

Annex A

Proposed Amendments to National Instrument 45-106 Prospectus Exemptions

1. *National Instrument 45-106 Prospectus Exemptions is amended by this Instrument.*

2. *Section 1.1 is amended by adding the following definitions:*

“professional association” means an organization of real property appraisers with its head office in Canada that

- (a) is generally accepted within the Canadian real property appraisal community as a reputable association,
- (b) admits individuals on the basis of their academic qualifications, experience and ethical fitness,
- (c) requires compliance with professional standards of competence and ethics established or endorsed by the organization,
- (d) requires or encourages continuing professional development, and
- (e) has and applies disciplinary powers, including the power to suspend or expel a member regardless of where the member practices or resides;

“qualified appraiser” means an individual who

- (a) regularly performs property appraisals for compensation,
- (b) is a member of a professional association holding the appropriate designation, certification, charter or licence to act as an appraiser for the type of property, and
- (c) is in good standing with the professional association; *and*

“syndicated mortgage” means a mortgage in which two or more persons participate, directly or indirectly, as a lender in a debt obligation that is secured by the mortgage;.

3. *Section 2.4 is amended by:*

(a) *adding “or a syndicated mortgage” after “a short-term securitized product” in subsection (4), and*

(b) *adding the following subsection:*

(6) Subsection 73.4(2) of the *Securities Act* (Ontario) does not apply to a distribution of a short-term securitized product or a syndicated mortgage..

4. *Section 2.9 is amended by adding the following subsections:*

(19) For the purposes of subsections (19.1) and (19.3), a qualified appraiser is independent of an issuer of a syndicated mortgage if there is no circumstance that, in the opinion of a reasonable person aware of all of the relevant facts, could interfere with the qualified appraiser’s judgment regarding the preparation of an appraisal for a property.

(19.1) Subsections (1), (2) and (2.1) do not apply to a distribution by an issuer of a syndicated mortgage unless, at the same time or before the issuer delivers an offering memorandum to the purchaser in accordance with subsections (1), (2) or (2.1), the issuer delivers to the purchaser an appraisal of the property subject to the syndicated mortgage that

- (a) is prepared by a qualified appraiser who is independent of the issuer,
- (b) is prepared in accordance with the applicable professional standards of the professional association of which the qualified appraiser is a member,
- (c) provides the fair market value of the property subject to the syndicated mortgage, without taking into account any proposed improvements or proposed development, and
- (d) is prepared with an effective date that is within 12 months preceding the date that the appraisal is delivered to the purchaser.

(19.2) An issuer of a syndicated mortgage distributed in reliance on the exemption described in subsection (1), (2) or (2.1) must not disclose any value of the property subject to the syndicated mortgage, other than the fair market value disclosed in the appraisal required under subsection (19.1), unless the issuer has a reasonable basis for that value.

(19.3) If an issuer of a syndicated mortgage distributed in reliance on the exemption described in subsection (1), (2) or (2.1) discloses any value of the property subject to the syndicated mortgage, other than the fair market value disclosed in the appraisal required under subsection (19.1), the issuer must state

- (a) with equal or greater prominence the fair market value disclosed in the appraisal required under subsection (19.1),
- (b) the material factors or assumptions used to develop the value, and
- (c) whether or not the value was prepared by a qualified appraiser who is independent of the issuer.

(19.4) The issuer of a syndicated mortgage distributed in reliance on the exemption described in subsection (1), (2) or (2.1) must file with the securities regulatory authority a copy of the appraisal required under subsection (19.1) on or before the 10th day after the distribution of the syndicated mortgage..

5. Section 2.36 is amended by:

- (a) *repealing subsection (1),***
- (b) *replacing “Except in Ontario, and subject” in subsection (2) with “Subject”, and***
- (c) *replacing “In Alberta, British Columbia, Manitoba, New Brunswick, Québec and Saskatchewan, subsection (2)” in subsection (3) with “Subsection (2)”.***

6. **Section 6.4 is amended by adding the following subsection:**

(3) Despite subsections (1) and (2), if the security distributed under section 2.9 [*Offering memorandum*] is a syndicated mortgage, the required form of offering memorandum is Form 45-106F2 supplemented by Form 45-106F18..

7. **The following form is added after Form 45-106F17:**

Form 45-106F18

Supplemental Offering Memorandum Disclosure for Syndicated Mortgages

INSTRUCTIONS:

1. *Integrate the following disclosure into your offering memorandum for a distribution of a syndicated mortgage.*
2. *You do not need to follow the order of items in this form. Information required in this form that has already been disclosed in response to the requirements of Form 45-106F2 Offering Memorandum for Non-Qualifying Issuers need not be repeated.*
3. *You do not need to respond to any item in this form that is inapplicable.*
4. *Certain items of this form require disclosure about the issuer of a syndicated mortgage or the borrower under a syndicated mortgage. In general, the borrower will also be the issuer of the syndicated mortgage. In these circumstances, the terms “issuer” and “borrower” are interchangeable and there is no requirement to duplicate information.*

There may be circumstances where the borrower is not the issuer of a syndicated mortgage, such as where a mortgage is syndicated by the original lender to add lenders. In these circumstances, the issuer is required to provide all disclosure required under Form 45-106F2 and this form as the issuer of the security being distributed. This form also requires information about the borrower under the syndicated mortgage, because the borrower is the person obligated to pay the principal and interest under the syndicated mortgage.
5. *In this form, the distribution of a syndicated mortgage may also be referred to as the “offering”. The lenders or investors in a syndicated mortgage may also be referred to in this form as the “purchasers”.*
6. *References to the “principal holder” of a person mean each person who, directly or indirectly, beneficially owns or controls 10% or more of any class of voting securities of the person. If a principal holder is not an individual, also provide the information required for the principal holder for any person that, directly or indirectly, beneficially owns or controls more than 50% of the voting rights of the principal holder.*
7. *When the term “related party” is used in this form, it has the meaning set out in the General Instructions to Form 45-106F2.*

Item 1 – Description of the Offering

(1) Describe what kind of investment is being offered and the legal rights of the purchaser, including, but not limited to, details of the following:

- (a) the nature of the investment, i.e., whether it is a participation in a mortgage, an assignment of a participation in a mortgage, a mortgage unit or some other direct or indirect interest or participation in a mortgage over real property and the legal rights of the purchaser attaching to the investment;
- (b) the rights of the purchaser on default by the borrower and the rights of the purchaser to share in the proceeds of any recovery from the borrower, in particular the purchaser's voting rights and whether the purchaser has the right to institute individual legal action against the borrower and, if not, the person or persons who may institute or coordinate the institution of legal action against the borrower; and
- (c) if the issuer of the syndicated mortgage is not the borrower under the syndicated mortgage, the rights of the purchaser against the issuer of the syndicated mortgage.

(2) Describe the project and the plans for the use of the funds.

Item 2 – Raising of Funds

(1) If the funds to be raised through the offering are required to be raised in stages, disclose the period over which the funds will be raised and the criteria to determine when they will be raised.

(2) If there are any arrangements under which any part of the funds raised will only become available to the borrower if certain conditions are fulfilled, describe those conditions and the procedure for the return of funds to the purchaser if the conditions are not met and any deduction or penalty imposed on the borrower or any other person for not meeting the conditions. Give details of the arrangements made for, and the persons responsible for, the supervision of the trust or escrow account or the investment of unreleased funds, and the investment policy to be followed.

Item 3 – Other Risk Factors Specific to Syndicated Mortgages

(1) State in bold:

Investments in syndicated mortgages are speculative and involve a high degree of risk. Purchasers should be aware that this investment has not only the usual risks associated with the financial ability of the borrower to make repayments but also risks associated with financing real estate and risks associated with syndication.

(2) If the syndicated mortgage includes a personal covenant, guarantee or other financial commitment, state in bold:

The ability of the person providing the personal covenant, guarantee or other financial commitment to perform under the personal covenant, guarantee or other financial commitment will depend on the financial strength of the person. There is no assurance that the person will have the financial ability to be able to satisfy their obligations under the personal covenant, guarantee or other financial commitment and therefore you may not receive any return from your investment, including any initial amount invested.

(3) Disclose the risk factors that make the offering a risk or speculation.

INSTRUCTIONS:

Risk factors may include, but are not limited to

- *the reliance on the ability of the borrower to make payments under the mortgage,*
- *the financial strength of any person offering a personal covenant, guarantee or financial commitment,*
- *the ability to raise further funds as progress in development or construction takes place,*
- *changes in land value,*
- *unanticipated construction and development costs,*
- *the ability to recover one's investment in the event of foreclosure,*
- *whether there are other encumbrances on the mortgaged property and their relative priority,*
- *the level of ranking of the syndicated mortgage in relation to other mortgages and other encumbrances,*
- *the conflicts of interest between the borrower and the mortgage broker,*
- *the mortgage broker's efforts, ability and experience,*
- *inadequate insurance coverage,*
- *inability to change the trustee (if any), and*
- *the restrictions imposed by securities legislation on the resale of the syndicated mortgage.*

Item 4 – Administration Agreement

(1) Disclose whether there is an administration agreement requiring the purchaser to pay fees or expenses for the administration of the syndicated mortgage to any person, such as a mortgage broker or a related party. Disclose all fees and expenses to be charged to the purchaser and how they are to be calculated. Also disclose the specific responsibilities of all parties to the administration agreement, including

- the collection responsibility for payments due under the syndicated mortgage,
- the commencement of legal action on default,
- the follow-up on insurance expirations or cancellations, and
- all other matters of administration to be provided by the person administering the syndicated mortgage.

(2) State:

Copies of the administration agreement are available on request from the borrower or any mortgage broker involved in the distribution.

Item 5 – Trust Agreement

Disclose whether there is any trust or other agreement that provides for any person to make advances of the funds to the borrower and to distribute the proceeds of repayments made by the borrower. Disclose the material terms of any agreement, in particular,

- whether the purchaser is required to grant a power of attorney to the trustee and the terms of that power of attorney,
- all fees and expenses to be charged to the purchaser, and
- the specific responsibilities of all parties to the agreement, including

- the opening of a trust account into which all investment proceeds must be paid until advanced to the borrower and into which all proceeds received in repayment of the syndicated mortgage must be paid before distribution to the purchasers,
- the means by which the syndicated mortgage will be repaid, and
- the mechanism for replacing the trustee and the procedure for dispute resolution.

Item 6 – Property Subject to Mortgage

Describe the details of the property subject to the mortgage, including

- the address and legal description,
- the past, current and intended use,
- any proposed improvements,
- the date of acquisition of the property and the purchase price paid,
- the details, including the purchase price, of any other transactions involving the property known to the borrower, any related party of the borrower or any of their respective partners, directors, officers or principal holders,
- if the borrower is not the issuer of the syndicated mortgage, the details, including the purchase price, of any other transactions involving the property known to the issuer, any related party of the issuer or any of their respective partners, directors, officers or principal holders,
- any contractual arrangements relating to the property,
- any insurance policies applicable to the property and their status,
- any claims or litigation,
- any known contamination or environmental concerns, and
- any other material facts.

Item 7 – Details of the Syndicated Mortgage

(1) Describe the details of the syndicated mortgage, including

- the material terms of the syndicated mortgage, including the principal amount, term, amortization period, interest rate, maturity date, any prepayment entitlement and the ranking of the syndicated mortgage (i.e., first, second, etc.),
- the material terms and relative priority of any other mortgages and other encumbrances on the mortgaged property,
- the loan-to-value ratio of the property, calculated on an aggregate basis using the loan value of the syndicated mortgage and all other mortgages or encumbrances with priority over the syndicated mortgage and the appraised value of the property described under item 8,
- the aggregate dollar amount of the funds being raised under the offering,
- the status of the syndicated mortgage, including whether there are any arrears and, if so, the amount and due dates of outstanding payments, if advances have already been made to the borrower and interests in the syndicated mortgage are subsequently sold to purchasers,
- the means by which the repayments by the borrower will be distributed and the procedure for establishing the proportion to which each purchaser is entitled to share in the distribution, and
- the source of funds that the borrower will use to pay interest on the syndicated mortgage, including any reserve accounts or other fund maintained by the borrower or any other person.

(2) Attach a copy of any commitment letter, or other commitment document, in which the mortgage broker or other person sets out the terms of the commitment to advance funds to the borrower.

Item 8 – Appraisal

Describe the most recent appraisal of the value of the land and existing improvements, including all assumptions and qualifications and the date of the appraisal prepared by a qualified appraiser in accordance with subsection 2.9(19.1) of National Instrument 45-106 *Prospectus Exemptions*.

Provide details of the most recent assessment of the land, including existing improvements by any provincial or municipal assessment authority.

Item 9 – Exemptions

Disclose any statutory or discretionary exemption from the registration requirement that is being relied upon by any person involved in the offering of the syndicated mortgage.

Item 10 – Guarantees or Other Similar Financial Commitments

(1) Summarize, in plain language, the key terms of any personal covenant, guarantee or other financial commitment provided in connection with the syndicated mortgage. Explain how the personal covenant, guarantee or financial commitment works and state:

Copies of the personal covenant, guarantee or other financial commitment are available on request from the borrower or any mortgage broker involved in the distribution.

(2) Disclose the financial position and business experience of the person providing any personal covenant, guarantee or other financial commitment.

(3) Indicate whether the purchasers will be entitled to ongoing disclosure of the financial position of the person providing any personal covenant, guarantee or other financial commitment during the period of the personal covenant, guarantee or commitment, and the nature, verification, timing and frequency of any disclosure that will be provided to purchasers.

Item 11 – Organization of Mortgage Broker

State the laws under which the mortgage broker is organized and the date of formation of the mortgage broker.

Item 12 – Borrower Information

If the borrower is not the issuer of the syndicated mortgage, include the disclosure required under items 2, 3, 4 and 12 of Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers* as if the borrower were the issuer of the syndicated mortgage.

Item 13 – Developer

If the property subject to the syndicated mortgage is being developed, state the laws under which the developer is organized and the date of formation of the developer. Describe the business of the developer and any prior experience of the developer in similar projects.

Item 14 – Mortgage Broker, Partners, Directors, Officers and Principal Holders

(1) Disclose the name, municipality of residence and principal occupation for the last 5 years of the mortgage broker, if the mortgage broker is an individual, or of the partners, directors, officers and any principal holders, if the mortgage broker is not an individual.

(2) Disclose any penalty or sanction, including the reason for it and whether it is currently in effect, that has been in effect during the last 10 years, or any cease trade order that has been in effect for a period of more than 30 consecutive days during the past 10 years against

- the mortgage broker,
- a director, executive officer or control person of the mortgage broker, or
- any issuer of which a person referred to above was a director, executive officer or control person at the time.

(3) Disclose any declaration of bankruptcy, voluntary assignment in bankruptcy, proposal under any bankruptcy or insolvency legislation, proceedings, arrangement or compromise with creditors or appointment of a receiver, receiver manager or trustee to hold assets, that has been in effect during the last 10 years with regard to

- the mortgage broker,
- a director, executive officer or control person of the mortgage broker, or
- any issuer of which a person referred to above was a director, executive officer or control person at that time.

Item 15 – Developer, Partners, Directors, Officers and Principal Holders

Disclose the information required by item 14 in respect of the mortgage broker for the developer and, if the developer is not an individual, its partners, directors, officers and principal holders.

Item 16 – Conflicts of Interest

(1) State the name of the mortgage broker, any relationship between the mortgage broker and the borrower or issuer, particulars of any agency or similar agreement and the remuneration, if any, that purchasers will pay to the mortgage broker in connection with the offering.

(2) Describe any existing or potential conflicts of interest that could reasonably be expected to affect the purchaser's investment decision among any of

- the borrower,
- the issuer,
- the mortgage broker,
- any partners, directors, officers and principal holders of the borrower, issuer, mortgage broker or developer, or
- the trustee and any person providing goods or services to the borrower, issuer, mortgage broker or developer in connection with the syndicated mortgage.

(3) Describe any direct or indirect interest of the mortgage broker, developer or related parties in the property, mortgage or business of the borrower, issuer or trustee.

Item 17 – Material Agreements

(1) To the extent not already disclosed elsewhere in the offering memorandum, give particulars of every material agreement relating to the offering of the syndicated mortgage entered into or to be entered into by the borrower, issuer or the mortgage broker or any of the affiliates of the borrower, issuer or mortgage broker, within the 2 years preceding the date of the offering memorandum.

(2) If the material agreements are not attached to the offering memorandum, disclose a place at which during regular business hours those agreements or copies of those agreements may be inspected during distribution of the syndicated mortgage.

Item 18 – Disclosure of Fees Specific to the Syndicated Mortgage

(1) Disclose whether a mortgage broker has provided a disclosure statement under mortgage broker legislation to the borrower concerning all fees, by whatever name those fees are called, charged to the borrower in addition to assessment, appraisal, survey and legal fees. State that a copy of that disclosure statement is available to the purchaser on request from the mortgage broker or issuer.

(2) If no mortgage broker has provided a disclosure statement to the borrower, state what fees (by whatever name those fees are called) are to be charged to the borrower, how they are to be calculated and paid and when any person involved in the distribution is entitled to payment.

(3) Disclose all fees to be paid by the purchaser, directly or indirectly, including any commissions, charges or referral fees.

Item 19 – Registration documentation

State:

In addition to all other material and documentation reasonably requested and mutually agreed upon, the purchaser should request, either from the lawyer or notary acting on the purchaser's behalf, or from the borrower, issuer or any mortgage broker involved in the distribution, the following documentation after the completion of registration and disbursement of the syndicated mortgage

- a copy of the certificate of mortgage interest or assignment of the mortgage or any other document evidencing the investment,
- a copy of a confirmation signed by any secured party with priority over the syndicated mortgage confirming the outstanding balance of its encumbrance over the property and that the borrower is not in arrears with any payments,
- written confirmation of valid insurance on the property and disclosure of the interest of the purchaser in the insurance,
- written confirmation that there are no outstanding arrears or delinquent municipal property taxes on the property,
- a state of title certificate, or equivalent, within 120 days of the date of the syndicated mortgage, and
- a copy of administration agreement or trust indenture.

Item 20 – Certification by Mortgage Broker

State, in a certificate signed by the mortgage broker, the following:

With respect to matters that are or should be within my personal knowledge, the foregoing contains no misrepresentation. With respect to matters that are not and are not required to be within my personal knowledge, I have made best efforts to ensure that the foregoing contains no misrepresentation.

The certificate must be signed by the persons holding positions with the mortgage broker that are the same as the signatories for an issuer under subsections 2.9(9) to 2.9(12) of National Instrument 45-106 *Prospectus Exemptions*..

8. This Instrument comes into force on ●.