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Condotels and Other Real Estate Projects such as Timeshares Targeted by Draft Regulation of the *Autorité des marchés financiers* (AMF)

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On November 25, 2016, the *Autorité des marchés financiers* (AMF) published draft regulation titled *Regulation respecting Real Estate Prospectus and Registration Exemptions* (draft Regulation). The draft Regulation sets out a framework for certain types of real estate projects, including hotel units and condominium projects that offer a rental management agreement allowing owners to earn income from their units when they are not using them.

The draft Regulation clarifies the details of the regime applicable to these types of real estate projects that many people were unaware of until now.

Under the *Securities Act* (Quebec), a prospectus must be filed with the AMF for the sale of an investment contract unless an exemption is available. Filing a prospectus is generally required for a proposed sale of residential units that includes a mandatory or optional rental management agreement offering the potential for individual or collective rental income through a pool program that provides for the sharing of expenses or income among participants or through any similar scheme.

The AMF sets out the following questions to determine whether a real estate project is subject to the requirements of the *Securities Act*:

- are there restrictions on the periods during which the purchaser can occupy a unit?
- are representations made to the purchaser highlighting the economic benefits of purchasing a unit, such as projected financial income or potential rental income?
- are income or rent guarantees or other undertakings given in connection with the sale of the unit?

The proposed regime

The offering document

When a real estate project is governed by the *Securities Act*, the draft Regulation provides that an offering document must be prepared and sent to all purchasers of a residential unit and filed with the AMF through SEDAR. The offering document must include the following information:

- any material forward-looking information relating to the project, including a description of the project, the material risk factors and the main agreements, including the rental management agreement;
- the audited annual statement as well as the interim statement of net revenue for the project;
- a certificate signed by the promoter that the offering document does not contain a misrepresentation.

Requirements are also imposed on the presentation of financial or other forward-looking information in the offering document. Another important requirement is that the offering document may not be drafted in English only.

Reports to be filed

Any sale of residential units will trigger an obligation by the promoter or manager to file an exempt distribution report with the AMF through SEDAR and pay the prescribed fee.

Periodic disclosure

The draft Regulation also provides for periodic disclosure that requires the promoter or manager to send owners of residential units the audited annual statements as well as the interim statements of net revenue for the project within the prescribed time.

Resale

Any resale of residential units will be subject to the seller's obligation to give advance notice to the promoter or manager, who will then have 30 days to give the new owner the financial documentation prescribed by regulation.

Obligation to register as a securities dealer

Note that the sale of residential units governed by the Securities Act could trigger for the promoter, seller or real estate broker the obligation to register as a securities dealer, especially if the person carries on the activity repeatedly, expects to receive compensation for it or conducts direct or indirect solicitation of potential purchasers, and carries on his or her activity similar to that of certain registered securities dealers.

Where applicable, it would be wise for any such promoter, seller or real estate broker to consult with a registered securities dealer to ensure that the requirements relating to the sale of investment contracts are fulfilled and, in particular, to verify whether the investment is suitable for its clients.

Comments

The AMF has set up a procedure allowing any interested person to comment on the draft Regulation until December 24, 2016. Davies will continue to follow this matter closely and let you know of any future developments, particularly regarding the date on which the draft Regulation will come into force and any changes that may be made to it.

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