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# Raising capital with the offering memorandum prospectus exemption



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# Role of the ASC

- **The Alberta Securities Commission (ASC) is the regulatory agency responsible for administering the province's securities laws.**
- Our mission is to foster a fair and efficient capital market in Alberta and to protect investors.
  - ✓ Strive to protect investors from improper, misleading or fraudulent practices
  - ✓ Work to ensure investors have timely, accurate information on which to base investment decisions
  - ✓ Register those selling securities and review that their conduct is in compliance with the law and professional standards

# Two key pillars of securities law

## Registration requirement

- Section 75 of the *Securities Act*
- Those who sell and advise in securities must conduct themselves professionally and compliantly
- Individuals/firms “in the business” of trading or advising in securities must be registered

*Overseen by ASC Market Regulation Division*

## Prospectus requirement

- Section 110 of the *Securities Act*
- Investors need timely, accurate information on which to base their investment decisions
- In order for a business to sell securities to an investor, the business must prepare & file a prospectus or comply with the rules of a prospectus exemption, i.e. the offering memorandum exemption

*Overseen by ASC Corporate Finance Division*

# The offering memorandum exemption

- **Overview of the offering memorandum (OM) exemption, first adopted in 2016**
  - ✓ OM is a less complex, less comprehensive offering document than prospectus.
  - ✓ Generally used to sell to retail investors.
  - ✓ Expected to be used by small issuers before transitioning to be a reporting issuer.
- **Amended in March 2023**

# Why did we make changes?

- **OM exemption not being used as expected**
  - Used primarily by two types of issuers:
    - ✓ Issuers involved in real estate
    - ✓ Issuers that meet the new defined term “collective investment vehicle”
  - The amendments provide tailored disclosure requirements for these types of issuers.
  - Intent is to clarify the disclosure necessary for these issuers to provide sufficient information for an informed investment decision.

# New definitions

## ➤ Real estate activities

*“means activities, the primary purpose of which is to generate for security holders income or gain from the lease, sale or other disposition of real property but, for greater certainty, does not include any of the following:*

- a) activities in respect of a “mineral project,” as defined in National Instrument 43-101 Standards of Disclosure for Mineral Projects;*
- b) “oil and gas activities” as defined in National Instrument 51-101 Standards of Disclosure for Oil and Gas Activities;*
- c) in Québec, activities relating to the forms of investments subject to Regulation Respecting Real Estate Prospectus and Registration Exemptions (Québec);”*

**Issuers who meet this definition must include disclosure from Schedule 1 to Form 45-106F2 in their OM.**

# New definitions...continued

## ➤ Collective investment vehicle

*“means either of the following:*

- a) an investment fund;*
- b) any other issuer, the primary purpose of which is to invest money provided by its security holders in a portfolio of securities other than securities of subsidiaries of the issuer”*

**Issuers who meet this definition must include disclosure from Schedule 2 to Form 45-106F2 in their OM.**



# Real estate activities

## Which issuers are included?

- Real estate developers
- Real estate investment trusts
- Buy and hold
- Purchase of property for purposes of rezoning and resale

## Which issuers are not included?

- Oil and gas
- Mining
- Mortgage investing/lending

# Real estate activities...continued

- **Appraisal requirement – subsections 2.9(19.5) to 2.9(19.9) of NI 45-106**
- Required if:
  - ✓ Proposing to acquire property from a related party, and acquisition is likely; or
  - ✓ A value for a property is disclosed in OM.
- Must be:
  - ✓ Performed by a qualified, independent appraiser;
  - ✓ Delivered to purchaser (along with OM); and
  - ✓ Filed with regulator (along with the OM or 10 days after first distribution for which appraisal was required to be delivered to purchaser).

# Collective investment vehicles

## Which issuers are included?

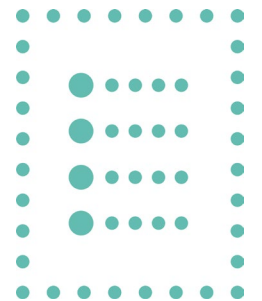
- Mortgage investment corporations/entities
- Investment funds
- Secured receivables

## Which issuers are not included?

- An issuer for which its only investment in securities is in securities of its subsidiaries

# New disclosure schedules

- For issuers engaged in real estate activities and collective investment vehicles.
- Disclosure can be included anywhere in OM.
- No need to repeat disclosure required by schedules if already included in OM.
- There is new guidance in 45-106CP relating to schedules.



# Schedule 1 – real estate activities

## ➤ Application

- ✓ Properties already acquired or reasonably expected to be acquired
- ✓ Does not apply to properties that are immaterial to the issuer

## ➤ Description of real property

- Disclose address, legal description or other reasonable description of the location of the property
- For 10 or more properties, can disclose on portfolio basis or divide into subgroups
- Expectations for proposed acquisitions

# Schedule 1 – real estate activities...continued

## ➤ Appraisal

- ✓ Only required if subsection 2.9(19.6) of NI 45-106 applies
- ✓ Schedule 1 requires disclosure of key information from the appraisal
- ✓ Must also include most recent assessment by any assessing authority

## ➤ Purchaser's interest in real property

## ➤ Developer or manager disclosure

- ✓ Applies to developer or manager under rental management/pool agreement
- ✓ Similar requirements to items 3.2 and 3.3 of the main body of the Form

# Schedule 1 – real estate activities...continued

## ➤ Transfers

- ✓ Applies to related party transactions
- ✓ Must explain price differences between transfers

## ➤ Approvals

## ➤ Costs and objectives

- ✓ For property to be developed
- ✓ Estimated costs and assumptions
- ✓ Short and long-term objectives

# Schedule 1 – real estate activities...continued

- **Future cash calls**
- **Rental pool agreement or rental management agreement**
- **Information statements**
  - ✓ Only if purchaser will acquire direct interest in property
- **Risk factors relating to real property**
  - ✓ Risk factors specific to the real property, including risks relating to development, leasing, speculative investment, encumbrances and control



# Schedule 2 – collective investment vehicles

## ➤ Investment objectives and strategy

- ✓ Non-mortgage lenders
- ✓ Mortgage lenders

## ➤ Portfolio management

- ✓ Applies to person acting as portfolio manager
- ✓ Similar requirements to items 3.2 and 3.3 of the main body of the Form

# Schedule 2 – collective investment vehicles...continued

## ➤ Portfolio summary

### ➤ Non-mortgage lenders

- ✓ Can be disclosed in subgroups
- ✓ Impaired assets
- ✓ Separately disclose information for securities that comprise more than 10 per cent of portfolio

### ➤ Mortgage lenders

- ✓ Interest rates, terms, LTV, priority ranking, location, property type, credit ratings
- ✓ Overdue mortgages, impaired mortgages
- ✓ Separately disclose information for securities that comprise more than 10 per cent of portfolio

### ➤ Other self-liquidating financial assets

# Schedule 2 – collective investment vehicles...continued

## ➤ Portfolio performance

- ✓ Different methodologies accepted but must follow same methodology as financial statements
- ✓ Must describe methodology

## ➤ Ongoing disclosure

## ➤ Conflicts of interest

# Other amendments to highlight

## ➤ Standard of disclosure

- ✓ No misrepresentation and sufficient information to make an informed decision
- ✓ Subsections 2.9(13.1) to 2.9(13.3) of NI 45-106
- ✓ Meant to be a clarification rather than a substantive change from previous version
- ✓ Clarifies issuers' obligations in case of material change

## ➤ Item 1.3 of Form 45-106F2

- ✓ Significant amount of offering proceeds will be transferred to another issuer that is not a subsidiary
- ✓ Requires disclosure of several items of the Form for the other issuer, including financial statements
- ✓ Would include Schedule 1 or 2 if other issuer is engaged in real estate activities or a collective investment vehicle

# Other amendments to highlight...continued

## ➤ Six-month interim financial statements

- Item B.16 of Instructions to Form 45-106F2
- Only applies in Ontario
- Sixty days after end of six-month interim period must either:
  - Amend the OM to include six-month interim financial statements; or
  - Append a certificate to the OM stating that:
    - ✓ The OM does not contain a misrepresentation as at the date of the certificate;
    - ✓ There have been no material changes since the date of OM; and
    - ✓ The OM still contains sufficient information to make an informed investment decision.

# Other amendments to highlight...continued

## ➤ Transition provision

- ✓ Allows an issuer to continue to use its existing OM after March 8, 2023, until it is required to amend its OM
- ✓ When an issuer prepares or amends its OM on or after March 8, 2023, it must follow the new Form requirements

## ➤ Form 45-106F4 *Risk Acknowledgement*

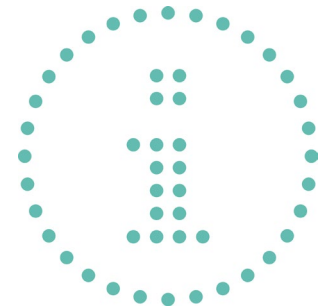
- ✓ Amendments are for the sake of consistency with other risk acknowledgement forms, including Form 45-106F9 *Form for Individual Accredited Investors* and Form 45-108F2 *Risk Acknowledgement*

## ➤ CSA Staff Notice 45-309

- ✓ Revised version to reflect amendments to the rule will be published March 8, 2023

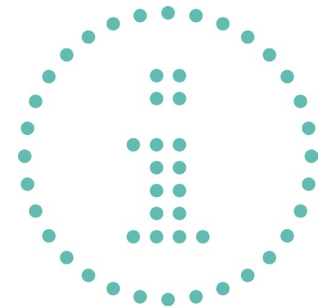
# Common deficiencies

- **Failure to comply with item 1.3 – *Proceeds Transferred to Other Issuers* when it applies (which includes financial statements of other issuer)**
- **Schedule 1 deficiencies**
  - ✓ Lack of disclosure about the expected costs of development
  - ✓ Failure to file required appraisals where a value for real estate has been disclosed in the OM
- **Schedule 2 deficiencies**
  - ✓ Missing required portfolio summary information per section 3
  - ✓ Lack of disclosure about portfolio performance required by section 4



# Common deficiencies...continued

- **Failure to disclose information about redemptions as per item 6.**
- **Failure to update penalties, sanctions, bankruptcy and insolvency disclosure with the additional criminal and quasi-criminal matters now required.**
- **Failure to include additional disclosure for issuers without significant revenue as required by item 2.7.**
- **Failure to include required information on cover page.**





# Questions about OM exemption?



# ASC Blanket Order 45-538 *Self-Certified Investor Prospectus Exemption*

- For investors who have financial/investment acumen but do not qualify as “accredited investors.”
- Investors must meet qualifying criteria set out in the Blanket Order, such as:
  - ✓ Chartered Professional Accountant (CPA), Chartered Financial Analyst (CFA), finance degree, MBA focused on finance, business or commerce degree in finance or investment specialization, etc.
- Exemption can be used by:
  - ✓ An individual.
  - ✓ A non-individual (e.g. a corporation where the majority of owners or directors are accredited investors or meet the self-certified investor qualifying criteria).
  - ✓ A qualifying special purpose vehicle (SPV) – who receives investments from both accredited and self-certified investors and invests that money collectively.

# ASC Blanket Order 45-538 *Self-Certified Investor Prospectus Exemption*

- There are financial limits (\$10K per business/aggregate of 30K annually).
  - ✓ Exceptions: listed issuer investment (meaning the issuer is listed on a Canadian exchange, among other requirements) or the investment is made by a qualifying SPV.
- There is no specified offering document.
  - ✓ Distribution from the issuer – must be a concurrent offering to an accredited investor.
- A Statutory Declaration and Acknowledgement is required.
  - ✓ Unless the self-certified investor is a qualifying SPV.
- Issuer must file a report of exempt distribution within 10 days of the distribution.
  - ✓ If the issuer is a “private issuer,” no report is required.

# ASC Blanket Order 45-539 *Small Business Financing*

- Allows private businesses to raise up to a lifetime limit of \$5 million from investors in Alberta and Saskatchewan.

*this exemption can be used concurrently with other exemptions, so investments from those qualified under other exemptions (Accredited Investor; Friends, Family & Business Associates; Foreign Investor and Self-Certified Investor) are not included in this total.*

- Issuer must complete Form 45-539F1 *Small Business Offering Document*.
- Investors must complete Form 45-539F2 *Small Business Risk Acknowledgement*.
- Issuer, if providing financial statements, must complete Form 45-539F3 *Small Business Undertaking*, promising to provide financial statements for the following three years.
- Issuer must file the offering document, the undertaking (if required) and a report of exempt distribution within 30 days of the distribution.

# ASC Blanket Order 45-539 *Small Business Financing*

## Tier 1

- Financial statements are not required.
- Can raise up to \$1.5 million in a 12-month period.
  - ✓ *Not including amounts for those qualifying under Accredited Investor, Friends, Family & Business Associates, Foreign Investor or Self-Certified Investor exemptions.*
- Maximum that an investor can invest in the issuer group in a 12-month period is \$2,500, or \$10,000 if the investor meets financial threshold and/or has obtained suitability advice.

## Tier 2

- Reviewed (not audited) financial statements are required.
- Can raise more than \$1.5 million in a 12-month period – up to \$5 million lifetime maximum.
- Maximum that an investor could invest in the issuer group in a 12-month period is \$5,000, or \$20,000 if the investor meets financial threshold and/or has obtained suitability advice.
- Other ongoing requirements around the financial statements.

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# Thank you