

**NOVA SCOTIA SECURITIES COMMISSION
NOTICE AND REQUEST FOR COMMENT**

**PROPOSED RULE 45-501
STATUTORY LIABILITY FOR MISREPRESENTATIONS IN AN
OFFERING MEMORANDUM UNDER CERTAIN EXEMPTIONS
FROM THE PROSPECTUS REQUIREMENT**

AND

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

May 9, 2013

Introduction

The Nova Scotia Securities Commission (the Commission) is publishing for a 60 day comment period proposed Rule 45-501 Statutory Liability for Misrepresentations in an Offering Memorandum Under Certain Exemptions From the Prospectus Requirement (the Proposed Rule) and proposed Companion Policy 45-501CP to Rule 45-501 Statutory Liability for Misrepresentations in an Offering Memorandum Under Certain Exemptions From the Prospectus Requirement (the Proposed Policy).

The text of the Proposed Rule and Proposed Policy is contained in Annexes A and B of this notice and is available on the Commission's website at www.gov.ns.ca/nssc .

Background

An "offering memorandum" is defined in clause 2(1)(ab) of the *Securities Act*, R.S.N.S. 1989, chapter 418, as amended (the Act) as a document that describes the business and affairs of an issuer prepared primarily for delivery to and review by prospective purchasers to assist those purchasers to make an investment decision in respect of securities sold in a distribution under a prospectus exemption contained in Nova Scotia securities laws. In Nova Scotia, section 138 of the Act provides for a statutory right of action if a misrepresentation is contained in an offering memorandum that is provided to a prospective purchaser in a distribution of securities under any prospectus exemption, regardless of whether the offering memorandum was required to be provided as a condition of relying on the prospectus exemption or was voluntarily provided by the issuer.

There is no uniformity across Canada with respect to when misrepresentations contained in an offering memorandum provided to purchasers in a prospectus exempt offering will trigger statutory rights of action. For example, in British Columbia, statutory rights for misrepresentation only apply to an offering memorandum provided under the offering memorandum exemption in section 2.9 of National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106). In other jurisdictions such as Ontario, New Brunswick and Saskatchewan, statutory rights for misrepresentation apply only to certain specified prospectus exemptions set out in a local rule or order.

Periodically, Commission staff have been contacted by legal counsel representing issuers who are concerned about the more comprehensive application of statutory rights in Nova Scotia. These counsel have advised staff that for offerings where statutory liability will apply only to purchasers in Nova Scotia, issuers may decide not to make the offering in Nova Scotia, thus depriving Nova Scotia investors of investment opportunities. Alternatively, such issuers may make the offering in Nova Scotia but not provide the offering memorandum to the Nova Scotia purchasers. A concern has also been expressed that in an offering, purchasers in Nova Scotia would have rights that purchasers in other jurisdictions would not have, and that to amend the offering memorandum for Nova Scotia purchasers to include a description of the Nova Scotia rights would add to the time and expense of such an offering.

Further, in response to the request for comments in CSA Staff Consultation Note 45-401 *Review of Minimum Amount and Accredited Investor Exemptions*, several commenters suggested that the Canadian Securities Administrators adopt a uniform description of the statutory rights available to purchasers in the exempt market.

In the interests of moving towards harmonization with other jurisdictions of Canada, subsection 138(14), which is found in section 19 of the Securities Act (amended), S.N.S. 2012, chapter 34, is added to the Act. Subsection 138(14) states that the rights of action in section 138 of the Act apply only to an offering memorandum that has been furnished to a prospective purchaser in connection with a distribution of a security under a prospectus exemption that is specified in the regulations for the purpose of that section. The Proposed Rule provides these specifications. Subsection 138(14) will be proclaimed in force on the same date as the effective date of the Proposed Rule and Proposed Policy.

Substance and Purpose

The Proposed Rule is a local rule that 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. The prospectus exemptions specified in the Proposed Rule are:

- 1) the capital raising exemptions in NI 45-106 that are most frequently used in Nova Scotia and harmonized to the extent possible with Ontario, New Brunswick and Saskatchewan; and

2) the local prospectus exemptions for an offering of securities by a an issuer under the *Community Economic-Development Corporations Regulations* or by a Nova Scotia co-operative association.

The Proposed 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.

Alternatives Considered

No alternatives to the Proposed Rule and Proposed Policy were considered, other than for maintaining the status quo.

Anticipated Costs and Benefits

The Proposed Rule reflects the balancing of the interests of investor protection and fostering the process of capital formation. With the adoption of the Proposed Rule, Nova Scotia investors will no longer have a right of action for misrepresentation in an offering memorandum provided to purchasers in connection with every prospectus exemption. To our knowledge, however, these rights have never been exercised in the past. Therefore, the anticipated costs, if any, are likely to be minimal.

The benefit of the Proposed Rule is greater harmonization of prospectus exempt offering requirements with other Canadian jurisdictions. The exempt market forms a substantial part of the capital markets in Nova Scotia. This will result in capital market efficiency and the possibility of a greater number of investment opportunities for Nova Scotia investors.

Consequential Amendments

With the coming into effect of the Proposed Rule, the specification in section A of Blanket Order No. 45-518 In the Matter of Specifications Regarding Certain Offering Documents Under Rule 45-106 *Prospectus and Registration Exemptions* (Blanket Order 45-518) is no longer required and can be revoked. Section B of Blanket Order 45-518 relating to the confidentiality of Schedule 1 to Form 45-106F1 Report of Exempt Distribution (the Schedule) in NI 45-106 is still required. Blanket Order No. 45-520 In the Matter of the Confidentiality of Schedule 1 to Form 45-106F1 Report of Exempt Distribution (the Proposed Blanket Order), which is contained in Annex C, revokes Blanket Order 45-518 and requires the Director, pursuant to subsection 148(2) of the Act, to hold in confidence each Schedule that is filed under NI 45-106.

Authority for the Proposed Rule

The rule making authority for the Proposed Rule is in clauses 150(aw),(dk) and (eb) of the Act.

Comments

We welcome your comments on the Proposed Rule and Proposed Policy. Please send your comments in writing by **July 8, 2013**, to:

Shirley P. Lee
Director, Policy and Market Regulation
Nova Scotia Securities Commission
Suite 400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia
B3J 1P3
Phone: (902) 424-5441
Fax: (902) 424-4625
E-mail: lees@p@ns.ca

Content of Annexes

Annex A sets out the Proposed Rule

Annex B sets out the Proposed Policy

Annex C sets out the Proposed Blanket Order

Annex A

NOVA SCOTIA SECURITIES COMMISSION

RULE 45-501

**STATUTORY LIABILITY FOR MISREPRESENTATIONS IN AN
OFFERING MEMORANDUM UNDER CERTAIN EXEMPTIONS
FROM THE PROSPECTUS REQUIREMENT**

PART 1 DEFINITIONS

1.1 In this rule,

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

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

PART 2 STATUTORY RIGHTS OF ACTION IN AN OFFERING MEMORANDUM

2.1 With respect to an offering memorandum that has been furnished to a prospective purchaser in connection with a distribution of a security, the following exemptions from section 58 of the Act are specified for the purpose of the statutory rights of action for a misrepresentation in an offering memorandum in section 138 of the Act:

- (a) a prospectus exemption in 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 *Community Economic-Development Corporations Regulations*; and
- (c) clause 77(1)(ah) of the Act.

PART 3 EFFECTIVE DATE

3.1 This rule shall take effect on **XXXX**, unless the Minister disapproves the rule or returns it to the Commission in accordance with subsection 150A(3) of the Act in which event the rule shall not be effective until the rule is approved by the Minister.

IN WITNESS WHEREOF this Instrument is made a rule by the signatures of the Chair and Vice-chair of the Commission, being the members of the Commission prescribed by the Chair pursuant to subsection 15(3) of the Act to attend the hearing of this matter and the quorum with respect to this matter, on the XX day of XX, 2013.

Sarah P. Bradley, Chair

Paul Radford, Q.C., Vice-chair

Annex B

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:
 - (ii) 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 in 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, 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 **XXXX**, 2013.

Annex C

Blanket Order No. 45-520

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

-AND-

IN THE MATTER OF THE CONFIDENTIALITY OF
SCHEDULE 1 TO FORM 45-106F1
REPORT OF EXEMPT DISTRIBUTION

ORDER

(Section 151 and subsection 148(2))

WHEREAS:

1. On **XXXX**, 2013, the Commission approved Rule 45-501 Statutory Liability for Misrepresentations in an Offering Memorandum Under Certain Exemptions From the Prospectus Requirement (the Rule) and declared in the Rule that it shall take effect on **XXXX**, unless the Minister disapproves the Rule or returns it to the Commission in accordance with subsection 150A(3) of the Act in which event the Rule shall not be effective until it is approved by the Minister.
2. For the purpose of this order, the effective date of the Rule (the Effective Date) shall be **XXXX** if the Minister does not disapprove the Rule or return it to the Commission; otherwise, the Effective Date would be the date that the Rule is approved by the Minister.
3. 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.
4. As a result of the Rule, the specification in section A of Blanket Order No. 45-518 In the Matter of Specifications Regarding Certain Offering Documents Under Rule 45-106 *Prospectus and Registration Exemptions* (the Blanket Order) is no longer required and can be revoked.
5. Section B of the Blanket Order relating to Schedule 1 to Form 45-106F1 Report of Exempt Distribution (the Schedule) in National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106) is still required. The Schedule contains intimate financial and person information and the Commission has determined that the desirability of avoiding disclosure of this information in the interests of any person or company

affected outweighs the desirability of adhering to the principle that material filed with the Director be available to the public for inspection.

6. The Commission is satisfied that to do so would not be prejudicial to the public interest.

A. Revocation of the Blanket Order

IT IS ORDERED, pursuant to section 151 of the Act, that the Blanket Order is revoked.

B. Confidentiality of the Schedule

The Commission, pursuant to subsection 148(2) of the Act, requires the Director to hold in confidence each Schedule that is filed under NI 45-106.

Dated at Halifax, Nova Scotia, this day of XXXX, 2013, effective on the Effective Date.

NOVA SCOTIA SECURITIES COMMISSION

Sarah P. Bradley, Chair

Paul Radford, Q.C., Vice-chair