

5.1.5 Changes to Companion Policy 45-106CP Prospectus Exemptions

The following reflects changes to Companion Policy 45-106CP *Prospectus Exemptions* that will take effect upon the coming into force of the amendments to National Instrument 45-106 *Prospectus Exemptions* related to the offering memorandum prospectus exemption. Additions are represented with underlined text and deletions are represented with strikethrough text.

PART 1 – INTRODUCTION

1.8 Persons created to use exemptions (“syndication”)

Sections 2.3(5), 2.4(1), 2.9(3), 2.9(3.0.1) and 2.10(2) of NI 45-106 specifically prohibit syndications. A distribution of securities to a person that had no pre-existing purpose and is created or used solely to purchase or hold securities under exemptions (a “syndicate”) may be considered a distribution of securities to the persons beneficially owning or controlling the syndicate.

For example, a newly formed company with 15 shareholders is set up with the intention of purchasing \$150 000 worth of securities under the minimum amount investment exemption. Each shareholder of the newly formed company contributes \$10 000. In this situation the shareholders of the newly formed company are indirectly investing \$10 000 when the exemption requires that they each invest \$150 000. Consequently, both the newly formed company and its shareholders may need to comply with the requirements of the minimum amount investment exemption, or find an alternative exemption to rely on.

Syndication related concerns should not ordinarily arise if the purchaser under the exemption is a corporation, syndicate, partnership or other form of entity that is pre-existing and has a bona fide purpose other than investing in the securities being sold. However, it is an inappropriate use of these exemptions to indirectly distribute securities when the exemption is not available to directly distribute securities to each person in the syndicate.

PART 3 – CAPITAL RAISING EXEMPTIONS

3.3 Advertising

NI 45-106 does not restrict the use of advertising to solicit or find purchasers. However, issuers and selling security holders should review other securities legislation and securities directions for guidelines, limitations and prohibitions on advertising intended to promote interest in an issuer or its securities. For example, any advertising or marketing communications must not contain a misrepresentation and should be consistent with the issuer’s public disclosure record.

3.3.1 Advertising and marketing materials under the offering memorandum exemption

In Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, an offering memorandum prepared in accordance with the offering memorandum exemption in section 2.9(2.1) of NI 45-106 must incorporate by reference any marketing materials used in relation to a distribution under the offering memorandum exemption. Subsection 2.9(8) of NI 45-106 requires the issuer to sign a certificate that indicates that the offering memorandum does not contain a misrepresentation. As marketing materials are incorporated by reference into the offering memorandum, the issuer must also ensure that the information contained in marketing materials does not contain a misrepresentation.

In these jurisdictions, an issuer or registrant that uses marketing materials as part of an offering made in reliance on the offering memorandum exemption must review the marketing materials to confirm that they are consistent with the offering document and are fair, balanced and not misleading. In addition, these jurisdictions expect an issuer or registrant to determine whether any claims set out in marketing materials adequately refer to information to support these claims and representations. For example, if benchmarks are used for comparison purposes, the issuer or registrant should assess whether the benchmarks are relevant and comparable to the investment in question and confirm the marketing materials:

- (a) adequately explain differences between the benchmark and the investment,
- (b) make reference to the source of the benchmark and identify the date to which the information is current, and
- (c) where relevant, caution purchasers that historical performance is not necessarily indicative of future results.

Issuers that prepare offering memoranda in accordance with Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers*, are also required to comply with requirements relating to forward-looking information, which are described in Instructions A.12 and B.14 of Form 45-106F2. Issuers cannot disseminate material forward-looking information unless it is contained within the offering memorandum. Additionally, forward-looking information contained in an offering memorandum must comply with certain requirements in National Instrument 51-102 *Continuous Disclosure Obligations*. These requirements also extend to marketing materials that are used in connection with a distribution under the offering memorandum exemption.

In these jurisdictions, if an issuer or registrant intends to rely on marketing materials prepared by a third party, such as an analyst report that rates a security or compares a security with securities of other issuers, the issuer or registrant is expected to perform its own assessment of the marketing materials to confirm that they are fair, balanced and not misleading. For example, if the report has been paid for by the issuer, or if there are other relationships between the analyst and the issuer, it would be inappropriate to describe the report as being an “independent” report. The report should also prominently disclose the fees paid and relationships between the analyst and the issuer. An issuer or registrant should not rely on marketing materials prepared by a third party without independently reviewing the materials prior to use.

A registrant should be aware of other CSA guidance on the review and use of marketing materials and reliance on marketing materials prepared by third parties.

3.4 Restrictions on finder’s fees or commissions

The following restrictions apply with respect to certain exemptions under NI 45-106:

- (1) no commissions or finder’s fees may be paid to directors, officers, founders and control persons in connection with a distribution made under the private issuer exemption or the family, friends and business associates exemption, except in connection with a distribution of a security to an accredited investor under the private issuer exemption; and
- (2) in Northwest Territories, ~~and Nunavut and Saskatchewan~~, only a registered dealer may be paid a commission or finder’s fee in connection with a distribution of a security to a purchaser in one of those jurisdictions under the offering memorandum exemption.

3.8 Offering memorandum

- (1) Eligibility criteria – ~~Alberta, Manitoba, Northwest Territories, Nunavut, and Prince Edward Island, Québec and Saskatchewan~~

~~Alberta, Manitoba, Northwest Territories, Nunavut, Prince Edward Island, Québec, Saskatchewan, and Yukon~~ impose eligibility criteria on persons investing under the offering memorandum exemption. In these jurisdictions, the purchaser must be an eligible investor if the purchaser’s acquisition cost is more than \$10 000.

In determining the acquisition cost to a purchaser who is not an eligible investor, include any future payments that the purchaser will be required to make. Proceeds that may be obtained on exercise of warrants or other rights, or on conversion of convertible securities, are not considered to be part of the acquisition cost unless the purchaser is legally obligated to exercise or convert the securities. The \$10 000 maximum acquisition cost is calculated per distribution of security.

Nevertheless, concurrent and consecutive, closely-timed offerings to the same purchaser will usually constitute one distribution of a security. Consequently, when calculating the acquisition cost, all of these offerings by or on behalf of the issuer to the same purchaser who is not an eligible investor would be included. It would be inappropriate for an issuer to try to circumvent the \$10 000 threshold by dividing a subscription in excess of \$10 000 by one purchaser into a number of smaller subscriptions of \$10 000 or less that are made directly or indirectly by the same purchaser.

A purchaser can qualify as an eligible investor under various categories of the definition, including if the purchaser has and has had in prior years either \$75 000 pre-tax net income or profit or has \$400 000 worth of net assets. In calculating a purchaser’s net assets, subtract the purchaser’s total liabilities from the purchaser’s total assets. The value attributed to assets should reasonably reflect their estimated fair value. Income tax should be considered a liability if the obligation to pay it is outstanding at the time of the distribution of a security.

Another way a purchaser can qualify as an eligible investor is to obtain advice from an eligibility adviser. An eligibility adviser is a person registered as an investment dealer (or in an equivalent category of unrestricted dealer in the purchaser’s jurisdiction) that is authorized to give advice with respect to the type of security being distributed. In ~~Saskatchewan and Manitoba~~, certain lawyers and public accountants may also act as eligibility advisers.

A registered investment dealer providing advice to a purchaser in these circumstances is expected to comply with the “know your client” and suitability requirements under applicable securities legislation and SRO rules and policies. Some dealers have obtained exemptions from the “know your client” and suitability requirements because they do not provide advice. An assessment of suitability by these dealers is not sufficient to qualify a purchaser as an eligible investor.

(1.1) Eligibility criteria and investment limits – Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan

(a) Eligibility criteria

Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan impose eligibility criteria on persons investing under the offering memorandum exemption.

The qualification criteria for becoming an eligible investor are substantially the same as in the jurisdictions identified in subsection (1), above. Note, however, that in Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, it is not possible to qualify as an eligible investor by receiving advice from an “eligibility advisor”.

A purchaser can qualify as an eligible investor under various categories of the definition, including if the purchaser has and has had in prior years either \$75 000 pre-tax net income or profit or has \$400 000 worth of net assets. In calculating a purchaser’s net assets, subtract the purchaser’s total liabilities from the purchaser’s total assets. The value attributed to assets should reasonably reflect their estimated fair value. Income tax should be considered a liability if the obligation to pay it is outstanding at the time of the distribution of a security.

(b) Investment limits for individual eligible and non-eligible investors

Both eligible investors and purchasers that do not qualify as eligible investors (non-eligible investors) who are individuals are subject to investment limits under the offering memorandum exemption. In these jurisdictions, non-eligible investors who are individuals are subject to an investment limit of \$10 000 and eligible investors who are individuals are subject to an investment limit of \$30 000. In both cases, the investment limits apply to all securities acquired by the purchaser under the offering memorandum exemption in the preceding 12 months.

However, an individual purchaser that qualifies as an eligible investor because the investor is an accredited investor or is a person described in the family, friends and business associates exemption, is not subject to an investment limit under the offering memorandum exemption.

The fact that investment limits have been established for eligible and non-eligible investors who are individuals does not mean that these amounts are suitable investments in all cases. If a registrant is involved in a transaction, the registrant must still conduct a suitability assessment to determine that the amount of the investment and the investment itself is suitable for the purchaser. This may result in a lower investment amount for a purchaser.

The \$30 000 investment limit may be exceeded by an eligible investor who receives advice from a portfolio manager, investment dealer or exempt market dealer that exceeding the investment limit of \$30 000 and the investment itself is suitable for the eligible investor. In this case, the investment limit for all securities acquired by the purchaser under the offering memorandum exemption in the preceding 12 months is \$100 000.

In determining the acquisition cost to a purchaser subject to investment limits, include any future payments that the purchaser will be required to make. Proceeds that may be obtained on exercise of warrants or other rights, or on conversion of convertible securities, are not considered to be part of the acquisition cost unless the purchaser is legally obligated to exercise or convert the securities.

“Individual” is defined in the securities legislation of certain jurisdictions to mean a natural person. The definition specifically excludes partnerships, unincorporated associations, unincorporated syndicates, unincorporated organizations and trusts. It also specifically excludes a natural person acting in the capacity of trustee, executor, administrator or personal or other legal representative.

(c) Circumstances when investment limits can be exceeded

The fact that higher investment limits apply to individual eligible investors than individual non-eligible investors does not mean these higher amounts will be suitable in all cases for eligible investors. It is a condition of the offering memorandum exemption that, in order to exceed the \$30 000 investment limit, a registrant must determine that an investment above the \$30,000 investment limit is suitable for the purchaser. Unless a registrant determines that exceeding the \$30 000 investment limit is suitable for the purchaser, the issuer cannot accept a subscription in excess of \$30 000 from the purchaser. In this case, the registrant could also not proceed to take instructions from the purchaser to exceed the \$30 000 investment limit.

(d) Investment limits apply over a 12-month period

The investment limits for both individual eligible and non-eligible investors apply to the aggregate of all investments made by a purchaser in distributions by different issuers (or multiple offerings by the same issuer) under the offering memorandum exemption during the preceding 12 months, which may or may not be a calendar year. For example, if a purchaser wishes to

acquire securities of an issuer under the offering memorandum exemption on January 15, the issuer must include in the calculation all investments made by the purchaser under the offering memorandum exemption beginning on January 16 of the prior year, up to and including the date of the proposed investment.

On each distribution, the issuer must confirm that the amount invested by a purchaser who is an individual does not exceed the applicable limit and should take reasonable steps to do so. This will require the issuer to first understand whether or not the purchaser is an eligible investor. As described above in section 1.9, the issuer should gather information that confirms the purchaser meets the criteria set out in the exemption. As part of this exercise, the issuer should also discuss with the purchaser the investment limits that apply to the purchaser.

In making a determination as to whether a purchaser is within the applicable investment limit, an issuer should obtain appropriate representations from the purchaser that confirm the purchaser has not exceeded the applicable investment limit over the relevant period. Note that we would have concerns if an issuer simply accepted standard representations from a purchaser without taking steps to verify the representations made by the purchaser. For instance, inquiries could be made with respect to other investments made under the offering memorandum exemption during the 12-month period preceding the current investment.

Notwithstanding the representations made by a purchaser in the schedules to the risk acknowledgement form, we expect an issuer to be able to explain what steps were taken to verify the representations made by the purchaser. We recognize that in many circumstances, a registrant may act as agent on behalf of an issuer for this process. In both cases, the guidance in section 1.9 above may also be instructive for this purpose.

(1.2) Role of registrant in providing suitability advice and conflicts of interest

A registrant involved in a distribution of securities pursuant to a prospectus exemption must not only establish that the prospectus exemption is available, it must also comply with its registrant obligations, including know-your-client, know-your-product and suitability. In assessing the level of investment that may be suitable for a purchaser under the offering memorandum exemption, registrants should take into consideration guidance published by the CSA on best practices for conducting a suitability assessment, which includes considering the level of concentration of investments in the client's portfolio.

NI 31-103 and the related companion policy provide a framework that requires registrants to identify and respond to material conflicts of interest that may affect their ability to meet their regulatory obligations, including suitability.

Where a registrant is providing suitability advice to a purchaser in respect of an offering by a related or connected issuer, we expect the registrant that is related or connected to the issuer to be aware of the material conflicts that arise in these circumstances, and to take appropriate steps to respond to the conflicts to ensure it is fulfilling its regulatory obligations. We expect a registrant to be able to demonstrate that it is addressing the conflicts by avoiding or managing and disclosing the conflicts of interest appropriately to ensure compliance with its obligation to deal fairly, honestly and in good faith with clients.

We expect all registrants to be aware of other CSA guidance on registrant obligations with respect to know-your-client, know-your-product and suitability, and identify and respond to conflicts of interest.

(5.1) Filing of marketing materials

In Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, marketing materials used in the context of an offering made in reliance on the offering memorandum exemption must also be filed with the securities regulatory authority. Once the marketing materials have been filed, there is no need to file them again after subsequent closings, unless there is a change to the marketing materials.

(7) Types of securities that can be distributed under the exemption – Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan

In Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, issuers are prohibited from distributing certain types of securities under the offering memorandum exemption, including specified derivatives and structured finance products. Note that this is in addition to the prohibition in subsection 2.9(3.1) against distributions of short-term securitized products under the offering memorandum exemption.

These types of securities have been excluded because the purpose of the exemption is for raising capital and it is not intended to be used to distribute complex or novel securities to purchasers. We would have concerns if issuers relied on the offering memorandum exemption to distribute novel or complex securities, even if they do not fall within the prohibited categories.

(8) Ongoing disclosure – Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan

In Alberta, New Brunswick, Ontario, Québec and Saskatchewan, non-reporting issuers that issue securities under the offering memorandum exemption are required, in respect of each financial year, to file or deliver (as applicable) to the securities regulatory authority and make available to purchasers, audited annual financial statements within 120 days from the issuer's financial year end. In Nova Scotia, issuers are not required to file or deliver these financial statements to the securities regulatory authority, but are only required to make them available to purchasers that acquired securities under the offering memorandum exemption.

The following table illustrates when the first audited annual financial statements of an issuer would be due, as required by subsections (17.4), (17.5) and (17.6), following an initial distribution of securities under the offering memorandum exemption. The examples in the table take into account the extension to the filing deadline provided by subsection (17.7).

The following examples assume the issuer's financial year end is December 31.

<u>Date of formation</u>	<u>Date of first distribution under subsection 2.9(2.1)</u>	<u>Deadline for first annual financial statements under subsections 2.9(17.4), (17.5) and (17.6)</u>	<u>Financial periods included in annual financial statements</u>	<u>Notes</u>
<u>January 1, 20X3</u>	<u>April 15, 20X7</u>	<u>June 14, 20X7</u>	<u>December 31, 20X6 and December 31, 20X5</u>	<u>The issuer completes its first distribution under the offering memorandum exemption in subsection 2.9(2.1) before the filing deadline for annual financial statements, which would be April 30, 20X7. Since the distribution was completed so close to the filing deadline, the issuer can take advantage of the extension in subsection 2.9(17.7) and file the statements on June 14, 20X7.</u>
<u>January 1, 20X7</u>	<u>April 15, 20X7</u>	<u>April 30, 20X8</u>	<u>December 31, 20X7</u>	<u>The issuer completes its first distribution under the offering memorandum exemption in subsection 2.9(2.1) before the filing deadline for annual financial statements, which would be April 30, 20X7. However, since the issuer has not completed a financial year, the issuer would not be required to file annual financial statements until April 30, 20X8 for the financial year ended December 31, 20X7.</u>

<u>Date of formation</u>	<u>Date of first distribution under subsection 2.9(2.1)</u>	<u>Deadline for first annual financial statements under subsections 2.9(17.4), (17.5) and (17.6)</u>	<u>Financial periods included in annual financial statements</u>	<u>Notes</u>
<u>January 1, 20X3</u>	<u>June 15, 20X7</u>	<u>April 30, 20X8</u>	<u>December 31, 20X7 and December 31, 20X6</u>	<u>The issuer completes its first distribution under the offering memorandum exemption in subsection 2.9(2.1) after the filing deadline for annual financial statements in 20X7. The offering memorandum would already include audited annual financial statements for the year ended December 31, 20X6. The next audited annual financial statements of the issuer would be required to be filed by April 30, 20X8 for the year ended December 31, 20X7.</u>

The requirement to file or deliver (as applicable) to the securities regulatory authority and make available to purchasers annual financial statements continues to apply each year after the initial distribution under subsection 2.9(2.1) until the earlier of (1) the date the issuer becomes a reporting issuer and (2) the date the issuer ceases to carry on business.

(9) Ongoing disclosure – notice of specified key events – New Brunswick, Nova Scotia and Ontario

In addition to audited annual financial statements and a notice of how the proceeds raised under the offering memorandum exemption have been used, non-reporting issuers that issue securities in reliance on the offering memorandum exemption in New Brunswick, Nova Scotia and Ontario must also make available to investors a notice of certain key events, within 10 days of the occurrence of the event. These events are considered to be significant changes in the business of the issuer of which purchasers should be notified. This requirement is in addition to any similar requirement under corporate law and also applies to non-reporting issuers with non-corporate structures, such as trusts or partnerships.

In making a determination as to whether an issuer’s industry has changed, issuers may consider whether they would identify a different industry category on Form 45-106F1 *Report of Exempt Distribution* than the category previously identified.

A non-reporting issuer must continue to provide notice of the specified events, if applicable, until the earlier of (i) the date the issuer becomes a reporting issuer or (ii) the date the issuer ceases to carry on business.

(10) Meaning of “make reasonably available”

In Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, disclosure documents will be considered to have been made reasonably available to each holder of a security acquired under the offering memorandum exemption if the documents are mailed to security holders, or if security holders receive notice that the disclosure documents can be viewed on a public website of the issuer or a website accessible by all holders of securities acquired under subsection 2.9(2.1) of the issuer (such as a password protected website). Issuers should take reasonable steps to enable purchasers to receive or access these documents promptly.

PART 5 – FORMS

5.2 Forms required under the offering memorandum exemption

NI 45-106 designates two forms of offering memorandum. The first, Form 45-106F2, is for non-qualifying issuers and the second, Form 45-106F3, can only be used by qualifying issuers (as defined in NI 45-106).

The required form of risk acknowledgment under sections 2.9(1), ~~and 2.9(2)~~ and 2.9(2.1) of NI 45-106 is Form 45-106F4.

Rules and Policies

In Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan, Form 45-106F4, required under subsection 2.9(2.1), includes Schedule 1 *Classification of Investors Under the Offering Memorandum Exemption*, with respect to eligibility of individual investors, and Schedule 2 *Investment Limits for Investors Under the Offering Memorandum Exemption*, with respect to investment limits of individual investors.