

Ontario Securities Commission

Companion Policy 45-501CP

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**COMPANION POLICY 45-501CP
ONTARIO PROSPECTUS AND REGISTRATION EXEMPTIONS**

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PART 1 APPLICATION

Introduction

1.1 Ontario Securities Commission Rule 45-501 *Ontario Registration and Prospectus Exemptions* (the Rule) concerns exemptions from the registration requirement and from the prospectus requirement.

Purpose

1.2 The purpose of this companion policy (the Policy) is to help users understand how the Commission interprets or applies certain provisions of the Rule. The Policy includes explanations, discussion and examples of various parts of the Rule.

PART 2 OTHER EXEMPTIONS AND DISCRETIONARY RELIEF

Other exemptions

2.1 In addition to the exemptions in the Rule, exemptions may also be available to persons under National Instrument 45-106 *Prospectus Exemptions* (NI 45-106) and other provisions of Ontario securities legislation, including exemptions from the registration requirement under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103).

Discretionary relief

2.2 In addition to the exemptions contained in the Rule and those available under other provisions of Ontario securities legislation, the Commission has the discretion to grant exemptions from the prospectus requirement and from the registration requirement.

PART 3 GENERAL

Availability of Registration Exemptions

3.0 With the exception of the dealer registration exemptions set out in sections 3.3 [Commodity futures option or contract] and 3.4 [*Security of a co-operative*], section 3.0 of the Rule withdraws the availability of all of the dealer registration exemptions set out in Part 3 of the Rule after the coming into force of NI 31-103 (and the transition period provided for in section 3.0). The withdrawal of the availability of these registration exemptions reflects the anticipated adoption of a "business trigger" for the dealer registration requirement, as a precondition to the coming into force of NI 31-103.

Under the business trigger, persons who are not in the business of trading securities will not be subject to the dealer registration requirement and will not require an exemption from the dealer registration requirement for their trading activities. Persons who are in the business of trading securities will generally be required to register as a dealer. The exemptions from the dealer registration requirement set out in section 3.3 and 3.4 of the Rule relate to circumstances where

the trading activity or person involved in the trading activity is subject to another regulatory regime.

All distributions are subject to securities legislation

3.1 (1) Ontario securities legislation applies to any trade in a security in Ontario, whether or not the issuer of the security is a reporting issuer in Ontario.

(2) The definition of "trade" includes any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a trade. A person who engages in these activities, or other trading activities, in Ontario must comply with Ontario securities legislation.

Multi-jurisdictional distributions

3.2 A distribution can occur in more than one jurisdiction. If it does, the person conducting the distribution must comply with the securities legislation of each jurisdiction in which the distribution occurs.

Responsibility for compliance

3.3 A person distributing or trading securities is responsible for determining when an exemption is available. In determining whether an exemption is available, a person may rely on factual representations by a purchaser, provided that the person has no reasonable grounds to believe that those representations are false. However, the person distributing or trading securities is responsible for determining whether, given the facts available, the exemption is available. A person distributing or trading securities under an exemption should retain all necessary documents that show that the person properly relied on the exemption. It is not appropriate for a person to assume an exemption is available.

Advisers

3.4 Subsection 1.4(2) of the Rule provides that an exemption from the dealer registration requirement is an exemption from the underwriter registration requirement. However, it is not an exemption from the adviser registration requirement. The adviser registration requirement is distinct from the dealer registration requirement. Under Ontario securities legislation, persons engaged in the business of, or holding themselves out as being in the business of, advising others as to the investing in or buying or selling of securities are required to be registered as an adviser or have an exemption from this registration requirement. Accordingly, only persons that are registered advisers or exempt from the requirement to be registered as advisers may act as advisers in connection with a trade made under the Rule.

Underwriters

3.5 (1) Underwriters should not sell securities to the public without providing a prospectus. If an underwriter purchases securities with a view to distribution, the underwriter should purchase the securities under the exemption from the prospectus requirement in section 2.33 of NI 45-106. If the underwriter purchases securities under this exemption, the first trade in the securities will be a distribution. As a result, the underwriter will only be able to resell the securities if it can rely on another exemption from the prospectus requirement, or if a prospectus is delivered to the purchasers of the securities.

(2) There may be legitimate transactions where a dealer purchases securities under an exemption from the prospectus requirement other than the exemption in section 2.33 of NI 45-106; however, these transactions are only appropriate when the dealer purchases the securities with investment intent and not with a view to distribution.

(3) If a dealer purchases securities through a series of exempt transactions in order to avoid the obligation to deliver a prospectus, the transactions will be viewed as a whole to determine if they constitute a distribution. If a transaction is in effect an indirect distribution, a prospectus will be required to qualify the sale of the securities despite the fact that each interim step in the transaction could otherwise be completed under an exemption from the prospectus requirement. Such indirect distributions cannot be legitimately structured under NI 45-106 or the Rule.

Soliciting purchasers

3.6 (1) Generally, a person is a market intermediary if the person is in the business of trading in securities as principal or agent. The term "market intermediary" is defined in Ontario Securities Commission Rule 14-501 *Definitions*.

(2) The Commission takes the position that if an issuer retains an employee whose primary job function is to actively solicit members of the public for the purposes of selling the issuer's securities, the issuer and its employees are in the business of selling securities. Further, if an issuer and its employees are deemed to be in the business of selling securities, the Commission considers both the issuer and its employees to be market intermediaries. This applies whether the issuer and its employees are located in Ontario and solicit members of the public outside of Ontario or whether the issuer and its employees are located outside of Ontario and solicit members of the public in Ontario. Accordingly, in order to be in compliance with Ontario securities legislation, these issuers and their employees should be registered under the appropriate category of registration in Ontario.

PART 4 INTERPRETATION

Definitions

4.1 Unless defined in the Rule, terms used in the Rule have the meaning given to them in Ontario securities legislation, including National Instrument 14-101 *Definitions*.

Executive officer

4.2 (1) The definition of "executive officer" in the Rule is based on the definition of the same term in National Instrument 51-102 *Continuous Disclosure Obligations*.

(2) The definition includes someone who "performs a policy-making function" in respect of an issuer. The Commission is of the view that an individual who "performs a policy-making function" in respect of an issuer is someone who is responsible, solely or jointly with others, for setting the direction of the issuer and is sufficiently knowledgeable of the business and affairs of the issuer so as to be able to respond meaningfully to inquiries from investors about the issuer.

(3) Paragraph (c) of the definition of "executive officer" includes individuals that are not employed by the issuer or any of its subsidiaries, but who perform a policy-making function in respect of the issuer.

Directors, executive officers and officers of non-corporate issuers

4.3 (1) Non-corporate issuers must determine which individuals are acting in capacities similar to that of directors and officers of corporate issuers for the purpose of complying with the Rule.

(2) The term "director" is defined in the Rule and it includes, for non-corporate issuers, individuals who perform functions similar to those of a director of a company.

(3) When the term "officer" is used in the Rule, a non-corporate issuer should refer to the definition in the Act, which defines the term to include any individual acting in a capacity similar to that of an officer of a company.

PART 5 OFFERING MEMORANDUM

Definition of offering memorandum

5.1 (1) "Offering memorandum" is defined in Ontario Securities Commission Rule 14-501 *Definitions*.

(2) 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 the prospective purchaser.

Mandatory and voluntary use of offering memorandum

5.2 (1) An issuer must prepare an offering memorandum for use in connection with a distribution made in reliance on the prospectus exemption in section 73.5 of the Act [*Government incentive security*].

(2) There is no obligation to prepare an offering memorandum for use in connection with a distribution made in reliance on a prospectus exemption in:

- (a) section 73.3 of the Act [*Accredited investor*],
- (b) section 73.4 of the Act [*Private issuer*],
- (b.1) section 2.5 of NI 45-106 [*Family, friends and business associates*],
- (c) [Repealed]
- (d) section 2.8 of NI 45-106 [*Affiliates*]
- (e) section 2.10 of NI 45-106 [*Minimum amount investment*], or
- (f) section 2.19 of NI 45-106 [*Additional investment in investment funds*].

Business practice may dictate the preparation of offering material that is delivered voluntarily to a prospective purchaser in connection with a distribution made in reliance on a prospectus exemption in section 73.3 of the Act, 73.4 of the Act, 2.5, 2.8, 2.10 or 2.19 of NI 45-106. This offering material may constitute an "offering memorandum" as defined in Ontario Securities Commission Rule 14-501 *Definitions*.

Right of action for damages and right of rescission

5.3 (1) Part 5 of the Rule provides for the application of the rights referred to in section 130.1 of the Act if an offering memorandum is delivered to a prospective purchaser in connection with a distribution made in reliance on a prospectus exemption in:

- (a) section 73.3 of the Act or a predecessor exemption to section 73.3 of the Act (subject to the provisions of subsection 6.2(2) of the Rule) [*Accredited investor*],
- (b) section 73.4 of the Act or a predecessor exemption to section 73.4 of the Act [*Private issuer*],
- (b.1) section 2.5 of NI 45-106 [*Family, friends and business associates*],
- (c) [Repealed]
- (d) section 2.8 of NI 45-106 [*Affiliates*],
- (d.1) section 2.9 of NI 45-106 [*Offering memorandum*],
- (e) section 2.10 of NI 45-106 [*Minimum amount investment*],
- (f) section 2.19 of NI 45-106 [*Additional investment in investment funds*],
- (f.1) section 5 of Multilateral Instrument 45-108 Crowdfunding [*Crowdfunding prospectus exemption*], or
- (g) section 73.5 of the Act or a predecessor exemption to section 73.5 of the Act [*Government incentive security*].

The rights apply when the offering memorandum is delivered mandatorily in connection with a distribution made in reliance on the exemption in section 73.5 of the Act or a predecessor exemption to section 73.5 of the Act, in accordance with the requirements of section 5 of Multilateral Instrument 45-108 Crowdfunding [*Crowdfunding prospectus exemption*], or voluntarily in connection with a distribution made in reliance on a prospectus exemption in section 73.3 of the Act or a predecessor exemption to section 73.3 of the Act, section 73.4 of the Act or a predecessor exemption to section 73.4 of the Act, 2.5, 2.8, 2.10 or 2.19 of NI 45-106.

(2) A document delivered in connection with a distribution in a security made otherwise than in reliance on the prospectus exemptions referred to in subsection (1) does not give rise to the rights referred to in section 130.1 of the Act or subject the selling security holder to the requirements of Part 5 of the Rule.

Content of offering memorandum

5.4 (1) Other than in the case of an offering memorandum delivered in connection with a distribution made in reliance on the exemption in section 73.5 of the Act or a predecessor exemption to section 73.5 of the Act, section 5 of 45-108 Multilateral Instrument 45-108 Crowdfunding [*Crowdfunding prospectus exemption*], and subject to subsection (2), Ontario securities legislation generally does 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 advisors.

(2) Under section 5.3 of the Rule, the rights referred to in section 130.1 of the Act must be described in an offering memorandum delivered in connection with a distribution to which the rights apply.

Review of offering memorandum

5.5 (1) Staff may review the form and content of an offering memorandum filed in connection with a distribution made in reliance on the exemption in section 5 of Multilateral Instrument 45-108 Crowdfunding [*Crowdfunding prospectus exemption*] or delivered in connection with a distribution made in reliance on another exemption referred to in Part 5 of the Rule, for the purpose of determining whether the issuer has complied with the requirements, conditions and restrictions of the exemption relied on for the distribution.

(2) If Commission staff becomes aware that an offering memorandum contains a misrepresentation, fails to disclose material information relating to a security that is the subject of a distribution, or the distribution otherwise fails to comply with Ontario securities law, staff may recommend remedial action or, in appropriate circumstances, enforcement action.

Preliminary offering material

5.6 (1) The Commission cautions against the practice of 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 130.1 of the Act in situations when the rights apply.

- (2) The only material delivered to a prospective purchaser in connection with a distribution made in reliance on a prospectus exemption referred to in section 5.1 of the Rule should be:
- (a) a "term sheet" (representing a skeletal outline of the features of a distribution without dealing extensively with the business or affairs of the issuer of the securities being distributed) or in the case of a distribution made in reliance on the exemption in section 2.9 of NI 45-106 [*Offering memorandum*] an "OM standard term sheet", as that term is defined in NI 45-106,
 - (b) an offering memorandum describing the rights referred to in section 130.1 of the Act available to purchasers and complying in all other respects with Ontario securities legislation, and
 - (c) a video, in the case of a distribution made in reliance on the exemption in section 5 of Multilateral Instrument 45-108 *Crowdfunding* [*Crowdfunding prospectus exemption*].

Availability of offering memorandum

5.7 Subject to *Freedom of Information and Protection of Privacy Act* requests, it is the Commission's policy that an offering memorandum delivered to the Commission under section 5.4 of the Rule will not be made available to the public.

PART 6 REPORTING REQUIREMENTS

Report of exempt distribution

6.1 (1) Section 6.1 of the Rule requires an issuer that has distributed a security of its own issue under section 73.5 of the Act or a predecessor exemption to section 73.5 of the Act [*Government incentive security*] or section 2.9 [*Distributions to existing security holders*] of the Rule to file a report of exempt distribution in the required form, on or before the 10th day after the distribution.

PART 7 RESALE OF SECURITIES ACQUIRED UNDER AN EXEMPTION

Resale restrictions

7.1 (1) A security distributed under a prospectus exemption may be subject to restrictions on its resale. The particular resale – or "first trade" – restrictions depend on the parties to the trade and the particular exemption from the prospectus requirement that was relied on to distribute

the security. In certain circumstances, no resale restrictions will apply and the security acquired under an exempt distribution will be freely tradable.

(2) Resale restrictions are imposed under National Instrument 45-102 *Resale of Securities*. While the Rule contains text boxes providing commentary on resale, these text boxes are intended as guidance only and are not a substitute for reviewing the applicable provisions in National Instrument 45-102 *Resale of Securities* to determine what resale restrictions, if any, apply to the security in question.

(3) The resale restrictions operate by triggering the prospectus requirement unless certain conditions are satisfied. A security that is subject to such restrictions in circumstances where the conditions cannot be satisfied may nevertheless be distributed in reliance on an exemption from the prospectus requirement in the Rule, NI 45-106 or another provision in Ontario securities legislation.

PART 8 EXISTING SECURITY HOLDER PROSPECTUS EXEMPTION

Distributions to existing security holders

General

8.1 All security holders of the same class of securities must be treated fairly and in a manner that is perceived to be fair in connection with a distribution under section 2.9 of the Rule. The Commission recognizes that distributions to existing security holders are capable of being abusive or unfair. Accordingly, issuers and others who benefit from access to the capital markets have an obligation to treat security holders fairly, and the fulfillment of this obligation is essential to the protection of the public interest in maintaining capital markets that operate efficiently, fairly and with integrity.

Anti-dilution

8.2 While an offer must be made available to all persons who, as of the record date, held a listed security of the issuer of the same class and series as the listed security to be distributed under section 2.9 of the Rule, there is no requirement that an issuer make the offer on a pro rata basis to its security holders. For the purposes of a distribution under section 2.9 of the Rule, if security holders have an identical opportunity under the distribution, then they are considered to be treated identically.

While there is no pro rata requirement, the Commission takes the position that in order to support the fair treatment of all security holders, an issuer should establish, maintain and apply policies and procedures that provide reasonable assurance that the issuer, and, if applicable, each registrant, fairly allocate investment opportunities among the issuer's security holders. However, any distribution under section 2.9 of the Rule cannot result in an increase of more than 100% of the outstanding securities of the same class and section 2.9 of the Rule should not be used in a manner that results in security holders suffering significant dilution.

Minimum Subscription Amount

8.3 Under section 2.9 of the Rule, there is no requirement that an issuer accept all subscriptions from each existing security holder. However, if an issuer were to reject a subscription that was in all respects a valid subscription, it could call into question whether the offering was made available to all security holders of the issuer. While an issuer might not want to accept small subscription amounts because of the administrative burden, for transparency

purposes, an issuer should consider clearly disclosing the minimum subscription amount in the offering news release.