

COMPANION POLICY 45-509CP
Community Economic Development Corporations and Cooperatives

PART 1 – GENERAL COMMENTS

Introduction

This Companion Policy sets out how the Financial and Consumer Services Commission (the Commission or we) interprets or applies the provisions of Local Rule 45-509 *Community Economic Development Corporations and Cooperatives* (the Instrument) and related legislation.

Except for Part 1, the numbering of Parts in this Companion Policy corresponds to the numbering in the Instrument. Any general guidance for a Part appears immediately after the Part name. Any specific guidance on sections in the Instrument follows any general guidance. If there is no guidance for a Part or section, the numbering in this Companion Policy will skip to the next provision that does have guidance.

Terms used in the Instrument and in this Companion Policy have the meaning given to them in securities legislation, including, for greater certainty, National Instrument 14-101 *Definitions*, National Instrument 45-106 *Prospectus Exemptions* and the *Securities Act*.

Definitions

1. In this Companion Policy,

“*SBITC Act*” means the *Small Business Investor Tax Credit Act*, S.N.B. 2003, c S-9.05;

“*General Regulation*” means New Brunswick Regulation 2003-39 under the *Small Business Investor Tax Credit Act*.

Fundamental concepts

2. Two fundamental concepts to securities legislation in New Brunswick are that:

- 1) every person who is in the business of trading or advising in securities and derivatives must be registered with the Commission; and
- 2) every person who distributes new securities must disclose certain information to potential investors in the form of a prospectus.

The Instrument provides exemptions from these two requirements for CEDCs that meet certain criteria outlined in that rule. The CEDC will also need to meet requirements under the *SBITC Act* to qualify for tax credits. The Instrument is complementary to, and works parallel with, the *SBITC Act* and the General Regulation under that Act. A CEDC that wants to take advantage of the prospectus and registration exemptions in the Instrument must also comply with the requirements for the registration of community economic development corporations or cooperatives outlined in the *SBITC Act* and *General Regulation*.

If a corporation or cooperative no longer meets the criteria to qualify for the prospectus and registration exemptions under the Instrument, or proposes to distribute additional securities outside the scope of the *SBITC Act*, it should refer to other securities laws, such as National Instrument 45-106 *Prospectus Exemptions*, to determine if there are other prospectus exemptions available. Prospectus exemptions can relieve a business from prospectus obligations in certain circumstances and can be used to: start a company; reward employees; raise money to finance the development of a business or community venture; reorganize a business; or to sell a business. National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* is helpful to determine whether it is subject to any registration requirements, and if any registration exemptions are available.

PART 2 – PROSPECTUS AND REGISTRATION EXEMPTIONS

Part 2 contains the requirements that a CEDC must meet in order to qualify for an exemption from the prospectus and registration requirements contained in securities legislation.

First and subsequent trades

4. A CEDC should be aware that the distribution of securities may be subject to resale restrictions. This means that the securities cannot be resold by the purchaser unless certain requirements are met. This includes keeping the securities for a specific period of time, often referred to as a seasoning period or restricted period. The rules and additional guidance on resale restrictions can be found in National Instrument 45-102 *Resale of Securities*.

A purchaser that has claimed the New Brunswick Small Business Investor Tax Credit is also subject to holding requirements that are distinct and separate from those noted above. There are potential negative consequences under the *SBITC Act* and *General Regulation* if a CEDC redeems an eligible share prior to 4 years from the date on which the eligible share was issued. Under the *General Regulation*, early redemptions are only permitted in certain circumstances, such as the death of the original purchaser of the eligible share. A CEDC should refer to the *SBITC Act* and the *General Regulation* for the permitted circumstances and conditions for an early redemption.

A CEDC that is a cooperative should be aware that there may be restrictions in applicable cooperatives legislation on the transferability of shares, and there may be other restrictions in the by-laws of the cooperative.

PART 3 – THE OFFERING

Use of available funds

11. A CEDC should be aware that it may be in breach of securities legislation and may be subject to regulatory action if it does not use the amounts raised under the offering in the same manner as indicated in the offering document. In addition, a CEDC must adhere to the specific investment requirements outlined in the *General Regulation* or it may be subject to a penalty outlined in the *General Regulation*.

Time limitation on offering

12. (3) If the CEDC applies to the Executive Director for an extension of the initial closing date under subsection 12(3), it must also obtain the approval of the Department of Finance for such an extension.

(4) Similarly, if a CEDC proposes to offer shares after the initial closing date, in addition to the letter of non-objection from the Executive Director, the CEDC should also obtain any additional approval that may be required from the Department of Finance.

Amendments to the offering document

14. Section 14 outlines the requirements for a CEDC if it delivers an amendment to an offering document after the Executive Director has issued a letter of non-objection. In addition, CEDCs should be aware that the Department of Finance has its own requirements in the event that the CEDC makes an amendment. Specifically, if the CEDC delivers an amendment, the Department of Finance will require the CEDC to submit an updated investment plan for review. A CEDC should refer to the Department of Finance, the *SBITC Act* and the *General Regulation* to determine if it is subject to any additional requirements.

Report of exempt distribution

15. A CEDC that relies on the prospectus exemption in Part 2 must file the prescribed form of report of exempt distribution with the Executive Director no later than 30 days after the closing date of the offering. The CEDC must also send its financial statements to the Department of Finance no later than 30 days after each closing of an offering.

Abandonment

16. The application by the CEDC may be considered to be abandoned if the CEDC conducts no activity for 90 days after filing the offering document with the Commission. For example, an activity would include any correspondence with the Commission regarding the application. If the Commission determines that the CEDC has abandoned the application, the Commission will notify the CEDC that the application will be considered as abandoned, unless the CEDC contacts the Commission within 10 days.

PART 4 – LETTER OF NON-OBJECTION

Revocation of letter of non-objection

18. The Executive Director has the power to revoke a letter of non-objection where the Instrument is not being complied with or if the offering would be prejudicial to the public interest. Where it has been determined that the *SBITC Act* and *General Regulation* have not also been complied with, the Executive Director may make a determination to revoke the letter of non-objection on the basis that the offering would be prejudicial to the public interest.

PART 5 – PERMITTED PROMOTIONAL ACTIVITIES

Permitted activities

19. (9) A CEDC is permitted to distribute other shares under other available prospectus exemptions at the same time as it is doing an offering under the Instrument in conjunction with the *SBITC Act* program. These other shares are not eligible for investor tax credits under the *SBITC Act* Community Economic Development Corporations or Cooperatives tax program. Only securities distributed using the Instrument procedures are eligible. Full details of the concurrent distribution must be disclosed in the offering document.

PART 6 – ONGOING REPORTING REQUIREMENTS

Copies to security holders

22. We consider documents to have been made “reasonably available” to security holders if they are mailed to security holders, or if security holders receive an electronic notice that such documents can be viewed on a public website of the CEDC or a website accessible by all security holders of the CEDC that were acquired under the exemptions in the Instrument (such as a password protected website).

Prohibition against insider trading, informing and recommending

23. Securities legislation prohibits any person in a “special relationship” with an issuer from trading in securities of the issuer while in possession of material non-public information (insider trading) or from informing or recommending any other person of the material non-public information, other than in the ordinary course of business (this is also known as “tipping”). Under securities legislation a “person in a special relationship” includes insiders, directors, officers and employees of the issuer. A CEDC that has met the requirements of the Instrument, *SBITC Act* and *General Regulation*, and has completed the initial closing will be subject to the same prohibitions on insider trading, informing and recommending that are applicable to issuers under section 147 of the *Securities Act*. A person in a special relationship with the CEDC will be subject to prohibitions in that section as well and may rely on the defences for insider trading, informing and recommending set out in the *Securities Act*.

PART 9 – DIRECTORS AND OFFICERS

Directors and Officers

28. Directors and officers of a CEDC must be fit and suitable to manage the affairs of a CEDC. To that end, among other things, we will look at those individuals' education, training and experience and how that supports their role with the CEDC. We will also look at previous experience with CEDCs as well as with business ventures generally. Individuals must conduct themselves with integrity and have an honest character. We will also look at the overall financial condition of the individual. A person who is insolvent or has a history of bankruptcies may not be a person suitable to act as a director or officer of the CEDC.