

**NEW BRUNSWICK SECURITIES COMMISSION  
LOCAL STAFF NOTICE 45-701**

***VOLUNTARY PRE-FILING OF DRAFT OFFERING MEMORANDA UNDER NATIONAL  
INSTRUMENT 45-106 PROSPECTUS AND REGISTRATION EXEMPTIONS***

The purpose of this Staff Notice is to inform New Brunswick-based issuers that they may pre-file a draft offering memorandum under National Instrument 45-106 *Prospectus and Registration Exemptions*, on a voluntary basis with the New Brunswick Securities Commission (Commission) for staff comment before it is used.

**The Offering Memorandum Exemption**

National Instrument 45-106 *Prospectus and Registration Exemptions* came into force on 14 September 2005. It contains exemptions from the prospectus requirements that issuers can use to raise capital. The offering memorandum exemption under section 2.9 of National Instrument 45-106 *Prospectus and Registration Exemptions* grants relief from the prospectus obligations in certain circumstances.

Under subsection 2.9(17) of National Instrument 45-106 *Prospectus and Registration Exemptions*, an issuer must file a copy of an offering memorandum and any update of a previously filed offering memorandum with the Commission on or before the 10<sup>th</sup> day after the distribution.

**Scope of Staff Participation**

Upon request, staff will provide comments on draft offering memorandum's pre-filed by issuers who have their registered office in New Brunswick based on the following considerations:

- Is the draft offering memorandum in the form prescribed in section 6.4 of National Instrument 45-106 *Prospectus and Registration Exemptions*? If a draft offering memorandum is not in the prescribed form, staff will not be able to provide comments, and will advise the issuer accordingly. Issuers and their advisors are encouraged to utilize the offering memorandum resources on the Commission's website in the preparation of an offering memorandum including the Offering Memorandum Tool, sample Offering Memorandum, and instructions for completing Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers* and Form 45-106F3 *Offering Memorandum for Qualifying Issuers*.

- Staff will refer to instructions within each item and the guidance provided in the Instructions for Completing the Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers* when an item is unclear or needs further clarification.
- Staff's comments will be based on the disclosure provided in the draft offering memorandum at the time of pre-filing.
- Staff's comments on the draft offering memorandum do not indicate that the Commission has assessed the merits of the securities being offered nor does it signal that the Commission has evaluated or endorsed the merits of the securities or the disclosure in the draft offering memorandum.

The offering memorandum states very clearly that no securities regulatory authority or regulator has assessed or reviewed the merits of the security. Rather, staff will provide comments on the draft offering memorandum to assist the issuer who itself determines whether their offering memorandum contains the required disclosure pursuant to National Instrument 45-106 *Prospectus and Registration Exemptions*, and that the offering memorandum contains sufficient information relating to the business of the issuer to enable a potential investor to make an informed investment decision. Any comments pertaining to an offering memorandum relate to distributions in New Brunswick only.

Staff's comments on a draft offering memorandum are not intended to replace professional legal advice, and staff cannot provide legal advice in the preparation of an offering memorandum, or the consequences of failing to provide full disclosure in an offering memorandum. Staff is otherwise available to answer questions from issuers or their professional advisers on the disclosure requirements under the offering memorandum exemption.

There are many aspects to consider when raising money for a business where professional advice is essential, such as securities holding periods and resale restrictions on shares, the consequences of not providing full disclosure, or the proper incorporation of businesses to be able to issue securities. Issuers are strongly encouraged to enlist the aid of legal and/or other profession counsel to make the determination that the offering memorandum complies with the disclosure requirements.

Upon pre-filing a draft offering memorandum, issuers should expect to receive comments from the Commission on the draft offering memorandum within 20 business days.

Please consult Commission Local Rule 11-501 *Fees* to determine whether there are any applicable fees associated with a voluntary pre-filing of an offering memorandum.

Individuals who choose to invest in the exempt market should be aware of the risks and limitations associated with investing in companies that do not trade on regulated exchanges. Exempt market securities are more risky than other securities.

## **Common Offering Memorandum Deficiencies**

On 26 April 2012, staff of the Canadian Securities Administrators (CSA), except in Ontario, published Multilateral CSA Staff Notice 45-309 *Guidance for Preparing and Filing an Offering Memorandum under National Instrument 45-106* to provide guidance to issuers, underwriters and their advisors that intend to rely on section 2.9 (offering memorandum exemption) of National Instrument 45-106 *Prospectus and Registration Exemptions*. The Notice summarizes common deficiencies the CSA have observed in offering memoranda prepared in accordance with Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers*. Issuers should ensure that they have reviewed the common offering memorandum deficiencies outlined in Multilateral CSA Staff Notice 45-309.

## **Consequences of Failing to Comply with Requirements**

Multilateral CSA Staff Notice 45-309 sets out the consequences of failing to comply with the offering memorandum disclosure requirements. Failure to comply with the disclosure requirements may result in the Commission taking one or more of the following actions:

- Requiring the issuer to file a revised or amended document.
- Requiring the issuer to prepare and deliver an updated offering memorandum to existing purchasers.
- Requiring the issuer to grant rescission rights to certain investors.
- Imposing a cease trade order.
- Taking enforcement action.

### **If you have any questions, please refer them to:**

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