

NOVA SCOTIA SECURITIES COMMISSION

COMPANION POLICY 45-501CP TO RULE 45-501 STATUTORY LIABILITY FOR MISREPRESENTATIONS IN AN OFFERING MEMORANDUM UNDER CERTAIN EXEMPTIONS FROM THE PROSPECTUS REQUIREMENT

PART 1 APPLICATION

1.1 Introduction

The Rule specifies when the statutory rights of action for misrepresentation in section 138 of the Act will apply to an offering memorandum that has been furnished to a prospective purchaser in connection with a distribution of a security under certain prospectus exemptions.

1.2 Purpose

The purpose of the Policy is to provide guidance on how the Commission interprets or applies certain provisions of Nova Scotia securities laws relating to the provision of an offering memorandum when an issuer relies on a prospectus exemption.

PART 2 INTERPRETATION

2.1 Definitions

In the Policy,

“Act” means the *Securities Act*, R.S.N.S. 1989, chapter 418, as amended;

“CEDC Regulations” means the *Community Economic-Development Corporations Regulations*;

“Commission” means the Nova Scotia Securities Commission;

“NI 45-106” means National Instrument 45-106 *Prospectus and Registration Exemptions*;

“Nova Scotia securities laws” has the same meaning as in clause 2(1)(aab) of the Act;

“offering memorandum” has the same meaning as in clause 2(1)(ab) of the Act;

“Policy” means Companion Policy 45-501CP to Rule 45-501 Statutory Liability for Misrepresentations in an Offering Memorandum Under Certain Exemptions From the Prospectus Requirement;

“prospectus exemption” means an exemption from the prospectus requirement in section 58 of the Act; and

“Rule” means Rule 45-501 Statutory Liability for Misrepresentations in an Offering Memorandum Under Certain Exemptions From the Prospectus Requirement.

PART 3 OFFERING MEMORANDUM

3.1 Definition of offering memorandum

The Commission is of the view that the phrase “prepared primarily for delivery to and review by a prospective purchaser” in the definition of offering memorandum means the document is prepared in contemplation of soliciting an investment from a prospective purchaser.

3.2 Mandatory and voluntary use of offering memorandum

(1) An issuer must prepare an offering memorandum for use in connection with a distribution made in reliance on the prospectus exemptions in section 2.9 of NI 45-106 and subsection 3(2) of the CEDC Regulations.

(2) There is no requirement to provide an offering memorandum to a prospective purchaser in connection with a distribution made in reliance on a prospectus exemption in:

- (a) section 2.3 of NI 45-106 Accredited investor;
- (b) section 2.5 of NI 45-106 Family, friends and business associates;
- (c) section 2.10 of NI 45-106 Minimum amount investment;
- (d) section 2.19 of NI 45-106 Additional investment in investment funds; or
- (e) clause 77(1)(ah) of the Act.

An issuer may decide to prepare offering material that is delivered voluntarily to a prospective purchaser in connection with a distribution made in reliance on a prospectus exemption referred to in clauses (a) to (e) of this subsection. This offering material may constitute an offering memorandum which is defined generally to mean a document that describes the business and affairs of an issuer that is prepared primarily for delivery to and review by a prospective purchaser under a prospectus exemption.

3.3 Right of action for damages or rescission

(1) Section 138 of the Act describes the rights of action for a misrepresentation in an offering memorandum. Subsection 138(14) of the Act states that section 138 applies only with respect to an offering memorandum that has been furnished to a prospective purchaser in connection with a distribution of a security under a prospectus exemption specified in the regulations for the purpose of that section.

(2) Section 2.1 of the Rule specifies the following prospectus exemptions for the application of the rights in section 138 of the Act for an offering memorandum that has been furnished to a prospective purchaser in connection with a distribution of a security:

- (a) one of the following sections of NI 45-106:
 - (i) 2.3 Accredited investor;
 - (ii) 2.5 Family, friends and business associates;
 - (iii) 2.9 Offering memorandum;
 - (iv) 2.10 Minimum amount investment;
 - (v) 2.19 Additional investment in investment funds;
- (b) subsection 3(2) of the CEDC Regulations; and
- (c) clause 77(1)(ah) of the Act.

The rights apply when an offering memorandum is delivered mandatorily in connection with a distribution made in reliance on the prospectus exemption in section 2.9 of NI 45-106 or subsection 3(2) of the CEDC Regulations, or voluntarily in connection with a distribution made in reliance on a prospectus exemption in section 2.3, 2.5, 2.10 or 2.19 of NI 45-106 or clause 77(1)(ah) of the Act.

(3) An offering memorandum delivered in connection with a distribution of a security made otherwise than in reliance on the prospectus exemptions referred to in subsection (2) does not trigger the rights referred to in section 138 of the Act.

3.4 Content of offering memorandum

(1) Other than an offering memorandum delivered in connection with a distribution made in reliance on the prospectus exemption in section 2.9 of NI 45-106 or subsection 3(2) of the CEDC Regulations and subject to subsection (2), Nova Scotia securities laws generally do not prescribe the content of an offering memorandum. The decision relating to the appropriate disclosure in an offering memorandum generally rests with the issuer, the selling security holder and their advisers.

(2) Under subsection 65(3) of the Act, an offering memorandum must contain a statement of the rights described in section 138 of the Act and a statement that these rights are in addition to any other right or remedy available at law to the purchaser and must describe the time limitations in subsection 146(2) of the Act for enforcing a right under section 138 of the Act.

3.5 Delivery of offering memorandum to the Director

(1) Subsection 77(3) of the Act requires two copies of an offering memorandum that is voluntarily furnished to a purchaser in connection with a distribution under section 2.3, 2.5, 2.10 or 2.19 of NI 45-106 to be delivered to the Director concurrently with or before the date

upon which a report of trade is required to be filed with the Director under Part 6 of NI 45-106.

(2) Under subsection 2.9(17) of NI 45-106, an issuer must file with the Director a copy of an offering memorandum delivered under section 2.9 of NI 45-106 within 10 days of the distribution under the offering memorandum.

(3) Under clause 77(1B)(b) of the Act, a co-operative must file with the Director a copy of an offering memorandum that is sent or delivered to a member of a co-operative or a purchaser in connection with a distribution under clause 77(1)(ah) of the Act, other than a distribution referred to in subsection 77(1A) of the Act, at least 10 days before the first trade of securities offered under the offering memorandum.

(4) Prior to an offering of securities under the CEDC Regulations, the Director must issue a letter of non-objection to an offering document prepared in accordance with Form 1 of the CEDC Regulations. The offering document would be an offering memorandum by definition. The offering document is pre-filed with the Director for review and non-objection.

3.6 Review of offering memorandum

(1) An offering memorandum delivered to the Director under subsection 77(3) or clause 77(1B)(b) of the Act is not generally reviewed or commented on by Commission staff. If Commission staff becomes aware that an offering memorandum fails to disclose material information relating to a security that is the subject of a distribution, Commission staff may consider remedial action.

(2) An offering memorandum filed under subsection 2.9(17) of NI 45-106 by an issuer with its head office in Nova Scotia is reviewed by Commission staff under the monitoring program described in Notice No. 45-705 (Amendment) In the Matter of National Instrument 45-106 Capital Raising Exemption Monitoring Program. If there are substantial deficiencies in the offering memorandum, Commission staff may consider remedial action.

(3) An offering memorandum filed under the CEDC Regulations is fully reviewed by Commission staff.

3.7 Preliminary offering material

(1) The Commission cautions against providing preliminary offering material to a prospective purchaser before furnishing a “final” offering memorandum unless the offering material contains a description of the rights referred to in section 138 of the Act in situations when the rights apply.

(2) The CEDC Regulations govern the use of preliminary offering material for an offering of securities under subsection 3(2) of the CEDC Regulations.

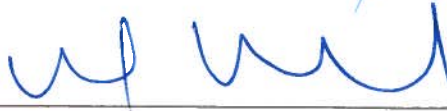
PART 4 EFFECTIVE DATE

4.1 The Policy is effective on March 31, 2014.

NOVA SCOTIA SECURITIES COMMISSION



Sarah P. Bradley, Chair



Paul Radford, Q.C., Vice-chair