

New Offering Memorandum Disclosure Requirements for Real Estate Issuers and Collective Investment Vehicles

By [Alexander Katznelson](#), [Zachary Janes](#), and [Hayden Wang](#) (Student-at-Law) – Securities and Capital Markets Group - Minden Gross LLP

December 22, 2022

On December 8, 2022, the Canadian Securities Administrators (“CSA”) announced [amendments](#) (the “Amendments”) to the offering memorandum (“OM”) exemption in [National Instrument 45-106 – Prospectus Exemptions](#) (“NI 45-106”) and [Companion Policy 45-106CP – Prospectus Exemptions](#) (the “Companion Policy”). The Amendments introduce enhanced disclosure obligations for issuers engaged in real estate activities (“Real Estate Issuers”) or issuers acting as collective investment vehicles (“CIVs”) when they rely on the OM exemption in NI 45-106. The Amendments are expected to come into force on March 8, 2023.

The Amendments also introduce enhanced disclosure standards for non-qualifying issuers, set out in the new Form 45-106F2 – *Offering Memorandum for Non-Qualifying Issuers* (“Form 45-106F2”)¹ that will replace the [current form](#).

Real Estate Issuers

The Amendments introduce additional OM disclosure requirements for Real Estate Issuers as well as a new requirement to file and deliver an appraisal of real property together with an OM in certain circumstances.

Real Estate Issuers are issuers engaged in activities with the primary purpose of generating for security holders income or gain from the lease, sale or other disposition of real property (subject to certain exceptions, including issuers engaged in mineral projects or oil and gas activities). The Companion Policy clarifies that Real Estate Issuers include, among others, persons who (a) develop or redevelop real properties for sale or lease, (b) own real properties for lease, (c) buy, hold, or sell real property with a view to making a gain or income, or (d) issue an interest in real property that is a security. Notably, Real Estate Issuers include a parent company whose subsidiary engages in real estate activities.

¹ See Schedule B-1 (pages 36 to 64) of the [Amendments](#).

Appraisal Requirement

Together with an OM, issuers will be required to file and deliver to investors a signed appraisal, prepared by a qualified independent appraiser, of an interest in real property where the issuer:

- a) proposes to acquire an interest in real property from a related party, and a reasonable person would believe that the likelihood of the issuer completing the acquisition is high; or
- b) except in the financial statements contained in the OM, discloses in the OM a value for an interest in real property.

The appraisal must provide the fair market value (“FMV”) of the real property interest as at a date within six months preceding the date that the appraisal is delivered to the purchaser, without considering any proposed improvements to or proposed development of the property.

The issuer must file a copy of the appraisal concurrently with the filing of the OM or any amended OM on or before the tenth day after the first distribution for which the appraisal was required to be delivered to a purchaser.

If the appraisal requirement applies, the issuer cannot disclose in any communication related to the distribution a representation or opinion of the value of the interest in real property other than the appraised FMV disclosed in the appraisal, unless the issuer has a reasonable basis for the value, in which case the issuer must also disclose in the same communication:

1. with equal or greater prominence as the representation or opinion, the appraised FMV;
2. the material factors or assumptions used to determine the representation or opinion; and
3. whether or not the representation or opinion was determined by a qualified appraiser who is independent of the issuer.

Additional Real Estate Disclosure

Non-qualifying Real Estate Issuers (which generally includes Real Estate Issuers who are not reporting issuers) will be required to include in their OMs the additional disclosure set forth in Schedule 1 – *Additional Disclosure Requirements for an Issuer Engaged in Real Estate Activities* to the new Form 45-106F2² in respect of each interest in real property held or proposed to be acquired by the issuer, including but not limited to:

1. information regarding the property’s location, encumbrances, current use, environmental liabilities, tax arrears, and occupancy levels;

² Note, non-qualifying Real Estate Issuers may continue using OMs prepared in accordance with the [current form](#), without the additional disclosure required by the new Schedule 2, if the OM is dated prior to March 8, 2023.

2. any penalties, sanctions, bankruptcies, insolvencies or convictions in respect of the property developer or manager;
3. any prior transfers of the property with a related party;
4. any required regulatory approvals; and
5. if the property is being developed, the estimated costs and objectives.

Collective Investor Vehicles

The Amendments introduce additional OM disclosure requirements for CIVs, which include (a) investment funds and (b) any other issuers whose primary purpose is to invest money provided by its security holders in a portfolio of securities other than securities of its own subsidiaries.

Non-qualifying CIV issuers (which generally includes CIV issuers who are not reporting issuers) will be required to include in their OMs the additional disclosure set forth in the new Schedule 2 – *Additional Disclosure Requirements for an Issuer that is a Collective Investment Vehicle* to the new Form 45-106F2,³ including but not limited to:

1. a description of the issuer's investment objectives and strategy;
2. any penalties, sanctions, bankruptcies, insolvencies or convictions in respect of the portfolio manager;
3. a detailed portfolio summary including prescribed information;
4. performance data for the issuer's portfolio; and
5. any conflicts of interest.

General Amendments

As discussed above, the Amendments will introduce a new Form 45-106F2, which will include a number of new disclosure requirements for OMs prepared by non-qualifying issuers, including but not limited to:

1. enhanced disclosure where a material amount of the proceeds of the offering will be transferred to another issuer that is not the issuer's subsidiary;
2. disclosure of historical transactions involving related parties;
3. disclosure regarding any repurchase requests from security holders; and
4. disclosure of the source of funds for any dividends or distributions paid in excess of cash flow from operations.

In addition, the Amendments require all OMs to be filed in a format that allows for the searching of words electronically using reasonably available technology.

³ Note, non-qualifying CIV issuers may continue using OMs prepared in accordance with the [current form](#), without the additional disclosure required by the new Schedule 2, if the OM is dated prior to March 8, 2023.

Interim Financial Reports

The Amendments relaxed the requirement for interim financial reports for ongoing distributions. Previously, in the event of an ongoing distribution, issuers were required to amend the OM to include an interim financial report for the issuer's most recently completed six-month period – the Amendments remove this requirement in all jurisdictions except Ontario. The Amendments do, however, exempt an issuer from Ontario's interim financial report requirement if the issuer appends to its OM an additional certificate certifying that, as of the date of the additional certificate:

1. the OM does not include a misrepresentation;
2. there has been no material change in respect of the issuer that is not disclosed in the OM; and
3. the OM provides a reasonable purchaser with sufficient information to make an informed investment decision.

Important to Remember Going Forward

The Amendments are expected to come into force on March 8, 2023. After March 8, non-qualifying issuers may continue using OMs prepared in accordance with the [current form](#) if the certificate attached to the OM is dated before March 8, 2023. However, certain of the new requirements, including the requirement to deliver an appraisal discussed above, will apply to OMs prepared prior to March 8 that continue to be used.

Please contact the authors, Alexander Katznelson at akatznelson@mindengross.com and Zachary Janes at zjanes@mindengross.com, for more information on the Amendments.

This article is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.