



**Saskatchewan  
Financial  
Services  
Commission**

Securities Division

## **HOW TO RAISE CAPITAL USING EXEMPTIONS**

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## HOW TO RAISE CAPITAL USING EXEMPTIONS

This publication provides information about how businesses can raise capital without complying with the registration and prospectus requirements of *The Securities Act, 1988* (Saskatchewan). Businesses can do this by using exemptions from these requirements contained in the Act and Securities Regulations. This publication is designed for Saskatchewan Issuers.

All capital raising statutory exemptions are found in [National Instrument 45-106 Prospectus and Registration Exemptions](#). This is a national instrument in effect in all of Canada and most of these exemptions are available throughout Canada. There are slight differences in the operation of some of these exemptions from jurisdiction to jurisdiction so you will want to look at the instrument closely if planning to sell securities outside of Saskatchewan. This publication only deals with the exemptions as they operate in Saskatchewan.

**Securities regulation is a complex area of the law. Therefore this publication is a general guide only. It does not deal with all of the provisions of the Act or Securities Regulations. You should still read the Act and Securities Regulations and consult your professional advisers when dealing with securities matters.**

The Act and Securities Regulations are available on the Commission's web site at <http://www.sfsc.gov.sk.ca/ssc/rules.shtml>. Forms are found at the end of the Regulations and in some Commission Regulations. Fees are found at the end of the Regulations.

The Commission does not require filings with it to be made by lawyers or accountants or other professional advisers. If you feel comfortable complying with the requirements of the Act and Securities Regulations on your own you are free to do so.

Commission staff is always prepared to discuss what exemptions might be available, and the other provisions of the Act or Securities Regulations. However, we do not have the mandate or resources to give you business or legal advice. We will not provide this advice.

One final caution. This publication deals with the Saskatchewan requirements. If you plan to sell securities in other provinces, you must obtain information about their requirements by contacting the securities regulators in those provinces. The Commission only regulates the selling of securities in Saskatchewan.

## PART 1      KEY TERMS

The following key terms are included to clarify some of the terms used in this publication. These are working definitions only but are important in understanding the workings of the Act and Securities Regulations. For full legal definitions see the provisions of the Act and Securities Regulations.

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

**"affiliate"** is defined in subsections 2(2), (3) and (4) of the Act but for the purposes of NI 45-106 is defined in section 1.2 of NI 45-106.

**"Commission"** means the Saskatchewan Financial Services Commission. See *The Saskatchewan Financial Services Commission Act* and *The Saskatchewan Financial Services Commission Assignment Regulations* at <http://www.sfsc.gov.sk.ca/legislation.shtml>.

**"Commission Regulations"** means regulations made by the Commission under the terms of *The Securities Commission (Regulation Procedures) Regulations*. See at <http://www.sfsc.gov.sk.ca/ssc/act&regulations.shtml>.

**"Continuous Disclosure Requirements"** refers to an Issuer's ongoing obligations to file with the Commission and send to its security holders financial statements, material change reports and security holder meeting information. These obligations will usually include all or part of the requirements of Commission Regulation National Instrument 51-102 *Continuous Disclosure Obligations* and related Commission Regulations.

**"control person"** means a person whom or company which holds enough securities in a company to materially affect control of an Issuer or a person whom or company which holds more than 20% of the voting securities of an Issuer. See the definition in clause 2(1)(k) of the Act.

**"Director"** means the Director of the Commission.

**"distribution"** means a trade of new securities from the treasury of an Issuer (primary distribution). It also includes certain trades of securities of an Issuer that are already issued (secondary distribution) where the vendor of the securities is an incorporator, promoter or control person of the Issuer. It does not include all secondary distributions of securities. See the definition in clause 2(1)(r) of the Act.

This term is important because when you make a distribution, you trigger the prospectus requirements in section 58 of the Act.

**"founder"** means a person whom or company which takes the initiative either directly or indirectly in founding, organizing or substantially reorganizing an Issuer. An Issuer can

have more than one founder. A director of an Issuer is not necessarily a founder of the Issuer unless that individual could be said to be a founder of the Issuer as well. With respect to a trade the person or company must be actively involved with the Issuer at the time of the trade in question to meet the definition. See the definition in section 1.1 of NI 45-106.

**“GRO 11-906”** means General Ruling/Order 11-906 *Offering Memorandum Specification Order*.

**"Issuer"** means a person whom or company which issues or intends to issue securities. This includes companies, partnerships, trusts, individuals or any legal entity that issues securities. See the definition in clause 2(1)(x) of the Act.

**"NI 45-101"** means Commission Regulation National Instrument 45-101 *Rights Offerings*.

**"NI 45-102"** means Commission Regulation National Instrument 45-102 *Resale of Securities*.

**“NI 45-106”** means Commission Regulation National Instrument 45-106 *Prospectus and Registration Exemptions* <http://www.sfsc.gov.sk.ca/ssc/national-instruments.shtml>.

**"offering memorandum"** means a document that provides information about the business or affairs of an Issuer that is given to investors to assist them in deciding whether to buy the securities of the Issuer under an exemption. See the definition in clause 2(1)(ff) of the Act. This definition does not include an annual report, interim report, information circular, take-over bid circular, issuer bid circular, prospectus or a document or type of document specified by the Director not to be included.

GRO 11-906 indicates that no document used with respect to a statutory exemption is an offering memorandum except for a document used in connection with the statutory exemptions in sections 2.3 – Accredited investor, 2.5 – Family, friends and business associates, 2.9 – Offering memorandum, 2.10 – Minimum amount investment, 2.12 – Asset acquisition, 2.13 – Petroleum, natural gas and mining properties, 2.19 – Additional investment in investment funds, 2.30 – Isolated trade by issuer and 5.2 – TSX Venture Exchange offering of NI 45-106. Some of these statutory exemptions are discussed in this publication.

Once the definition is triggered the rights of action for investors in section 80.1 and Part XIX of the Act and section 2.9 of NI 45-106 are available.

**"Regulations"** means *The Securities Regulations* (Saskatchewan).

**"Resale Restrictions"** refers to certain restrictions contained in NI 45-102 on the resale of securities by an investor who bought those securities under certain statutory exemptions from the prospectus requirements of the Act contained in NI 45-106. Statutory exemptions from the registration requirements of the Act contained in NI 45-106 do not trigger Resale Restrictions. Use of discretionary exemptions from the registration and prospectus requirements of the Act do not trigger Resale Restrictions unless the Resale Restriction is specifically built into the terms and conditions of the discretionary exemption granted by the Commission.

This means that an investor who purchases securities under certain statutory exemptions from the prospectus requirements of the Act contained in NI 45-106 and under some discretionary exemptions from the prospectus requirements of the Act will not be able to resell those securities to someone else unless certain requirements are met.

The purpose of Resale Restrictions is to ensure there is a level playing field and buyers and sellers of securities have access to the same information about Issuers and their securities.

There are basically three types of Resale Restrictions:

**Type 1:** Arises as a result of the definition of distribution in the Act and prohibits the resale of securities of an Issuer by an incorporator, promoter or control person of the Issuer unless with respect to the sale:

- 1) The prospectus requirements of the Act have been met;
- 2) A statutory exemption from the prospectus requirements of the Act is available;
- 3) A discretionary exemption from the prospectus requirements of the Act is obtained from the Commission; or
- 4) The vendor of the securities can bring itself within the provisions of section 2.8 of NI 45-102 to utilize the exemption from the Resale Restrictions in that section.

**Type 2:** Flows from the provisions of sections 2.3 and 2.5 of NI 45-102. Section 2.3 of NI 45-102 Act states that if a security of an Issuer was acquired by

an investor under one of the statutory exemptions from the prospectus requirements of the Act or Securities Regulations listed in Appendix D to NI 45-102, the resale of those securities is a distribution within the meaning of the Act and subject to the prospectus requirements of the Act unless a statutory exemption from those requirements is available or the vendor obtains a discretionary exemption from those requirements from the Commission.

Section 2.5 of NI 45-102 goes on to provide an additional exemption from the prospectus requirements of the Act for the resale of the securities by a vendor where the Issuer of the securities is and has been a reporting issuer within the meaning of the Act (see the definition in clause 2(1)(qq) of the Act) or in another jurisdiction of Canada for four months (the seasoning period) and the securities have been held by the vendor for at least four months (the hold period). If the Issuer of the securities is not a reporting issuer anywhere in Canada the Resale Restriction under section 2.5 of NI 45-102 will never expire and the securities may never become re-saleable under section 2.5 of NI 45-102. The exemption in section 2.5 of NI 45-102 is dependent on security certificates carrying the required legend and the vendor not being an incorporator, promoter or control person of the Issuer of the securities. Section 2.8 of NI 45-102 provides an additional exemption from Resale Restrictions for incorporators, promoters, and control persons of Issuers.

**Type 3:** Flows from the provisions of sections 2.4 and 2.6 of NI 45-102. Section 2.4 of NI 45-102 states that if a security of an Issuer was acquired by an investor under one of the statutory exemptions from the prospectus requirements of the Act or Securities Regulations listed in Appendix E to NI 45-102, the resale of those securities is a distribution within the meaning of the Act and subject to the prospectus requirements of the Act unless a statutory exemption from those requirements is available or the vendor obtains a discretionary exemption from those requirements from the Commission.

Section 2.6 of NI 45-102 goes on to provide an additional exemption from the prospectus requirements of the Act for the resale of the securities by a vendor where the Issuer of the securities has been a reporting issuer within the meaning of the Act or in another jurisdiction of Canada for at least four months (the seasoning period). There is no minimum period for which the securities must have been held by the vendor as long as this requirement is met. If the Issuer of the securities is not a reporting issuer anywhere in Canada the securities may never become re-saleable under section 2.6 of NI 45-102. The exemption in section 2.6 of NI 45-102 is dependant on the vendor not being an incorporator, promoter or control

person of the Issuer of the securities. Section 2.8 of NI 45-102 provides an additional exemption from Resale Restrictions for incorporators, promoters, and control persons of Issuers.

The seasoning periods discussed above are not applicable if the Issuer of the securities files a prospectus after the securities in question were initially sold by the Issuer. See section 2.7 of NI 45-102.

NI 45-102 should be reviewed in its entirety when dealing with Resale Restrictions. There are additional exemptions from Resale Restrictions in NI 45-102. These are available in specialized situations that are not as relevant in the context of capital raising - securities acquired as a result of the exercise of a conversion right where the convertible security was acquired under a prospectus or certain take-over or issuer bids, securities acquired as a result of certain take-over or issuer bids or securities of a non reporting issuer sold outside of Canada where the Issuer of the securities has little connection to Canada (sections 2.10, 2.11, 2.12 and 2.14 of NI 45-102).

Also note that NI 45-102 has been adopted by all jurisdictions of Canada and Resale Restrictions applying in Saskatchewan will also apply in those jurisdiction.

**The Resale Restrictions are complex. The most important thing is to realize that they are applicable and alert investors before they buy securities of an Issuer that there are restrictions on the resale of the securities being purchased.**

"**Section 80.2 Disclosure**" refers to the requirement under section 80.2 of the Act that every offering memorandum must contain a statement of the rights of action that an investor has when they purchase securities. Those rights are found in section 80.1 and Part XIX of the Act and section 2.9 of NI 45-106 and may include among others:

1. On receipt of an amended offering memorandum, a right to withdraw from an agreement to purchase securities by a delivering a notice to the person who or company that is selling the securities indicating an intention not to be bound by the purchase agreement, such notice to delivered within two business days after receipt of the amended offering memorandum (see subsection 80.1 of the Act);
2. In the case of where section 2.9 of NI 45-106 is being used a right to cancel the agreement to purchase the security by delivering a notice to the Issuer not later than midnight on the 2nd business day after the purchaser signs the agreement to purchase the security; and
3. Where the offering memorandum contains a misrepresentation, a right to bring an action for rescission or damage within certain time periods (see sections 138 and 147 of the Act).



Section 80.2 of the Act simply means that if rights of action are available with respect to the trade in question, the offering memorandum with respect to the trade must disclose those rights of action. Not all of the rights of action are available in all cases. Section 80.2 of the Act does not create additional rights of action; it just requires disclosure where the rights of action are available.

Currently these provisions only apply to trades under statutory exemptions in sections 2.3 – Accredited investor, 2.5 – Family, friends and business associates, 2.9 – Offering memorandum, 2.10 – Minimum amount investment, 2.12 – Asset acquisition, 2.13 – Petroleum, natural gas and mining properties, 2.19 – Additional investment in investment funds, 2.30 – Isolated trade by issuer and 5.2 – TSX Venture Exchange offering of NI 45-106 and under discretionary exemptions. Most of these rights are only triggered when a document is used. Only sections 2.9 – Offering memorandum and 5.2 – TSX Venture Exchange offering of NI 45-106 require the use of a document to complete the trade.

Sample Section 80.2 Disclosure is in section 8.2 of this publication.

**"Securities Regulations"** means Regulations and Commission Regulations.

**"security"** includes such things as shares, limited partnership units, trust units, investment contracts, debt instruments or promissory notes issued by Issuers. This list is not exhaustive. The Commission interprets this term broadly. See the definition in clause 2(1)(ss) of the Act.

**"trade"** means any transfer, sale or disposition of a security for valuable consideration.

It includes any advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a transfer, sale or disposition of a security for valuable consideration. It includes activity done to promote or convince an investor to purchase securities before money is paid for the securities. It includes advertising the sale of the securities. The Commission interprets this term broadly.

It does not include a gift of securities where there is no valuable consideration. For example most bequests of securities under a will would not be a trade in securities.

See the definition in clause 2(1)(vv) of the Act.

Activities carried out to find out if there is a market for an offering would be covered by the use of an exemption when a purchase is made.

This term is important because when you trade, you trigger the registration requirements in section 27 of the Act.

For easier understanding we sometimes use the word "**sell**" instead of "**trade**" in this publication. It has the same meaning.

## **PART 2      INTRODUCTION**

### **2.1            Vision and Mission of the Saskatchewan Financial Services Commission**

#### **Vision**

The Commission's vision is to cultivate an environment in which everyone in Saskatchewan has confidence in and can enjoy the benefits from the vibrant financial marketplace.

#### **Mission**

The Commission strengthens Saskatchewan's financial marketplace and protects consumers by regulating providers of financial products and services in an effective, efficient and balanced manner.

## 2.2 Basic Principles of the Act

The Act is consumer protection legislation that is aimed at protecting investors. The Commission's mandate is to protect investors' interests by regulating the sale of securities.

When carrying out its mandate, the Commission tries to ensure that its rules do not unnecessarily interfere with the efficient raising of capital. The system of regulation must be strong enough to encourage public confidence in the capital markets. Businesses can only raise capital in such an environment.

The Act embodies five main principles of securities regulation:

1. ***Only honest and knowledgeable persons should be able to sell securities.***  
Section 27 of the Act, one of the key sections of the Act, requires that all persons or companies selling or giving advice about securities be registered with the Commission.
2. ***When securities are first offered to the public, investors must be given and be able to rely on truthful, complete and understandable disclosure documents.***  
Section 58 of the Act, another key section of the Act, requires that a business offering its securities for sale to the public must obtain clearance from the Commission for a prospectus containing full, true and plain disclosure of all material facts about that business. This prospectus must be given to investors and allows investors to make an informed investment decision.
3. ***All buyers and sellers of securities should have equal access to information about businesses whose securities are trading in the market.*** Once a business sells its securities it has an ongoing obligation to send information to its security holders. This information includes financial statements, material change reports and information about security holder meetings. The Issuer must also file this information with the Commission. Information filed with the Commission is available for public viewing. This would be an Issuer's Continuous Disclosure Requirement.
4. ***Where appropriate, businesses should be exempted from the requirements of the Act where alternate investor protection measures exist.*** It is exemptions from the requirements of the Act that provide the safety value to avoid over-regulation and to deal with special situations. Some of these exemptions are the subject matter of this publication.
5. ***Persons taking undue advantage of investors should be held to account.*** The Act gives the Commission enforcement powers and creates civil liability against

Issuers and their sellers for misrepresentations in disclosure documents like prospectuses and offering memorandums and for failure to comply with the requirements of the Act. See Parts XVIII - Enforcement and XIX - Civil Liability of the Act.

**In the capital raising context the Act really hinges on two key sections of the Act - section 27 which requires registration of anyone selling or giving advice in securities, and section 58 which requires the clearance from the Commission of a prospectus before securities are sold.**

**If your transaction involves securities the requirements of the Act are likely triggered and you must be careful to ensure that you meet these requirements.**

**If your transaction involves a trade in securities within the meaning of the Act, the registration requirements of the Act will be triggered and if that trade in securities is also a distribution of securities within the meaning of the Act, the prospectus requirements of the Act will also be triggered.**

It is your obligation to ensure that you are in compliance with the provisions of the Act and Securities Regulations or you could find yourself subject to the enforcement provisions of the Act.

### **2.3 Overview of Exemptions**

Becoming registered under the Act or finding a registrant under the Act to sell your securities and clearing a prospectus with the Commission with respect to the securities you want to sell can be complex, expensive and time-consuming. You will want to avoid these requirements if possible while at the same time complying with the Act. This is where exemptions from the registration and prospectus requirements of the Act are useful.

Because there are situations where the registration and prospectus requirements of the Act would not be necessary for the protection of investors and because alternate protection is available in one way or another and the registration and prospectus requirements of the Act would therefore be over-regulation, the Act and Securities Regulations contains a number of waivers of or exemptions from these requirements.

There are basically two types of exemptions from the registration and prospectus requirements of the Act contained in the Act and Securities Regulations.

The first type is the statutory exemptions from the registration and prospectus requirements of the Act contained in NI 45-106. The registration and prospectus exemptions in NI 45-106 do not always parallel each other.

NI 45-106 has been adopted in all jurisdictions of Canada and you can use these exemptions in any jurisdiction of Canada. There are slight differences in some exemptions between jurisdictions. NI 45-106 reads the same in all jurisdictions so you need only look at one document to see any jurisdiction's requirements.

Part 4 of this publication outlines some of the more commonly used statutory exemptions in the incorporation and organization of an Issuer and the raising of capital. With respect to each statutory exemption dealt with we briefly describe:

- What the exemption allows;
- How it can be used;
- Restrictions or conditions that apply to the exemption;
- The procedure to use it; and
- Ongoing consequences of using the exemption.

The statutory exemptions are the first place you should look when wanting to avoid the registration and prospectus requirements of the Act in raising capital. This is because all you have to do to use them is meet the specific requirements of the exemption. You would then be exempt from the registration and prospectus requirements of the Act. Involvement of the Commission in the use of statutory exemptions varies from nothing at all to requiring the use of a specific form of offering memorandum. Specific provisions with respect to the statutory exemption you are interested in should be reviewed in full to ensure that you are complying with all of its requirements.

If you can't fit yourself within one of the statutory exemptions, you should turn to the second type of exemption from the registration and prospectus requirements of the Act, the discretionary exemption, found in section 83 of the Act. Section 83 of the Act allows for an application to the Commission for a ruling of the Commission that the registration and prospectus requirements of the Act not apply to the sale of securities in question. You would generally turn to the discretionary exemption after having reviewed the statutory exemptions available because the discretionary exemptions require more Commission involvement and therefore may be more time-consuming and more expensive to use. Part 5 of this publication gives details about this process.

Again, we remind you that raising capital by selling securities involves a technical area of the law. You should review the actual provisions of the Act and Securities Regulations and consult your professional adviser before you commence selling securities. **You are responsible to comply with the requirements of the Act and the Securities Regulations.**

## **PART 3      MAKING A SECURITIES OFFERING USING EXEMPTIONS**

There are several steps involved in preparing for and carrying out a securities offering using exemptions from the registration and prospectus requirements of the Act.

### **3.1            Develop a business plan**

Before you attempt to obtain any type of financing through selling securities or otherwise, you should develop a sensible and realistic business plan. This plan should describe in detail:

- The basics, including name of the business, the incorporating or organizational jurisdiction, the business and registered office address and the like;
- A history of your business;
- The product or service you sell;
- What and where your market is;
- Who your competition is;
- The risk associated with your business;
- Your managers and their backgrounds;
- The financial condition of your business;
- The proposed project and its costs;
- A budget which includes sources of funds to complete the project and how the funds will be used;
- Requirements for operating capital; and
- The expected effect of the completion of the project on your business.

If you do not know how to create a business plan, you should seek assistance. Lawyers, accountants and business consultants should be able to help you with this. Other sources of information are Saskatchewan Industry and Resources at <http://www.ir.gov.sk.ca> and the Canada-Saskatchewan Business Service Center at <http://www.cbsc.org/sask/main.cfm>.

### **3.2            Determine if a securities offering is appropriate for your business**

The next step is to determine whether a security offering is the best way to obtain financing for your business. You will have to devote a significant amount of time to putting the offering together, obtaining any necessary approval from the Commission to offer the securities, and selling the securities to investors.

If your securities offering is successful, you will have given up a portion of your business and you must answer to your investors. These investors will expect periodic reports on the business's progress, and they may want to talk to management, attend meetings of directors, or visit the business facilities on a regular basis.

### **3.3 Select the most appropriate way of offering securities and the security type**

If you decide to undertake a securities offering, the next step is to determine whether you can make your offering under a statutory or discretionary exemption from the registration and prospectus requirements of the Act, or whether you must get registered and clear a prospectus with the Commission. Your decisions will be based on a number of factors including the amount of capital you need to raise, the number of investors you think will be necessary to raise that amount, the potential investors' relationship to the business and its founders, the potential investor's knowledge of the business and its promoters or founders, the potential investors' business and investment experience and how much you can afford for professional services and offering expenses.

If you think you can use a statutory or discretionary exemption, you should do everything necessary to use the exemption. See Parts 4 and 5 of this publication for details of these requirements. Because a discretionary exemption involves more Commission involvement you should consider statutory exemptions first. Also the Commission will expect you to use a statutory exemption if one is available rather than applying for a discretionary exemption.

You must decide the legal structure of the Issuer. Will it be a corporation, a limited partnership, a trust, a sole proprietorship, or some other legal structure? In making this decision you must consider the tax implications of each structure. Generally legal structures should be as simple as possible to accomplish your goals. Simple structures are easier for investors to understand.

You must consider how much of your business or control of your business you are willing to sell to others and on what terms and conditions.

The legal structure of the Issuer will determine the type of security you can offer:

- Common shares;
- Preferred shares;
- Debt securities such as debentures or promissory notes;
- Limited partnership units;
- Trust units; or
- Etc.

When deciding this, think about what type of security will be easiest to sell. Also will your target investors want to be paid dividends, interest or income distributions? These and other considerations will help you decide the type of security you will offer.



Once you decide the Issuer's legal structure and the type of security, then you must plan the offering. How many securities will you sell? For what price? What return will be offered? Can you realistically expect to pay this return? Investors will expect you to be reasonable.

You should also consider any Resale Restrictions on the securities and whether investors will accept these or will expect to be able to liquidate their investment or sell their securities. If so, how can you best deal with this?

### **3.4 Prepare an offering memorandum**

If you are required to prepare an offering memorandum under the Offering memorandum exemption in section 2.9 of NI 45-106 or by the terms of a discretionary exemption or you voluntarily choose to use an offering document, you should clearly explain the Issuer's business, any risks that should be considered before investing and how the funds from the offering will be used. If you make any earnings or cost forecast or projection you should fully explain, justify and document the assumptions on which the forecast or projection is based. Undisclosed assumptions are a frequent problem, so you should carefully prepare any forecast or projection you plan to use in the offering memorandum. Guidance in preparing forecasts and projections can be found in sections 4250 and the auditing guidelines of the Handbook of the Canadian Institute of Chartered Accountants. An auditor's involvement is required in preparing forecasts or projections for offerings under the Offering memorandum exemption in section 2.9 of NI 45-106. See Staff Notice 45-705 *Preparation and Audit Requirements for Future Oriented Financial Information Included in NI 45-106 Offering Memoranda* <http://www.sfsc.gov.sk.ca/ssc/files/loc-noti/45-705-amended-sept14-05.pdf>. You should also double check figures and proofread all documents to avoid errors, omissions and discrepancies.

Only offering memorandums prepared for use under the Offering memorandum exemption in section 2.9 of NI 45-106 have prescribed content requirements. See discussion later in this publication.

Offering memorandums or documents that are carelessly prepared often do not create the confidence in investors to allow the offering to be successful and may cause the Commission to consider enforcement action if they are not in compliance with the Act and Securities Regulations, are misleading or contain misrepresentations.

Remember an offering memorandum or document is not just to satisfy the requirements of the Act and Securities Regulations. It is the business's main marketing tool. Don't just prepare it with the securities requirements in mind. When you prepare it, bear in mind that investors will be reading it and making a decision on whether to invest based on its contents and appearance.

Developing an offering memorandum or document can be demanding. However, you must remember that you will be asking investors to part with money that could be placed in a financial institution and insured against loss. Investing in small businesses is inherently risky, and it is important that investors have enough information to make an informed investment decision.

You should also bear in mind when preparing your offering memorandum or document that an investor will acquire under the Act and /or at common law certain rights of action against your business, your sellers and yourself for any misrepresentations in the offering memorandum or document or breach of the Act. See Part XIX of the Act - Civil Liability.

### **3.5 Clearance for the offering from the Commission**

Other than with the use of the Rights offering exemption in section 2.1 of NI 45-106 or a discretionary exemption (see discussion in Parts 4 and 5 of this publication) the Commission has no involvement in exempt offerings and no approval is required to proceed with the offering.

The Commission reviews all offering memorandums filed with the Commission by Saskatchewan Issuers using the Offering memorandum exemption in section 2.9 of NI 45-106. The review is usually done after the offering is completed because these offering memorandums are usually filed with the report of trade. If the offering memorandum does not meet the requirement of Offering memorandum exemption in section 2.9 of NI 45-106, Issuers may be asked to inform investors of the non-compliance, offer rights of recession or in the case of serious deficiencies face enforcement action. It is very important that you follow the content requirements for the offering memorandum to be used with this exemption closely. The Commission has published Staff Notice 45-704 *Review of Offering Memoranda under NI 45-106 Prospectus And Registration Exemptions* which sets out common problems with these offering memorandums. It can be found at <http://www.sfsc.gov.sk.ca/ssc/files/loc-noti/45-704-amendedsept14-2005.pdf>.

### **3.6 Sell the securities**

Getting to the point where you can sell securities may have been a difficult task, but your greatest challenge may be finding investors. Offerings by start-up or smaller businesses tend to be high risk, and investors are often wary. Furthermore, securities dealers do not generally handle small offerings because they cannot make enough in commissions to cover their costs. Although most exemptions do not prohibit advertising (if you advertise under the Private issuer exemption or Family, friends and business associates exemption in NI 45-106 the Commission may suspect that you are offering to investors other than investors eligible under those exemptions), for the most part, you will be relying on yourself and the management of your business to sell your offering. It is important that you allow plenty of time to sell your offering.

A well-planned project, a simple organizational and offering structure and a clear, concise, and understandable offering memorandum or document go a long way to ensuring a successful offering.

Registrants under the Act involved in selling securities under exemptions from the registration and prospectus requirements of the Act contained in the Act should be aware of the requirements of Saskatchewan Local Instrument 33-502 *Requirements For Sale Of Certain Securities*. <http://www.sfsc.gov.sk.ca/ssc/local-instruments.shtml>

### **3.7 Amend offering memorandum**

If there a material change in the affairs of the Issuer or the terms of the offering, the offering memorandum or document must be amended. A copy of the amended offering memorandum or document should be provided to all investors and filed with the Commission (see section 80.1 of the Act and section 2.9 – Offering memorandum of NI 45-106).

### **3.8 Fulfil any reporting requirements**

Some exemptions require that you report the final sales results to the Commission when the offering is completed. See Parts 4 and 5 of this publication for details.

The Commission has instituted a random monitoring program of the use of certain statutory exemption contained in NI 45-106 and you may be requested to provide follow up information. The monitoring program is discussed in Staff Notice 45-703 *Monitoring the use of the Exemptions Under National Instrument 45-106 Prospectus And Registration Exemptions* <http://www.sfsc.gov.sk.ca/ssc/files/loc-noti/45-703-amended-sept14-05.pdf>.

Offering memorandums or amended offering memorandums used must be filed with Commission when the report of sales is filed with the Commission. A document only need be filed with the Commission once.

### **3.9 Report to investors**

Use of the statutory exemptions in NI 45-106 does not create new Continuous Disclosure Requirements. Some discretionary exemptions granted by the Commission may create these requirements. See Part 5 of this publication for details. You may have these requirements under corporate legislation or organizational documents.

Having said this, investors have placed their money in your business. They may want regular, ongoing information about the business's financial condition. You should consider how you can keep your investors informed. You might want to consider this when you are planning your offering.

When planning your offering you should make sure that the business will have the resources and organizational systems to prepare this material and send it to its security holders.

## **PART 4      STATUTORY EXEMPTIONS**

Here are some of the statutory exemptions from the registration and prospectus requirements of the Act Issuers use to raise capital and an explanation of how to use them. Remember, most statutory exemptions from the registration and prospectus requirements of the Act are contained in NI 45-106 but the exemptions discussed below are not all of the statutory exemptions in NI 45-106, just some of the exemptions most commonly used to raise capital. There are other statutory exemptions in NI 45-106 dealing with stock dividends, reorganizations, the exercise of options, amalgamations, take-over and issuer bids, the redemption of securities, dividend reinvestment and stock purchase plans and many other transactions. There are exemptions for co-operatives and credit unions in the Act or Securities Regulations that are not in NI 45-106.

Statutory exemptions can be stacked or used concurrently. They can be used more than once.

All citations in this part of the publication are from the Act unless otherwise stated.

All filing requirements:

1. With respect to offering memorandums and amendments to offering memorandums are found in section 80.1 of the Act and section 2.9 of NI 45-106; and
2. With respect to reports of sales to the Commission after the exemption is used are found in section 6 of NI 45-106.

All Resale Restrictions are found in the definition of distribution in the Act and NI 45-102. See the definition of Resale Restrictions in Part 1 of this publication. In the following paragraphs the Resale Restrictions triggered by the use of the statutory exemption are set out. You should note that Type 1 Resale Restrictions are triggered any time an incorporator, promoter or control person of an Issuer sells their securities in the Issuer no matter what statutory exemption was used to acquire them.

You should also be aware that the Commission generally will interpret a statutory exemption to include purely administrative non-trading activities of third parties not specifically mentioned in the statutory exemption. If you have questions in this regard check with the Commission staff.

When you make a filing under a statutory exemption, unless the statutory exemption requires the specific approval of the Commission or the Director, you will not receive confirmation of receipt of the filing from the Commission. If a filing fee has been paid you will not receive a receipt for the fee. If there is a problem with the filing you will receive a deficiency letter and if you do not receive such a letter you can assume the

filing has been accepted. This acceptance is of course subject to withdrawal should the Commission become aware of problems with filing at a later date.

More information about these exemption can also be found in *Companion Policy 45-106CP Prospectus And Registration Exemptions* <http://www.sfsc.gov.sk.ca/ssc/files/nat-inst/45-106cp-july-05.pdf> and in *Canadian Securities Administrators Staff Notice 45-305 Frequently Asked Questions Regarding National Instrument 45-106 Prospectus And Registration Exemptions* <http://www.sfsc.gov.sk.ca/ssc/files/nat-noti/45-305.pdf>

## **4.1 Rights offering – Section 2.1 of NI 45-106**

### **The Basics**

- This exemption allows an Issuer to sell its own securities to existing security holders of the Issuer.
- An Issuer must sell investors securities in proportion to their current holdings in the Issuer. For example, each security holder could receive one right to purchase additional securities of the Issuer for each security of the Issuer they already own. Then, four rights to purchase additional securities of the Issuer and payment of a purchase price could allow the security holder to purchase one new security of the Issuer.
- There is usually an additional subscription privilege whereby an investor can subscribe for additional securities out of those securities offered but not taken up by other investors if the investor purchased all those securities available to him or her in the first stage of the offering.
- This exemption can be seen as involving the selling of two securities, the rights to purchase additional securities of the Issuer and the securities issued on the exercise of these rights.
- An Issuer can sell only to existing security holders.
- This exemption allows an Issuer to raise capital from its existing security holders.
- There is no limit to the amount of capital raised under this exemption.
- You have to provide investors with a rights offering circular (see below). A rights offering circular updates investors about the Issuer from the last information the Issuer sent to them.
- You must comply with NI 45-101.
- Policy reasons for this exemption: Because investors are already security holders of the Issuer, they are presumed to know about the Issuer and the securities offered and not require the protection of the Act.

### **The Procedure**

- You must follow NI 45-101. You must prepare a rights offering circular and file it, along with the other information required by MI 45-101 and section 2.1 of NI 45-106

with the Commission. It is the rights offering circular that is sent to security holders of the Issuer after it is accepted by the Commission. The rights offering circular is not an offering memorandum within the meaning of clause 2(1)(ff) of the Act and GRO 11-906 and its use will not trigger rights of withdrawal or action for misrepresentation.

- We will review the rights offering circular within 10 days of your filing it, and give you comments. If we do not give you comments within the 10 day period we are deemed to have accepted the circular. If we do give you comments, you must resolve them. After we approve the final document, you can proceed with the rights offering and sell the securities.
- No reports to Commission are required after the exemption is used.
- Fees: \$350 on initial filing of a notice under section 2.1 of 45-106 with rights offering circular.

### **Ongoing requirements**

- The exemption triggers no new Continuous Disclosure Requirements.
- Resale Restrictions - Type 3 - Securities unless a further exemption can be used must be held until the Issuer has been a reporting issuer for 4 months.

## **4.2 Accredited investor - Section 2.3 of NI 45-106**

### **The Basics**

- This exemption allows sales of securities of an issuer to investors who are accredited investors (see definition in section 1.1 of NI 45-106). It is your obligation to ensure you are selling to investors that meet these criteria. You should ensure investors understand what an accredited investor is and do what is reasonable to confirm they fit into the definition. This should be done before you take any funds from the investor.
- This exemption can be used by an issuer to raise capital by selling new securities from its treasury or by anyone selling their already issued securities provided the purchaser is an accredited investor.
- There is no limit on the number of investors, the amount of capital raised or the number of times the exemption is used.



- Each investor must purchase as principal. This means that they must buy the securities for themselves, not as an agent for someone else.
- Policy reasons for this exemption: Because investors are presumed to have the resources to protect themselves and not require the protection of the Act.
- There is more information about this exemption in the Companion Policy to NI 45-106.

### **The Procedure**

- No approval of the Commission is required before the exemption is used.
- No offering memorandum is required. However if you voluntarily choose to use a document it will be an offering memorandum within the meaning of clause 2(1)(ff) of the Act and GRO 11-906. Use of an offering memorandum will trigger statutory rights of withdrawal and action for misrepresentation. There are no content requirements for this type of offering memorandum except that it must contain Section 80.2 Disclosure. You must file the offering memorandum with the Commission with your report of sales. We don't review this offering memorandum except to look for the Section 80.2 Disclosure.
- You must file with the Commission a report of sales in Form 45-106F1 within 10 business days after the sale is complete.
- Fees: \$100 on filing a Form 45-106F1.

### **Ongoing Requirements**

- The exemption triggers no new Continuous Disclosure Requirements.
- Resale Restrictions – Type 2 - Securities unless a further exemption can be used must be held for 4 months and until the Issuer has been a reporting issuer for 4 months.

### 4.3 Private issuer – Section 2.4 NI 45-106

#### The Basics

- This exemption allows a sale of securities of a private issuer where the securities are sold to those persons enumerated in the section 2.4 of NI 45-106. The list includes:
  1. a director, officer, employee, founder or control person of the issuer;
  2. a spouse, parent, grandparent, brother, sister or child of a director, executive officer, founder or control person of the issuer;
  3. a parent, grandparent, brother, sister or child of the spouse of a director, executive officer, founder or control person of the issuer;
  4. a close personal friend of a director, executive officer, founder or control person of the issuer;
  5. a close business associate of a director, executive officer, founder or control person of the issuer;
  6. a spouse, parent, grandparent, brother, sister or child of the selling security holder or of the selling security holder's spouse;
  7. a security holder of the issuer;
  8. an accredited investor;
  9. a person of which a majority of the voting securities are beneficially owned by, or a majority of the directors are, persons described in paragraphs 1. to 8.;
  10. a trust or estate of which all of the beneficiaries or a majority of the trustees are persons described in paragraphs 1. to 8.; or
  11. a person that is not the public.
- This exemption removes any uncertainty there may have been in earlier versions of this exemption about unsolicited sales of securities as it clearly states a sale under this exemption can only be to those listed in the exemption. The list has been provided to add some certainty to this exemption about who can purchase under this exemption as the meaning of public has always been somewhat uncertain. In order not to narrow this exemption from earlier versions of this exemption, non-public purchasers have been retained in the list of purchasers in section 2.4 of NI 45-106.
- Each investor must purchase as principal. This means that they must buy the securities for themselves, not as an agent for someone else.
- No commissions or finders fee can be paid to any director, officer, founder or control person of an issuer for sales made under this exemption except for sales to an accredited investor (see definition in section 1.1 of NI 45-106). Actual out of pocket expenses can be reimbursed.

- The issuer must be a private issuer (see the definition in section 2.4 of NI 45-106).  
To be a private issuer, an issuer:
  - Must not be a reporting issuer or an investment fund (see definitions in the Act and NI 45-106);
  - Must restrict the right to transfer its securities, other than non-convertible debt securities;
  - Must limit the number of holders of its securities, other than non-convertible securities to 50 (not counting employees and former employees of the issuer or its affiliates); and
  - Must have sold securities on to only those persons listed in section 2.4 of NI 45-106.
- A private issuer can use this exemption to sell securities from its treasury or security holders of a private issuer can use this exemption to sell their securities private issuer if the sales are to persons or companies listed in section 2.4 of NI 45-106.
- The Act does not define what is "the public". However, the courts have considered this issue in many cases. A list of some cases is in Section 8.1 of this publication. Get advice from your lawyer on this issue. Each fact situation is different and must be reviewed against the law in this area.
- There is no limit on the amount of capital raised under this exemption.
- Policy reasons for this exemption: Investors because of their relationship to the issuer should have sufficient information about the issuer and the securities offered and not require the protection of the Act.
- This exemption can be used to incorporate or organize an Issuer.
- There is more information about this exemption in the Companion Policy to NI 45-106. See the Companion Policy for a discussion of the use of advertising with this exemption and for a discussion of the meaning of close personal friend and close business associate.

### **The Procedure**

- No approval of the Commission is required before the exemption is used.
- No offering memorandum is required. Use of any documentation does not trigger statutory rights of withdrawal or action for misrepresentation as this exemption is not

included in the definition of offering memorandum within the meaning of clause 2(1)(ff) of the Act and GRO 11-906.

- No reports to the Commission are required after the exemption is used.
- No fees are payable.

### **Ongoing requirements**

- The exemption triggers no new Continuous Disclosure Requirements.
- Resale Restriction -Type 3 - Securities unless a further exemption can be used must be held until the Issuer has been a reporting issuer for 4 months.

## **4.4 Family, friends and business associates - Sections 2.5 and section 2.6 of NI 45-106**

### **The Basics**

- This exemption allows a sale of securities of an issuer where the securities are sold to those persons enumerated in the section 2.5 of NI 45-106. The list includes:
  1. a director, executive officer or control person of the issuer, or of an affiliate of the issuer;
  2. a spouse, parent, grandparent, brother, sister or child of a director, executive officer or control person of the issuer, or of an affiliate of the issuer;
  3. a parent, grandparent, brother, sister or child of the spouse of a director, executive officer or control person of the issuer, or of an affiliate of the issuer;
  4. a close personal friend of a director, executive officer or control person of the issuer, or of an affiliate of the issuer;
  5. a close business associate of a director, executive officer or control person of the issuer, or of an affiliate of the issuer;
  6. a founder of the issuer or a spouse, parent, grandparent, brother, sister, child, close personal friend or close business associate of a founder of the issuer;
  7. a parent, grandparent, brother, sister or child of the spouse of a founder of the issuer;
  8. a person of which a majority of the voting securities are beneficially owned by, or a majority of the directors are, persons described in paragraphs 1. to 7.; or
  9. a trust or estate of which all of the beneficiaries or a majority of the trustees are persons described in paragraphs 1. to 7.;

- Note that the definition of "founder" in section 1.1 of NI 45-106 is different than the definition of "promoter" in the Act and used in an earlier version of this exemption. The relationship must be in place at the time of the sale.
- Each investor must purchase as principal. This means that they must buy the securities for themselves, not as an agent for someone else.
- No commissions or finders fee can be paid to any director, officer, founder, or control person of the issuer for sales under this exemption. Actual out of pocket expenses can be reimbursed.
- An issuer can use this exemption to sell securities from its treasury or security holders of an issuer can use this exemption to sell their securities of an issuer if the sales are to persons listed in section 2.5 of NI 45-106.
- There is no limit on the amount of capital raised under this exemption or the number of investors involved.
- Policy reasons for this exemption: Investors because of their relationship to the issuer should have sufficient information about the Issuer and the securities offered and not require the protection of the Act.
- This exemption can be used to incorporate or organize an Issuer.
- There is more information about this exemption in the Companion Policy to NI 45-106. See the Companion Policy for a discussion of the use of advertising with this exemption and for a discussion of the meaning of close personal friend and close business associate.

### **The Procedure**

- No approval of the Commission is required before the exemption is used.
- No offering memorandum is required. However if you voluntarily choose to use a document it will be an offering memorandum within the meaning of clause 2(1)(ff) of the Act and GRO 11-906. Use of an offering memorandum will trigger statutory rights of withdrawal and action for misrepresentation. There are no content requirements for this type of offering memorandum except that it must contain Section 80.2 Disclosure. You must file the offering memorandum with the Commission with your report of sales. We don't review this offering memorandum except to look for the Section 80.2 Disclosure.

- You must obtain from each purchaser, where the purchase is based on a close person friendship or close business association basis, a signed Risk Acknowledgement Form 45-106F5. You must retain these forms for eight years and provide each purchaser with a copy of their signed form.
- You must file with the Commission a report of sales in Form 45-106F1 within 10 business days after the sale is complete.
- Fees: \$100 on filing a Form 45-106F1.

**Ongoing requirements**

- The exemption triggers no new Continuous Disclosure Requirements.
- Resale Restrictions – Type 2 - Securities unless a further exemption can be used must be held for 4 months and until the Issuer has been a reporting issuer for 4 months.

## 4.5 Offering memorandum -Section 2.9 of NI 45-106

### The Basics

- This exemption allows an issuer to sell its own securities to an unlimited number of investors in Saskatchewan. This exemption is only available to Issuers.
- Each investor must receive a copy of an offering memorandum prepared in accordance with NI 45-106.
- Each investor must purchase as principal. This means that they must buy the securities for themselves, not as an agent for someone else.
- If an investor is purchasing over \$10,000.00 in securities the investor must be an eligible investor (see definition in section 1.1 of NI 45-106) which includes persons:
  - with specified net assets
  - with a specified net income;
  - that receive independent advice from a recognized advisor;
  - who could purchase under section 2.5 NI 45-106, or
  - who is an accredited investor.
- There must be no commissions or finders fees paid except to a registered dealer. This means there can be no payment of commission or finders fees either directly or indirectly to anyone other than a registered dealer. Actual out of pocket expenses can be reimbursed.
- There is no limit on the amount of capital raised under this exemption.
- Policy reasons for this exemption: Investor should be able to make smaller investments based on information in the offering memorandum but when the investment gets to a certain size investors should meet some criteria to ensure they are able to assume the larger risk. Because of their net worth or income or the advice they receive they should be able to evaluate the investment and not require the protection of the Act.
- There is more information about this exemption in the Companion Policy to NI 45-106. See the Companion Policy for a discussion of the use of advertising with this exemption.

### The Procedure

- No approval of the Commission is required before the exemption is used.

- The Commission reviews all offering memorandums filed with the Commission by Saskatchewan Issuers using the Offering memorandum exemption in section 2.9 of NI 45-106. The review is usually done after the offering is completed because these offering memorandums are usually filed with the report of sales. If the offering memorandum does not meet the requirement of Offering memorandum exemption in section 2.9 of NI 45-106, Issuers may be asked to inform investors of the non-compliance, offer rights of recession or in the case of serious deficiencies face enforcement action. It is very important that you follow the content requirements for the offering memorandum to be used with this exemption closely. The Commission has published Staff Notice 45-704 *Review of Offering Memoranda under NI 45-106 Prospectus And Registration Exemptions* which sets out common problems with these offering memorandums. It can be found at <http://www.spsc.gov.sk.ca/ssc/files/loc-noti/45-704-amendedsept14-2005.pdf>.
- Each investor must receive a copy of an offering memorandum prepared in accordance with NI 45-106. The offering memorandum and any amendments to the offering memorandum must be filed with the report of sales.
- You must hold the funds raised in trust and provide the right of cancellation set out in section 2.9 of NI 45-106.
- As this exemption is included in the definition of offering memorandum within the meaning of clause 2(1)(ff) and GRO 11-906 of the Act, the offering memorandum required for this exemption does trigger statutory rights of withdrawal and action for misrepresentation. It must contain Section 80.2 Disclosure. The offering memorandum must also include the contractual rights of action for cancellation set out in section 2.9 of NI 45-106.
- You must obtain from each purchaser a signed Risk Acknowledgement in Form 45-106F4. You must retain these forms for eight years and provide each purchaser with a copy of their signed form.
- You must file with the Commission report of sales in Form 45-106F1 within 10 business days after the sale is complete.
- Fees: \$100 on filing a Form 45-106F1.  
\$500 on initial filing an offering memorandum.  
No fee on filing an amendment to an offering memorandum.

### **Ongoing requirements**

- This exemption triggers no new Continuous Disclosure Requirements.



- Resale Restrictions – Type 2 - Securities unless a further exemption can be used must be held for 4 months and until the Issuer has been a reporting issuer for 4 months.

#### **4.6 Minimum amount investment – Section 2.10 of NI 45-106**

##### **The Basics**

- This exemption allows sales of securities of an issuer to investors who buy securities worth \$150,000 or more. The securities must be of a single Issuer but they can be different types of securities of the same Issuer.
- This exemption requires that this amount be payable in full in cash at the time of the sale. This does not allow for promissory notes, assumption of debt, installment payments or post-dated cheques.
- This exemption can be used by an issuer to raise capital by selling new securities from its treasury or by anyone selling their already issued securities provided the threshold amount of \$150,000 is met.
- There is no limit on the number of investors, the total amount of capital raised or the number of times the exemption is used.
- There can be no syndication. For example, this exemption is not available where 100 investors get together to each invest \$1,500 in an issuer so that the issuer will have sufficient funds to meet the threshold amount of \$150,000 to use this exemption to purchase securities of another issuer.
- Each investor must purchase as principal. This means that they must buy the securities for themselves, not as an agent for someone else.
- The minimum purchase amount for each investor is \$150,000.
- Policy reasons for this exemption: Because of the minimum purchase price, investors are presumed to have the resources to protect themselves and not require the protection of the Act.
- There is more information about this exemption in the Companion Policy to NI 45-106.

## **The Procedure**

- No approval of the Commission is required before the exemption is used.
- No offering memorandum is required. However if you voluntarily choose to use a document it will be an offering memorandum within the meaning of clause 2(1)(ff) of the Act and GRO 11-906. Use of an offering memorandum will trigger statutory rights of withdrawal and action for misrepresentation. There are no content requirements for this type of offering memorandum except that it must contain Section 80.2 Disclosure. You must file the offering memorandum with the Commission with your report of sales. We don't review this offering memorandum except to look for the Section 80.2 Disclosure.
- You must file with the Commission a report in Form 45-106F1 within 10 business days after the sale is complete.
- Fees: \$100 or \$50 per Saskatchewan investor, whichever is greater, on filing a Form 45-106F1.

## **Ongoing Requirements**

- The exemption triggers no new Continuous Disclosure Requirements.
- Resale Restrictions – Type 2 - Securities unless a further exemption can be used must be held for 4 months and until the Issuer has been a reporting issuer for 4 months.

## **4.7 Asset acquisition – Section 2.12 of NI 45-106**

### **The Basics**

- This exemption allows an Issuer to sell its own securities in consideration for assets of the investor. The fair value of the assets so purchased must not be less than \$150,000.
- This exemption allows an Issuer to issue securities in exchange for property, not to raise capital. It is often used to roll property into an Issuer.
- There must only be one investor for each time the exemption is used. There must be no syndication.
- There is no limit to number of times an Issuer can use the exemption.
- Policy reasons for this exemption: Securities are issued as part of a commercial transaction. Investors are presumed to have the resources to protect themselves and not require the protection of the Act.

- There is more information about this exemption in the Companion Policy to NI 45-106.

### **The Procedure**

- No approval of the Commission is required before the exemption is used.
- No offering memorandum is required. However if you voluntarily choose to use a document it will be an offering memorandum within the meaning of clause 2(1)(ff) of the Act and GRO 11-906. Use of an offering memorandum will trigger statutory rights of withdrawal and action for misrepresentation. There are no content requirements for this type of offering memorandum except that it must contain Section 80.2 Disclosure. You must file the offering memorandum with the Commission with your report of sales. We don't review this offering memorandum except to look for the Section 80.2 Disclosure.
- You must file with the Commission a report in Form 45-106F1 within 10 business days after the sale is complete.
- Fees: \$100 on filing a Form 45-106F1.

### **Ongoing requirements**

- This exemption triggers no new Continuous Disclosure Requirements.
- Resale Restrictions – Type 2 - Securities unless a further exemption can be used must be held for 4 months and until the Issuer has been a reporting issuer for 4 months.

## **4.8 Petroleum, natural gas and mining properties – Section 2.13 of NI 45-106**

### **The Basics**

- This exemption allows an Issuer to sell its securities in consideration for petroleum, natural gas and mining properties or an interest in them.
- An Issuer can't raise capital using this exemption, but can use it to acquire resource properties by issuing securities. The exemption is used to roll resource properties into an Issuer.
- There must only be one investor for each time the exemption is used. There must be no syndication.
- There is no limit to the number of times an Issuer can use the exemption.
- Policy reasons for this exemption: Securities are issued as part of a commercial transaction. Investors are presumed to have the resources to protect themselves and not require the protection of the Act.

### **The Procedure**

- No approval of the Commission is required before the exemption is used.
- No offering memorandum is required. However if you voluntarily choose to use a document it will be an offering memorandum within the meaning of clause 2(1)(ff) of the Act and GRO 11-906. Use of an offering memorandum will trigger statutory rights of withdrawal and action for misrepresentation. There are no content requirements for this type of offering memorandum except that it must contain Section 80.2 Disclosure. You must file the offering memorandum with the Commission with your report of sales. We don't review this offering memorandum except to look for the Section 80.2 Disclosure.
- You must file with the Commission a report in Form 45-106F1 within 10 business days after the sale is complete.
- Fees: \$100 on filing a Form 45-106F1.

**Ongoing Requirements**

- This exemption triggers no new Continuous Disclosure Requirements.
- Resale Restrictions – Type 2 - Securities unless a further exemption can be used must be held for 4 months and until the issuer has been a reporting issuer for 4 months.

## 4.9 Isolated Trade – Sections 2.30 and 3.3 of NI 45-106

### The Basics

- In this case there are two exemptions.
- Section 2.30 of NI 45-106 provides for a registration and prospectus exemption for an Issuer to sell its securities.
- Section 3.3 of NI 45-106 provides only a registration exemption for a person holding securities of an Issuer. There is no prospectus exemption. In order for a holder of the securities to sell the securities the securities would have to be free of Resale Restrictions or a different prospectus exemption would need to be found.
- In both cases the sale must be an isolated trade. It must not be made in the course of continued and successive transactions of a like nature, or by a person or company whose usual business is selling securities.
- This exemption allows the rare transaction. An Issuer can use it very rarely to raise capital by selling securities to a very small number of investors, usually just one or two. It is a sale that is likely to be a one-time or the very rare case, not likely to happen again or is a special situation or isolated transaction. Very few investors can be involved.
- Often the sale is part of a larger commercial transaction where the purchaser has had an independent adviser.
- Securities sales must be a very rare occurrence for Issuers using this exemption.
- The Commission interprets this exemption quite narrowly.
- Policy reasons for this exemption: Very few investors are involved and usually they have a special relationship to the Issuer. This relationship is assumed to provide investors sufficient information about the Issuer and the securities offered and the protection of the Act is not required.
- There is more information about this exemption in the Companion Policy to NI 45-106.

### The Procedure

- No approval of the Commission is required before the exemption is used.
- No offering memorandum is required. However if you voluntarily choose to use a document it will be an offering memorandum within the meaning of clause

2(1)(ff) of the Act and GRO 11-906. Use of an offering memorandum will trigger statutory rights of withdrawal and action for misrepresentation. There are no content requirements for this type of offering memorandum except that it must contain Section 80.2 Disclosure. You must file the offering memorandum with the Commission with your report of sales. We don't review this offering memorandum except to look for the Section 80.2 Disclosure.

- You must file with the Commission a report in Form 45-106F1 within 10 business days after the sale is complete.
- Fees: \$100 on filing a Form 45-106F1.

### **Ongoing requirements**

- This exemption triggers no new Continuous Disclosure Requirements.
- Resale Restrictions
- Type 2 for securities sold under section 2.30 of NI 45-106 - Securities unless a further exemption can be used must be held for 4 months and until the Issuer has been a reporting issuer for 4 months.
- The Resale Restrictions for sales under section 3.3 of NI 45-106 will depend on the prospectus exemption used to carry out the sale.

## **4.10 Not for profit issuer – Section 2.38 of NI 45-106**

### **The Basics**

- This exemption allows sales in securities of an Issuer organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not for profit.
- To use this exemption, the Issuer must be organized exclusively for one or more of the listed purposes and use the funds raised under this exemption for these purposes. An issuer organized for one of the listed purposes using this exemption cannot, for example, lend funds to another organization, even if the other organization is organized exclusively for one of the listed purposes. In this example, the Issuer is not organized exclusively for the listed purposes because it is providing financing to other organizations, which is not one of the listed purposes. The same would also be true if one of the Issuer's mandates was to provide an investment vehicle for its members.
- This exemption is only available to an Issuer. An Issuer can raise capital by selling its securities. Security holders of an Issuer could not use this exemption to resell their securities to anyone else. While there is no Resale Restrictions on these securities the holder would need to find a registration exemption to sell the securities.

- No part of the Issuer's net earnings can benefit any security holder. This means that the securities can't pay dividends. However, if the securities are debt securities and the Issuer agrees to repay the principal amount with or without interest, the Commission takes the position that the security holders are not receiving part of the net earnings of the Issuer. The debt securities may be secured or unsecured.
- If investors could receive any special treatment as a result of purchasing securities such as a reduced rate for the Issuer's services or the like, the Commission takes the position that the security holders are not receiving part of the net earnings of the Issuer and the sale will fit within this exemption.
- If on liquidation any part of the Issuer's assets after payment of its debts could go to the investors, then they would be getting part of the net earnings of the Issuer, and the sale will not fit within this exemption.
- There can be no commission or other remuneration paid in connection with the sale of securities.
- The exemption does not require that security holders' voting rights be restricted.
- Anyone can buy. An investor does not have to be a member of the Issuer, live in a certain geographical area or meet any special qualifications.
- There is no limit of the number of investors or the amount of capital raised.
- Policy reasons for this exemption: Investors are not really investing, because they are usually buying for non-investment reasons.
- There is more information about this exemption in the Companion Policy to NI 45-106.

### **The Procedure**

- No approval from the Commission is required before the exemption is used.
- No offering memorandum is required. Use of any documentation does not trigger statutory rights of withdrawal or action for misrepresentation as this exemption is not included in the definition of offering memorandum within the meaning of clause 2(1)(ff) of the Act and GRO 11-906.
- No reports to the Commission are required after the exemption is used.
- No fees are payable.

### **Ongoing Requirements**



- This exemption triggers no new Continuous Disclosure Requirements.
- There are no Resale Restrictions

#### **4.11 Employee, Executive Officer, Director and Consultants Exemptions – Division 4 of NI 45-106**

##### **The Basics**

- This exemption allows an Issuer or a control person of the Issuer to sell the Issuer's securities (or an option to purchase the Issuer's securities ) to:
  - Employees, executive officers, directors and consultants of the Issuer and their spouses;
  - Employees, executive officers, directors and consultants of related entity of the Issuer and their spouses;
  - Certain entities related to the above persons and their spouses (including RRSPs and RRIFs); and
  - A trustee custodian or administrator acting on behalf of the above persons for the purpose of facilitating the trade.
- Issuers can raise capital under this exemption by selling securities to the above persons.
- There are also exemptions in Division 4 of NI 45-106 for sales between purchasers.
- A person cannot be induced to purchase by expectation of employment, appointment or engagement or continued employment, appointment or engagement.
- Policy reasons for this exemption: These persons are presumed to know about the Issuer they are involved with and not require the protection of the Act.

##### **The Procedure**

- No approval from the Commission is required before the exemption is used.
- No offering memorandum is required. Use of any documentation does not trigger statutory rights of withdrawal or action for misrepresentation as this exemption is not included in the definition of offering memorandum within the meaning of clause 2(1)(ff) of the Act and GRO 11-906.
- No reports to the Commission are required after the exemption is used.
- No fees are payable.

**Ongoing Requirements**

- This exemption triggers no new Continuous Disclosure Requirements.
- Resale Restrictions – Type 3 - Securities unless a further exemption can be used must be held until the issuer has been a reporting issuer for 4 months.

## **PART 5 THE DISCRETIONARY EXEMPTION**

### **5.1 General Principles**

If you do not fit into a statutory exemption from the registration and prospectus requirements of the Act, then you can apply to the Commission under section 83 of the Act for a discretionary exemption waiving the registration and prospectus requirements of the Act.

The Commission has the power to grant discretionary exemptions from both the registration and prospectus requirements of the Act under section 83 of the Act.

To apply for discretionary exemptions follow the procedure set out in Saskatchewan Local Policy Statement 12-601 *Applications to the Saskatchewan Securities Commission*. <http://www.sfsc.gov.sk.ca/ssc/files/loc-poli/12-601amended-nov-04.pdf>

Before granting a discretionary exemption under section 83 of the Act, the Commission must first be satisfied that it is not prejudicial to the public interest to do so. There is never a guarantee the Commission will grant a discretionary exemption when applied for.

The Commission will consider whether there are other factors in place for public protection making the prospectus and registration requirements of the Act unnecessary.

Discretionary exemptions are often granted where a trade almost meets the requirements of a statutory exemption and the policy considerations behind that statutory exemption are met but, for a technicality, the trade does not fall within the statutory exemption.

The Commission may grant discretionary exemptions where there is a special relationship between the Issuer and the investors and through this special relationship, the investors have special knowledge both about the Issuer and its promoters. In this case the investors may not require the protection afforded by registration or the disclosure normally made in a prospectus.

Discretionary exemptions may be granted where the Commission is satisfied investors are knowledgeable, sophisticated, can protect themselves and don't require the protection of the Act.

In general terms, the Commission is open-minded as to when it will grant a discretionary exemption. It must be satisfied that the results will be that the same level of public protection is provided, albeit in a different manner, as would be present if the registration and prospectus requirements of the Act had been complied with. Discretionary exemptions usually have terms and conditions attached to them and may or may not require the use of an offering memorandum.

The sale of securities by an Issuer pursuant to a discretionary exemption does not in and of itself trigger any Continuous Disclosure Requirements or Resale Restrictions unless such requirements are built into the terms and conditions of the discretionary exemption received from the Commission. Therefore an Issuer will only become subject to those Continuous Disclosure Requirements and Resale Restrictions that are imposed as a term of the discretionary exemption. An Issuer should look to the terms of the discretionary exemption for its requirements in this regard. It is usual for the Commission to build in these types of requirements. This is the same with respect to the reports of sales that must be filed with the Commission after use of the discretionary exemption. The terms of the discretionary exemption received must be reviewed to find the Issuer's requirements in this regard. If an offering document is used with respect to a trade under a discretionary exemption, it will be an offering memorandum within the meaning of clause 2(1)(ff) of the Act. It must contain Section 80.2 Disclosure.

## **5.2 Labour-sponsored Venture Capital Corporations - General/Ruling Order 45-902 Exemptions for Certain Trades by and to Labour-sponsored Venture Capital Corporations**

### **The Basics**

- *The Labour-sponsored Venture Capital Corporations Act* (Saskatchewan) provides for a tax credit for investors who invest in a labour-sponsored venture capital corporation within the meaning of that legislation. One of the conditions of that program is that any securities issued as the result of the program comply with the requirements of the Act.
- General/Ruling Order 45- 902 *Exemptions for Certain Trades by and to Labour-sponsored Venture Capital Corporations* is a discretionary exemption that allows sales by Type B labour-sponsored venture capital corporations. General Ruling/Order 45-902 *Exemptions for Certain Trades by and to Labour-sponsored Venture Capital Corporations* is designed to simplify the procedures to complete this type of offering. <http://www.sfsc.gov.sk.ca/ssc/files/gro/45-902howto.pdf>  
<http://www.sfsc.gov.sk.ca/ssc/files/gro/45-902-jan-04.pdf>
- General Ruling/Order 45-902 *Exemptions for Certain Trades by and to Labour-sponsored Venture Capital Corporations* is necessary because the Employee Exemption is usually not available for these types of offerings. This is because the labour-sponsored venture capital corporation makes the offering, but the investors are employed by the operating company, not the labour-sponsored venture capital

corporation. In very rare cases the Private issuer exemption and the Family, friends and business associates exemption have been used.

- Under General Ruling/Order 45-902 *Exemptions for Certain Trades by and to Labour-sponsored Venture Capital Corporations* you can sell only to employees of the operating company.
- There is no limit on the number of investors.
- There is no limit on the amount of capital raised.
- *The Labour-sponsored Venture Capital Corporations Act* (Saskatchewan) has other requirements besides those of the Act to access this program. For details contact the Department of Industry and Resources at 2103 11th Avenue, Regina, Saskatchewan, S4P 3V7, (306) 787-2252.

### **The Procedure**

- You do not have to have any contact with the Commission to use General Ruling/Order 45-902 *Exemptions for Certain Trades by and to Labour-sponsored Venture Capital Corporations*. It is designed so that no approvals from the Commission are needed. Nothing needs to be filed with the Commission before or after the use of the exemption. There are no fees to be paid to the Commission. See General Ruling/Order 45-902 *Exemptions for Certain Trades by and to Labour-sponsored Venture Capital Corporations* for details. You must only comply with the terms of General Ruling/Order 45-902 *Exemptions for Certain Trades by and to Labour-sponsored Venture Capital Corporations*.
- No approval of the Commission is required before the exemption is used.
- General Ruling/Order 45-902 *Exemptions for Certain Trades by and to Labour-sponsored Venture Capital Corporations* does require the use of an offering memorandum. It will be an offering memorandum within the meaning of clause 2(1)(ff) of the Act. Its use will trigger statutory rights of withdrawal and action for misrepresentation. There are content requirements. It must contain Section 80.2 Disclosure. We don't receive or review this offering memorandum.
- No reports to the Commission are required after the exemption is used.
- Fees: No fees are payable.

### **Ongoing Requirements**

- This exemption triggers no new Continuous Disclosure Requirements.

- Resale Restrictions – Type 3 - Securities unless a further exemption can be used must be held until the issuer has been a reporting issuer for 4 months. There are some exception to the rule in *General Ruling/Order 45-902 Exemptions for Certain Trades by and to Labour-sponsored Venture Capital Corporations*.

## **PART 6                      GENERAL PROCEDURES**

### **6.1                      Filing Offering Memorandums**

Offering memorandums within the meaning of clause 2(1)(ff) of the Act and GRO 11-906 must be filed with the Commission. These offering memorandums are filed with the report of sales. Send offering memorandums with a covering letter setting out the following:

- Confirming the statutory exemption used; and
- A reference to the page number of the offering memorandum where the Section 80.2 Disclosure and if applicable the section 2.9 of NI 45-106 Offering memorandum exemption investor rights can be found.

Any amended offering memorandums or amendments to offering memorandums must also be filed with the Commission.

### **6.2                      Filing Reports of Trade**

When filing a NI 45-106F1 with the Commission ensure the exemption used is clearly indicated. This should clearly be indicated in the appropriate column on Schedule 1 to the form.

**PART 7      CONCLUSION**

Copies of any Commission Regulation, Saskatchewan Local Policy, General Ruling/Order or Staff Notice are available on the Commission's web site. This is also true of any National Instrument, Multilateral Instrument, Companion Policy, National Policy or CSA Staff Notice.

If you have any questions about the information in this publication contact the Deputy Director, Legal/Registration at (306) 787-5879.

This paper was prepared by Dean Murrison, Deputy Director, Legal/Registration, Securities Division, Saskatchewan Financial Services Commission.



## **PART 8      ATTACHMENTS**

### **8.1            List of Cases – Private Issuer Exemption**

**In the following cases the courts have dealt with the issue of whether or not a securities offering was made to the "public" and falls within the Private issuer exemption. This list may not be complete or up-to-date.**

#### **Alberta Cases**

*R. v. Piepgrass* (1959) 29 W.W.R. 218 (Alta. C.A.) - leading Canadian case

*R. v Buck River Resources Ltd. Et al* (1984) 25 B.L.R. 209 (Alta. Prov. Ct.)

#### **Ontario Cases**

*R. v. McKillip* [1972] 1 O.R. 164 (Ont. Prov. Ct.)

*In the Matter of Shelter Corporation of Canada Limited* Ontario Securities Commission, January, 1977 O.S.C.B. 6

#### **British Columbia Cases**

*R. v. Empire Dock Ltd.* (194) 55 B.C.R. 34 (B.C. Co. Ct.)

*R. v. Slegg* [1974] 4 W.W.R. 402 (B.C. Prov. Ct.)

*R. v. Kiefer* [1976] 6 W.W.R. 541 (B.C. County Ct.)

#### **Manitoba Cases**

*R. v. Gyles* (1982) 145 D.L.R. (3rd) 61 (Man. C.A.)

#### **English Cases**

*Nash v. Lynde* [1929] A.C. 158 (H.L.)

#### **United States Cases**

*The Securities and Exchange Commission v. Ralston Purina Company* (1953) 346 U.S. 119

*Duran v. Petroleum Management Corp.* (1977) United States Court of Appeals 5th Circuit, 545F 2nd 893

## 8.2 Section 80.2 Disclosure

An investor is given certain rights of action under the Act. These rights are:

1. Section 80.1 – on receipt of an amended offering memorandum, the right to withdraw from an agreement to purchase securities by a delivering a notice to the person who or company that is selling the securities indicating an intention not to be bound by the purchase agreement, such notice to delivered within two business days after receipt of the amended offering memorandum.
2. *[Include this if using section 2.9 of NI 45-106 - Section 2.9 of National Instrument 45-106 Prospectus and Registration Exemptions - the right to cancel the agreement to purchase the security by delivering a notice to the Issuer not later than midnight on the 2nd business day after the purchaser signs the agreement to purchase the security.]*
3. Subsection 138(1) - a right of action for rescission or for damages where the offering memorandum and any amendment to the offering memorandum contains a misrepresentation.
4. Subsection 138.1(3) - a right of action for misrepresentation in advertising and sales literature.
5. Subsection 138.2(1) - a right of action for damages for verbal misrepresentation in the sale of securities.
6. Subsection 141(1) - a right to void the purchase agreement and recover the purchase price if the securities are sold in contravention of the Act or the regulations to the Act.
7. Subsection 141(2) - 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 80.1 of the Act.

An investor should refer to the provisions of the Act for particulars of these rights or consult with a lawyer.

These rights are in addition to and without derogation from any other right or remedy which an investor might have at law.

### **Time limitations**

Pursuant to section 147 of the Act these rights of action must be exercised within certain time periods. These time periods are:

1. An action for rescission must be started within 180 days after the date of the transaction that gave rise to the action.
2. An action for damages must be started by the earlier of:
  - a. One year after the investor first had knowledge of the facts giving rise to the action; or
  - b. Six years after the date of the transaction that gave rise to the action.

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