

Companion Policy 45-512CP Real Estate Securities

BC Instrument 45-512 *Real Estate Securities* (BCI 45-512) provides exemptions from the prospectus and registration requirements for trades in eligible real estate securities and for resale of these securities.

Purpose

This Companion Policy provides guidance on the application of BCI 45-512.

1. Securities legislation applies to trades in real estate securities

Securities legislation applies to any trade in a security, including real estate securities. The securities legislation in each Canadian jurisdiction includes the same fundamental components - a registration requirement for those who sell or advise on securities, a prospectus requirement for those who issue securities, and market conduct prohibitions for every person trading a security (regardless of whether that person is a registered person or is a prospectus qualified issuer or not). These requirements apply to trading in real estate securities, too.

BCI 45-512 provides a person who makes a trade in a real estate security with an exemption from the requirements to

- register as a dealer
- issue a prospectus

The exemption is provided if the person follows the conditions set out in the instrument. If the conditions for using the exemption are not followed, then the exemption is not available and the person trading in real estate securities is required to register and required to issue a prospectus. Failure to either get on-side of the conditions of the exemption, or get on-side by registering and issuing a prospectus, results in an illegal distribution.

BCI 45-512 does not provide an exemption from the basic market conduct prohibitions contained in securities legislation. These provisions prohibit, for example,

- fraud and market manipulation
- pressure sales
- misrepresentations during investor relations activities

The market conduct prohibitions are set out in Part 7 of the *Securities Act*.

This Companion Policy provides you with guidance so you can understand whether you meet the conditions necessary to sell or issue real estate securities without either registering as a dealer or filing a prospectus.

2. Conduct of developers and managers

Developers and rental pool managers should not seek blanket assignments of voting rights (under the *Condominium Act* or condominium bylaws) from holders of real estate securities or require holders to waive notice of meetings of a strata corporation. While

developers and managers are not precluded from taking *bona fide* proxies on an optional basis where the owner is assigning the right to vote on specific matters, blanket proxies in favor of the developer or manager are considered an assignment of the right to vote. Section 69 of the *Condominium Act* contains a deemed assignment of all rights, powers and obligations under that Act and bylaws in the case of a lease, sublease or assignment of lease of a residential strata lot for a term of three years or more. Developers are encouraged to structure their transactions without such arrangements.

3. Marketing and advertising of real estate securities

Section 50 of the *Securities Act* prohibits any person from making certain representations to a purchaser, including an undertaking about the future value or price of the securities. The provisions also prohibit a person from making any statement that the person knows or ought reasonably to know is a misrepresentation.

1. Developers should comply with all the restrictions on marketing contained in the securities legislation. These restrictions include:
 - (a) section 50(1)(a) of the *Securities Act*, which prohibits a person from representing that the person will resell or repurchase the security or refund all or any of the purchase price of the security, subject to certain limited exceptions (note that this section does not prevent developers from returning deposits to purchasers where conditions precedent have not been satisfied);
 - (b) section 50(1)(b) of the *Securities Act*, which prohibits a person from giving an undertaking relating to the future value or price of a security;
 - (c) the guidelines specific to the marketing and promotion of real estate securities set out in NIN#96/36, including:
 - (i) the requirement that partial disclosure of facts and figures must be avoided when full disclosure of such facts and figures is required for a proper comprehension of the offering, and the requirement that any representation as to any benefit be balanced by all conditions and contingencies applicable to the benefit; and
 - (ii) the restriction on the use of words such as “guaranteed”, “preferred”, “liquid” and “indemnity” in any marketing or promotional materials or representations because of their frequent misinterpretation by purchasers, and the requirement that when other modifiers are used, their context must be made perfectly clear; and
 - (d) Interim National Policy Statement No. 42, which restricts advertising on radio or television;
 - (e) Where a developer intends to market a return (which is not permitted if the developer is relying on BCI#45-512), the return must be supported by audited

forecasts or projections contained in the disclosure document and prepared in accordance with section 4250 of the CICA Handbook and audited in accordance with the Assurance and Related Services Guidelines of the CICA Handbook entitled “AuG-6 Examination of a Financial Forecast or Projection Included in a Prospectus or Other Public Offering Document”. In such cases, the marketing materials should contain a disclaimer such as the following:

“The rate of return is based on certain assumptions that may not apply to you. Actual results achieved may vary and the variation may be material. Any investor considering this investment should consult the completed audited [projections/forecasts] set out in the disclosure statement.”

4. General

“Advertising” is a more limited term and includes the dissemination of information through the public media, such as the print media, on radio or television, by mail, facsimile, electronic mail and bulletin boards, the Internet or similar facilities, or through public promotions, such as billboards, signs or displays.

Advertisements and other promotional materials should be worded so as to encourage recipients to consult the relevant disclosure document. Accordingly, all advertisements should contain a prominently displayed disclaimer such as the following:

“There are risks associated with this investment. Any investor considering this investment should consult the disclosure statement.”

In addition, advertisements and other promotional materials should disclose the name and address of at least one person from whom more information and a copy of the disclosure document may be obtained

Developers and their agents should seek legal advice on marketing and promotion of real estate securities.

The Executive Director has issued cease trading orders and imposed other sanctions where representations or disclosure in advertising were considered to be misleading.

These guidelines, and the general prohibitions in the *Securities Act* against fraud and misrepresentation, apply to any offering of real estate securities, regardless of whether or not the trade is exempt from registration and prospectus requirements.

In addition to the above requirements, the *Real Estate Marketing and Development Act* contains various rules relating to the advertising of real estate by vendors and agents. Developers should obtain proper legal advice with respect to all applicable *Securities Act* and *Real Estate Marketing and Development Act* requirements relating to advertising, and instruct their representatives accordingly.

BCI 45-512 prohibits:

- (i) marketing or advertising, as the case may be, “to a prospective purchaser”. The placing of an advertisement in, for instance, a newspaper, journal or electronic bulletin board is an inducement to every prospective purchaser. A response to a specific inquiry from a prospective purchaser, with information contained in a disclosure document is not considered communication with intent to induce a prospective purchaser the purchase of the real estate security;
- (ii) initial distributions by developers from “marketing” of the expected economic benefits of the rental pool agreement or rental management agreement. For trades by eligible holders to subsequent prospective purchasers, the prohibition is against “advertising” of the expected economic benefits of the rental pool agreement.

“Marketing” includes any communication intended to induce the purchase by a subsequent prospective purchaser, other than the provision of disclosure documents. “Marketing” is broadly defined in BCI 45-512.