

POLICY STATEMENT TO THE REGULATION RESPECTING REAL ESTATE PROSPECTUS AND REGISTRATION EXEMPTIONS

INTRODUCTION

Purpose

The purpose of this Policy Statement is to help users understand how the Autorité des marchés financiers (the “Authority”) interprets or applies certain provisions of the *Regulation respecting real estate prospectus and registration exemptions* (chapter V-1.1, r. 45.1) (the “Regulation”).

Under the Regulation, an issuer is exempt from the requirement to prepare a prospectus for distributions of investment contracts consisting of a real right in an immovable and a rental management agreement and for distribution of securities of an issuer that owns an immovable where such security gives the holder a right of exclusive use of the immovable or a portion of the immovable. The Regulation also provides, with conditions, an exemption from the broker registration requirement for such distributions.

Reference to Regulation

Other than Chapter 1, any provision of this Policy Statement refers to the equivalent provision of the Regulation.

CHAPTER I SCOPE AND INTERPRETATION

Concept of Investment Contract

Market participants seeking to offer or sell hotel unit-type or real estate unit-type immovables involving a rental management agreement giving purchasers the option of combining ownership of an immovable with rental income (the “offer or sale of real estate units”) must determine whether such an offer or sale constitutes a distribution of a security—i.e., an investment contract, which is a form of investment subject to the *Securities Act* (chapter V-1.1) (the “Act”). The Authority considers there to be a high likelihood that an investment contract covered by the scope of the Regulation exists where the offer or sale of real estate units includes a real estate unit rental management agreement under which the purchaser wishing to offer his or her real estate unit for rental is required to do so through one or more specified persons who will be responsible for managing or coordinating real estate unit rentals or providing other related services. The rental management agreement may offer the prospect of individual rental income, or of collective rental income through a real estate unit rental pool program providing for the sharing of expenses and/or revenues among the participants or through any other scheme of that nature. The market participants, including the issuer, promoter and selling purchasers, are responsible for determining whether they are distributing an investment contract.

In the Regulation, “investment contract” has the same meaning as in the Act.

The following factors are given to guide market participants in better understanding the concept of an investment contract. Depending on the circumstances, the presence of one or more of the following factors may indicate that the offer or sale of real estate units constitutes an investment contract. This list is not exhaustive:

- restrictions on the periods during which the purchaser or purchaser of a real estate unit can occupy the unit;
- representations made to a purchaser or purchaser highlighting economic advantages such as projected financial income or potential rental income from the real estate units;
- income or rent guarantees or other financial undertakings offered by any person connected with the offer or sale of real estate units.

Rental Management Agreement

The term “rental management agreement” means a management agreement, whether mandatory or optional on purchase, that covers the rental of a real estate unit offered by the issuer, promoter or manager and whose purpose is to manage or coordinate the rental of the real estate unit or provide other related services through one or more specified persons whom the purchaser is required to use for such purpose. The term also means an agreement forming part of a mandatory or optional real estate unit rental pool program that provides for revenue sharing among the participants.

The Authority considers that, notwithstanding the fact that a purchaser has the right to personally occupy the real estate unit or the fact that the purchaser is not under any obligation to sign the rental management agreement on subscribing for the investment contract, requiring the purchaser to use one or more specified persons to manage and coordinate the rental of their real estate unit when the purchaser wishes to offer the real estate unit for rental is a condition that indicates a high likelihood that an investment contract referred to in paragraph 1 of section 1 of the Regulation exists.

Concept of Promoter

“Promoter” generally means a person who has taken the initiative in founding, organizing or substantially reorganizing the business of the issuer or who has received consideration over a prescribed amount for services or property or both in connection with the founding, organizing or substantial reorganizing of the business of the issuer. In Québec, the term is not defined in the Act and is given a broad interpretation.

Persons who receive consideration solely as commissions related to a distribution or in consideration of a contribution in kind and who do not otherwise take part in the founding, organizing or substantial reorganizing of the business of the issuer are generally not promoters.

The terms “forward-looking information,” “future-oriented financial information” and “financial outlook” are defined in *Regulation 51-102 respecting continuous disclosure obligations* (chapter V-1.1, r. 24).

1. The security of an issuer that owns an immovable where such security gives the holder a right of exclusive use of the immovable or a portion of the immovable under paragraph 2 of section 1 is known as a “proprietary lease.” With this type of distribution, a rental agreement is not severable from the agreement transferring the security and gives the security holder the exclusive enjoyment of an immovable, a real estate unit and, in some cases, a portion of the immovable such as a parking space. Although the holder owns the security, the issuer remains the owner of the immovable and the security holder is considered a lessee within the meaning of the *Civil Code of Québec* (chapter CCQ-1991).

2. The Authority authorizes the use of the real estate offering document (the “offering document”) in lieu of a prospectus, giving rise to the rights of action set forth in sections 217 to 221 of the Act.

CHAPTER II DISTRIBUTION OF AN INVESTMENT CONTRACT

DIVISION I PROSPECTUS EXEMPTION

3. The issuer is “in operation” when it has begun the venture involving the rental management of a real estate unit. For the purpose of calculating the period in subparagraph 2(a) of section 3 of the Regulation, the date the venture began means, in particular, the date a real estate unit was made available for rental.

Where a real estate project is phased, the offering document must present the statement of net revenue for the previous phases, where those phases will be subject to common rental management with the real estate project in the process of distribution.

4. Material agreements relating to the use or management of the immovable generally cover disclosure of the rights or obligations arising from the real rights related to the immovable and the rental management agreement. For example, in the case of a rental program, the rental management agreement is a material agreement. Contracts arising from emphyteutic rights may also be material agreements.

DIVISION II EXEMPTION FROM REGISTRATION REQUIREMENT

5. Based on the registration requirement triggers set out in section 1.3 of the *Policy Statement to Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations* (Decision 2021-PDG-0023, 2021-05-26), a person may be required to register as a securities dealer for the offer or sale of real estate units.

The requirement to register with the Authority may be triggered if, for example, the person carries on the activity with repetition, expects to be remunerated or compensated for carrying on the activity, directly or indirectly solicits a clientele of potential buyers, and engages in activities similar to that of certain registered securities dealers. The role of a securities dealer is to fulfill all the requirements related to the sale of the investment contract and, in particular, to understand the terms of the investment so as to be able to explain them to purchasers, know the client’s investor profile, and ensure the investment is suitable for the client.

Where the registration requirement is triggered for the distribution of an investment contract under paragraph 1 of section 1 of the Regulation, the involvement of a registered securities dealer in the offer or sale of real estate units is not required if the individual who acts as an intermediary for the distribution is the holder of a licence issued in accordance with the *Real Estate Brokerage Act* (chapter C-73.2).

DIVISION IV DOCUMENTS TO BE FILED

11. If the issuer is conducting multiple closings, the offering document must be filed on or before the 10th day after the first distribution. Once the offering document has been filed, it does not need to be filed again after subsequent closings, unless it has been modified or updated.

The filing of the report of exempt distribution must be accompanied by the fee indicated in subparagraph 4 of section 267 of the *Securities Regulation* (chapter V-1.1, r. 50).

Where required, the offering document and any update, along with any report of exempt distribution, are filed electronically with the Authority through the System

for Electronic Document Analysis and Retrieval (SEDAR) in accordance with *Regulation 13-101 respecting the System for Electronic Document Analysis and Retrieval (SEDAR)* (chapter V-1.1, r. 2).

The offering document and any report of exempt distribution should be filed under the category “Exempt Market Offerings and Disclosure.”

DIVISION V CERTIFICATES

12. The Act prohibits a person from making any statement that the person knows or ought reasonably to know is a misrepresentation. This prohibition applies whether or not the distribution is made under an exemption. The term “misrepresentation” is defined in the Act. The use of exaggeration, innuendo or ambiguity in an oral or written representation about a material fact, or other deceptive behaviour relating to a material fact, might be a misrepresentation.

The issuer must ensure that the information provided to the purchaser is current and does not contain a misrepresentation. For example, if a material change occurs in the business of the issuer or the financial information after delivery to the purchaser of the offering document referred to in paragraph 1 of section 3 of the Regulation but before the beginning of the venture, the issuer must give the purchaser an update to the offering document before accepting a commitment from the purchaser. The update to the offering document may take the form of an amendment describing the material change or a new real estate offering document containing up-to-date disclosure, whichever the issuer decides will most effectively inform purchasers.

Whatever form of update the issuer uses, it must include a newly signed and dated certificate in the form prescribed in Division V of the Regulation.

DIVISION VI PERIODIC DISCLOSURES

16. The issuer must deliver to the security holders the periodic disclosures indicated in section 16 of the Regulation. Furthermore, under section 7 of the Act, it is the responsibility of the promoter of the venture and the persons in charge of it to make the disclosure related to the venture, unless the Authority specifically designates a person pursuant to section 66 of the Act. The manager or the rental pool that manages the rental of a real estate unit will be considered a person referred to in the expression “the persons in charge of it.” It is a question of fact.

The issuer, the promoter or the persons in charge of the venture are not required to deliver or file the annual or interim statement of net revenue of the venture to or with the Authority. They need only deliver it to the holders who acquired an investment contract under the exemptions in section 3 or 18 of the Regulation.

17. The requirement to deliver the annual and interim statement of net revenue of the venture to the holders continues to apply each year after the initial distribution until the earlier of (i) the date the issuer becomes a reporting issuer and (ii) the date the Authority ends the special disclosure scheme through an exemption. In certain circumstances, such as when the rental pool program is terminated or when there is a change of destination of the immovable, the Authority may, through an exemption, end the special disclosure scheme upon request by a party responsible for delivering the periodic disclosure documents to the holders.

DIVISION VII RESALE

19. The notification must allow the person in charge of the venture to fulfill the requirement to deliver the updated real estate offering document and the statement

of net revenue of the venture to the person purchasing the security, where notification from the security holder takes place before the beginning of the venture.

Where notification from the security holder takes place after the beginning of the venture, the person in charge of the venture must deliver the most recent version of the real estate offering document and the statement of net revenue of the venture to the person purchasing the security. The person in charge of the venture must also prepare and deliver to the person purchasing the security the resale document relating to the manager and the rental pool.

CHAPTER III DISTRIBUTION OF A SECURITY GIVING A RIGHT OF EXCLUSIVE USE IN AN IMMOVABLE

DIVISION I PROSPECTUS AND REGISTRATION EXEMPTION

21. The Regulation provides for a prospectus and broker registration exemption for the distribution of such securities at the time of the initial sale or resale of the securities, provided a rental agreement is signed by the purchaser that gives the purchaser a right of exclusive use of a designated immovable or a portion of the immovable.

CHAPTER IV TRANSITION AND OTHER EXEMPTIONS

24. The purpose of section 24 of the Regulation is to allow any person who purchased an investment contract or security covered by the scope of section 1 of the Regulation, pursuant to a prospectus exemption under *Regulation 45-106 respecting Prospectus Exemptions* (chapter V-1.1, r. 21), to rely, at the person's option, on the requirements of any of the applicable prospectus exemptions when reselling the investment contract or security.

Décision 2023-PDG-0006, 2023-02-01
Bulletin de l'Autorité : 2023-03-09, Vol. 20 n° 9