

SASKATCHEWAN POLICY STATEMENT 45-602

QUALIFIED INVESTOR EXEMPTION IN CLAUSES 39(1)(y) AND 81(1)(s)

PART 1 DEFINITIONS

In this policy statement:

"**Act**" means *The Securities Act, 1988* (Saskatchewan);

"**Commission**" means the Saskatchewan Securities Commission;

"**Director**" means the Director of the Commission;

"**Issuer**" means a person who or company which issues and intends to issue securities relying on the registration and prospectus exemption in clauses 39(1)(y) and 81(1)(s) of the Act;

"**Offering**" means an offering of securities by an Issuer relying on the registration and prospectus exemptions in clauses 39(1)(y) and 81(1)(s) of the Act; and

"**Promoter**" means a person or company that takes the initiative in founding, organizing or substantially reorganizing an Issuer.

In this policy statement a reference to clause 81(1)(s) or any part of clause 81(1)(s):

- a. Refers to clause 81(1)(s) of the Act or a part of that clause; and
- b. Includes a reference to clause 39(1)(y) of the Act or the corresponding part of clause 39(1)(y) of the Act.

Appendix A contains a copy of all the provisions of the Act referred to in this policy statement.

Caution - All discussion of provisions of the Act are a paraphrase of these provisions and Issuers and their advisers should ensure that they review the actual provisions of the Act and understand their obligations under the Act before proceeding with an Offering.

PART 2 PURPOSE

2.1 The purpose of this policy statement is to specify several matters left to be specified by the Commission in clauses 39(1)(y) and 81(1)(s) of the Act. Clause 39(1)(y) exempts Issuers from the registration requirements of the Act provided that the Offering is sold to investors who qualify under the exemption. Clause 81(1)(s) provides the same exemption from the prospectus requirements of the Act. The wording of clauses 39(1)(y) and 81(1)(s) is the same.

Both clauses together are referred to as the "qualified investor exemption".

The exemption leaves several matters to be specified by the Commission. In this policy statement the Commission sets out:

- a. The net worth and income requirements of an investor under subparagraph 81(1)(s)(iv)(A)(I);
 - b. What is "investment experience" under subparagraph 81(1)(s)(iv)(A)(I);
 - c. Those independent persons or companies who may give advice to an investor under subparagraph 81(1)(s)(iv)(A)(II);
 - d. The information that an Issuer must file under subclause 81(1)(s)(v) to prove that an investor meets the criteria prescribed in subclause 81(1)(s)(iv); and
 - e. The form of offering memorandum or amendment to offering memorandum that will be satisfactory to the Commission under subclause 81(1)(s)(ix).
- 2.2 This policy statement also describes procedures for use of the exemption.
- 2.3 This policy statement does not contain a full discussion of all of the requirements of the exemption. Issuers and their advisers should refer to the actual provisions of the exemption in the Act to ensure that they meet these requirements.

PART 3 REQUIREMENTS

- 3.1 **Net worth and income** - For the purposes of subparagraph 81(1)(s)(iv)(A)(I), an investor must:
- a. Have a net worth of more than \$300,000 exclusive of home, furnishings and automobile; and
 - b. Have had an annual income of more than \$75,000 in each of the previous two years.
- 3.2 **Investment experience** - An investor has the "investment experience" required under subparagraph 81(1)(s)(iv)(A)(I) if the investor has previously:
- a. Purchased securities of the same type as those being offered by the Issuer; or

b. Invested in the same industry in which the Issuer carries on business.

3.3 **Advisers** - For the purposes of subparagraph 81(1)(s)(iv)(A)(II), those independent persons who or companies which may give advice to an investor are:

- a. A lawyer who is a practicing member in good standing of the Law Society of Saskatchewan;
- b. An accountant who is a member in good standing of The Institute of Chartered Accountants of Saskatchewan, the Certified General Accountants Association of Saskatchewan, or the Society of Management Accountants of Saskatchewan; or
- c. A dealer or an adviser registered under the Act who is authorized under the Act to sell or give advice with respect to the type of securities being offered by the Issuer;

provided that such person or company:

- d. Does not have a professional, business or personal relationship with the Issuer, its Promoters, directors, officers or controlling shareholders; and
- e. Has not acted or been retained personally or otherwise as an employee, officer, director, associate or partner of a person who or company which has acted or been retained by the Issuer, its Promoters, directors, officers or controlling shareholders within the previous one year.

3.4 **Declarations** - For the purposes of subclause 81(1)(s)(v) an Issuer must file a declaration in Form SPS45-602-B of the Commission completed by each investor to prove that the investor meets the criteria prescribed in subclause 81(1)(s)(iv).

Where the investor has received advice under sub-paragraph 81(1)(s)(iv)(A)(II), the investor's declaration must have attached to it a certificate in Form SPS45-602-C of the Commission completed by the adviser.

3.5 **Form of offering memorandum** - For the purposes of subclause 81(1)(s)(ix) an offering memorandum prepared in Form SPS45-602-OM of the Commission is satisfactory to the Director.

An offering memorandum in a form prepared for use in another jurisdiction that contains substantially the same information as set out in Form SPS45-602-OM of the Commission is also satisfactory to the Director.

There is no specified form of amendment to offering memorandum. You should contact the staff of the Commission for information about how to prepare one.

PART 4 USING THE EXEMPTION

4.1 Dealing with the Commission - The following are the steps involved in using the exemption:

- a. You must file with the Commission Form SPS45-602-A of the Commission together with:
 - i. A final signed and commercial copy of the offering memorandum in Form SPS45-602-OM of the Commission ;
 - ii. Other documents requested in Form SPS45-602-A of the Commission; and
 - iii. A cheque for \$500 payable to the Minister of Finance;
- b. You must file this material before or contemporaneously with a trade under the qualified investor exemption. See subsection 81(3.1) of the Act.
- c. The date the offering memorandum is filed with the Director is the date of approval by the Director of the offering memorandum for the purposes of subclause 81(1)(s)(iii).
- d. Staff of the Commission will not provide comments or give formal approval of the offering memorandum. You may begin the offering as soon as you have filed the offering memorandum with the Commission.
- e. You must use only the offering memorandum filed with the Commission to sell securities of the Issuer under the Offering. You cannot use any other material of any sort.

4.2 Testing the waters - You must not sell the securities before you file the offering memorandum. You also must not do anything directly or indirectly in furtherance of selling the securities such as distributing promotional materials or having promotional meetings until you have filed your offering memorandum.

However, you may take certain steps to gauge potential investor interest in an Offering, as set out in General Ruling/Order 47-901 Testing the Waters.

4.3 **Reports after Offering is completed** - The qualified investor exemption and subsection 81(4) of the Act require you to file the following documents within 10 days of the completion of the Offering:

- a. A report in Form 20 as prescribed in *The Securities Regulations* (Saskatchewan);
- b. A declaration in Form SPS45-602-B of the Commission completed by each investor;
and
- c. Where the investor has received advise, a certificate of the adviser in Form SPS45-602-C of the Commission attached to the investor's declaration.

4.4 **Rights of action** - You should note that an investor under an Offering is given certain statutory rights of action under the Act. Those rights are:

- a. Under subsection 80.3(3) of the Act, the right to withdraw from an agreement to purchase the securities by giving written notice to the seller within two business days after receipt of the offering memorandum or any amendments to the offering memorandum;
- b. Under subsection 138(1) of the Act, a right of action for rescission or for damages where the offering memorandum or any amendment to the offering memorandum contains a misrepresentation;
- c. Under subsection 138.2(1) of the Act, a right of action for damages against any individual who makes a verbal statement which contains a misrepresentation relating to the security being sold;
- d. Under subsection 141(1) of the Act, a right to void the purchase agreement and recover the purchase price if the securities are sold in contravention of the Act; and
- e. Under subsection 141(2) of the Act, a right of action for rescission or for damages if the offering memorandum is not delivered to the investor before the agreement to purchase, as required by subsection 80.3(1) of the Act;

These statutory rights of action must be exercised within the time limits set out in section 147 of the Act.

You should keep these rights of action in mind when preparing an offering memorandum or carrying out an offering.

There is a potential for liability if the offering memorandum contains a misrepresentation, the offering is carried out in breach of a provision of the Act or the offering memorandum is not delivered as required by the Act.

- 4.5 **Resale restrictions** - You should note that subsections 81(6) and (7) of the Act will be applicable to the securities being offered under an Offering and will, except in very limited circumstances, prevent investors from selling their securities acquired under an Offering. The Issuer should review the provisions of subsections 81(6) and (7) of the Act in full for a complete understanding of these requirements.
- 4.6 **Continuous Disclosure** - The offering memorandum given to investors, will, upon completion of the Offering, become a contract between the Issuer and its investors.

Form SPS45-602-OM of the Commission requires that an Issuer in its offering memorandum contract with its investors to comply with Part XIV of the Act - "Continuous Disclosure" including the requirements to prepare, file and send on a continuous basis annual and interim financial statements and material change reports as if it were subject to those provisions except that:

- a. It is not required to file with the Commission or send to its security holders financial statements for the first and third quarters of each of its financial years; and
- b. If the cumulative amount raised by the Issuer in all Offerings is less than \$500,000, its annual financial statements need not be accompanied by a report of an auditor if:
 - i. A general review has been carried out by an independent accountant as set out in section 8100 of the Canadian Institute of Chartered Accountants' ("CICA") Handbook; and
 - ii. Such financial statements are accompanied by a review engagement report as set out in section 8200 of the CICA Handbook;

The Commission considers the filing of an offering memorandum with the Commission, once the Offering is completed, to be an undertaking to the Commission from the Issuer that it will comply with these requirements, forwarding this information to the investors and filing it with the

Commission. A person or company who breaches such an undertaking is guilty of an offence under the Act.

You should ensure that you are familiar with these provisions.

PART 5 REPEAL OF FORMER LOCAL POLICY 5.2

This policy statement replaces former Local Policy 5.2 dated November 7, 1988 which is hereby rescinded.

Adopted by the Commission
effective September 20, 1993

Amended effective May 15, 1996

Amended effective July 9, 1996

Amended effective September 18, 1996

Amended effective June 11, 1998

"Marcel de la Gorgendière"

Marcel de la Gorgendière, Q.C.

Chairperson