations Respecting Exemptions to the *Mortgage Regulation Act* (Nova Scotia)).
2. The prospectus requirement in section 58 of the Act and the dealer registration requirement in section 31 of the Act do not apply to a distribution or trade of a syndicated mortgage on real property in a jurisdiction of Canada to a mortgage broker acting as principal that is licensed under legislation governing mortgage brokers in Nova Scotia, provided that:
 - a. the first trade of the syndicated mortgage is a distribution; and
 - b. an issuer that distributes the syndicated mortgage must, no later than 10 days after the distribution, file a Form 45-106F1 *Report of Exempt Distribution*.
3. The dealer registration requirement in section 31 of the Act does not apply to a trade in a syndicated mortgage on real property in a jurisdiction of Canada to a “permitted client” as such term is defined in NI 31-103, if a person or company involved in the trade is licensed under legislation governing mortgage brokers in Nova Scotia.

EFFECTIVE DATE

This Order comes into effect on March 1, 2021.

Dated at Halifax, Nova Scotia, this 26th day of February, 2021.

NOVA SCOTIA SECURITIES COMMISSION

(signed) "Paul Radford"

Paul E. Radford, Q.C., Chair