

Guidance

Interpretation

Approach

Information

Decision



Effective Date: December 14, 2020

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High-Risk Offerings issued under the Co-operative Corporations Act

Purpose

This Guidance, which contains both an Interpretation and an Approach, requires certain co-operative corporations (“**co-ops**”) to provide enhanced disclosure to investors when selling certain securities^[1] defined herein as “High-Risk Offerings” through an offering statement required under section 34 of the Co-operative Corporations Act (“**Co-op Act**”). This Guidance will require such co-ops to provide enhanced disclosure, failing which the Financial Services Regulatory Authority of Ontario (“**FSRA**”)^[2] will not issue a receipt for an offering statement pursuant to subsection 36(1) of the Co-op Act. FSRA’s objective in providing this Guidance is to ensure that investors in co-ops are better protected by requiring co-ops to provide enhanced disclosure of the risks of investing in “High-Risk Offerings” of securities issued by a co-op. It is also intended to help co-ops understand what additional disclosures FSRA requires and why.

Scope

This Guidance applies to “High-Risk Offerings” (defined below) of securities issued through the offering statement regime under the Co-op Act. It also affects the members of a co-op, and other any persons, who may wish to purchase securities in a High-Risk Offering.

Rationale and Background

Rationale

This Guidance is intended to assist investors in a “High-Risk Offering” to make more informed investment decisions. It is also intended to promote high standards of business conduct for co-ops, and to improve the transparency of FSRA’s decision-making process. All of these outcomes are consistent with a number of FSRA’s objects, as set out in the Financial Services Regulatory Authority of Ontario Act,^[3] specifically:

- a. to regulate and generally supervise the regulated sectors;
- b. to contribute to public confidence in the regulated sectors;
- c. to promote transparency and disclosure of information by the regulated sectors;
- d. to promote high standards of business conduct; and
- e. to protect the rights and interests of consumers.

Background

Section 34 of the Co-op Act prohibits the sale of securities by a co-op or a person unless an offering statement has been filed with, and receipted by FSRA or an exemption applies.^[4] Subsection 35(1) of the Co-op Act requires an offering statement to provide “full, true and plain disclosure of all material facts relating to the securities proposed to be issued”. An offering statement must contain the information, statements and documents specified in section 12 of Regulation 178, R.R.O. 1990, c. 35 (the “**Regulation**”).

Subsection 36(1) of the Co-op Act authorizes FSRA to issue a receipt for an offering statement unless it appears to FSRA that the offering statement or any document required to be filed with it:

1. Fails to comply in any substantial respect with the Co-op Act or the Regulation;

2. Contains any statement, promise, estimate or forecast that is misleading, false or deceptive; or
3. Conceals or omits to state any material facts.

In addition, if it appears to FSRA that the proceeds from the sale of securities, together with other resources of the co-op, are insufficient to accomplish the stated purpose of the issue, clause 36(1)(b) of the Co-op Act prohibits FSRA from issuing a receipt for an offering statement.

Principles

The key principles guiding FSRA's interpretation of "full, true and plain disclosure of all material facts" for High-Risk Offerings as requiring Enhanced Disclosure (as defined below), and its approach to exercising its discretion to issue a receipt for an offering statement for High-Risk Offerings of securities, consist of the following:

1. **Investor protection:** The Enhanced Disclosure requirement is intended to ensure that investors better understand the risks involved before purchasing securities in High-Risk Offerings. This will promote transparency and protect investors' rights and interests.
2. **High standards of business conduct:** This Guidance will promote high standards of business conduct for co-ops proposing to issue High-Risk Offerings.
3. **Transparency:** This Guidance will promote transparency by helping co-ops better understand the additional disclosures that FSRA requires before it will issue a receipt for an offering statement involving a High-Risk Offering.
4. **Contribute to public confidence in the co-op sector:** Better informed investors and higher quality disclosure in High-Risk Offerings will contribute to increasing public confidence in the co-op sector.
5. **Deter deceptive or fraudulent conduct, practices and activities:** The Enhanced Disclosure requirement will serve to reduce the risk of deceptive or fraudulent conduct related to the distribution of High-Risk Offerings in the co-op sector.

Interpretation

The legislative liquidity requirements detailed in section 84 and 85 of the Act and sections 21 to 23 of the Regulation require that credit unions maintain adequate and appropriate forms of liquidity and establish and adhere to liquidity policies. This Guidance interprets these legislative requirements under the Act and Regulations in addition to outlining FSRAs approach to supervising against the standards, including reporting requirements.

Principles

FSRA interprets “full, true and plain disclosure”, as required by subsection 35(1) of the Co-op Act, to include Enhanced Disclosure where the securities offering is considered to be a “High-Risk Offering”. This Enhanced Disclosure is in addition to the information, statements and documents specified in section 12 of the Regulation.

FSRA defines a “**High-Risk Offering**” to mean a securities offering:

1. of a co-op that:
 - a. has a business model that is not focused on serving the specific needs of its members or a well-defined community^[5];
 - b. appears to be intended as an investment vehicle, resulting in a potential misalignment between members and investors;
 - c. uses promoters to sell the securities;
 - d. is a “start-up” (i.e., it has no meaningful assets or relevant business history); or
 - e. markets the securities to “retail investors”^[6] and/or investors who are motivated by the potential for investment income, rather than the benefits to be obtained through participation in the co-op (beyond benefits available to the general public), or who consider the securities to be low-risk investments or to provide guaranteed returns on their investment.

OR

2. that has any of the following characteristics:
 - a. sets an expectation of financial appreciation, return, profit or distribution for the purchaser of the securities;
 - b. promises to return the investor's principal;
 - c. provides insufficient disclosure of the risk of non-payment, refinancing risk, security backing the instrument, or value of the co-op's assets;
 - d. provides future projections that rely on assumptions that are risky or not highly probable; or
 - e. represents that the securities may be held in a registered account, such as a Registered Retirement Savings Plan ("**RRSP**") or a Tax-Free Savings Account ("**TFSA**").

All High-Risk Offerings will be required to contain the Enhanced Disclosure described below in their offering statements.

The "**Enhanced Disclosure**" required by FSRA to be provided in offering statements for High-Risk Offerings includes, but is not limited to:

1. Details of upcoming debt repayments, by year and instrument;
2. Ranking of the security in insolvency or bankruptcy proceedings;
3. Confirmation that the co-op has not defaulted on and is not in breach of any of its debt or covenants, or details if it has defaulted or is in breach of a covenant;
4. Information concerning interest rate sensitivity or other financial market risks;
5. Information as to how a co-op will satisfy its financial obligations if the co-op is unable to raise capital pursuant to the offering statement;
6. Minimum amount of the offering that needs to be raised to meet contractual financial obligations of the co-op during the year following the offering; and
7. Quantification of the risks that could affect the operations of the co-op.

Please note that this is not an exhaustive list of information that a co-op must provide to FSRA with respect to High-Risk Offerings. Depending on the circumstances of the proposed High-Risk Offering, a co-op should identify and disclose any additional information and risks that may be relevant in order to fulfil the “full, true and plain disclosure” requirement under subsection 35(1) of the Co-op Act.

For High-Risk Offerings, FSRA interprets the “full, true and plain disclosure” requirement under subsection 35(1) of the Co-op Act to include the Enhanced Disclosure. An offering statement must therefore contain the Enhanced Disclosure (and any additional relevant information) before FSRA will issue a receipt for it pursuant to subsection 36(1) of the Co-op Act.

Approach

The Approach component of this Guidance is intended to define the processes and practices that FSRA will employ in exercising its discretion to issue a receipt for an offering statement for securities issued in a High-Risk Offering, based on its interpretation of the Enhanced Disclosure requirements.

Processes and practices

FSRA reviews all offering statements submitted by co-ops for compliance with the Co-op Act. FSRA’s review process is intended to verify that an offering statement fully discloses all of the relevant information and risks associated with the securities, particularly for High-Risk Offerings. The objective of this Approach Guidance is to ensure that potential purchasers of the securities have all of the information they need to make informed investment decisions.

An offering statement for a High-Risk Offering must include the Enhanced Disclosure and any additional disclosures identified by the co-op in order to satisfy the statutory requirement for “full, true and plain disclosure”. If such disclosure is not provided, FSRA will refuse to issue a receipt for the offering statement. If a co-op provides such additional disclosure, FSRA may consider exercising its discretion and issue a receipt for the offering statement.

If a co-op does not provide the Enhanced Disclosure (and any additional disclosures identified by the co-op that are necessary to satisfy the “full, true and plain disclosure” requirement) in its offering statement, FSRA will refuse to issue a receipt for the offering statement. However, prior to making such a determination, FSRA would give the co-op an opportunity to be heard, in accordance with subsection 36(2) of the Co-op Act. If, following that opportunity to be heard, FSRA nonetheless determines that the offering statement does not comply with subsection 36(1) of the Co-op Act as interpreted in this Guidance, FSRA will exercise its discretion and make an order or ruling in writing, refusing to issue a receipt for the offering statement.

Effective Date and Future Review

This Guidance became effective on December 14, 2020. It will be reviewed no later than December 14, 2025.

About this Guidance

As Interpretation guidance, this document describes FSRA’s view of requirements under its legislative mandate (i.e. legislation, regulations and rules).

As Approach guidance, it describes FSRA’s internal principles, processes and practices for supervisory action and application of the Chief Executive Officer’s discretion. Approach Guidance may refer to compliance obligations but does not in and of itself create a compliance obligation.

Visit FSRA’s [Guidance Framework](#) to learn more.

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^[1] “Security” is defined in subsection 1(1) of the Co-op Act to mean “any share of any class or series of shares or any debt obligation of a corporation”.

^[2] Pursuant to subsection 36(1) of the Co-op Act, the receipt for an offering statement is provided by the CEO of FSRA. However, for the purposes of this Guidance, reference will be made to FSRA, instead of the CEO, as the CEO may delegate his authority within FSRA, as permitted by applicable law.

^[3] See subsections 3(1) and 3(2) of the Financial Services Regulatory Authority of Ontario Act and section 1 of the regulation made under that act.

^[4] Exemptions from the offering statement requirement are found in subsection 34(2) of the Co-op Act and sections 11.1 and 12.6 of the Regulation.

^[5] An example of a “well-defined community” is a group of persons who participate economically in the co-op and purchase and benefit from the products or services (beyond benefits available to the general public) provided by the co-op.

^[6] FSRA considers a “retail investor” to be an individual who is not an “accredited investor”, as defined in subsection 73.3(1) of the Securities Act and paragraphs (j)-(l) of section 1.1 of National Instrument 45-106 Prospectus Exemptions.