

## PUBLICATION

### Amendments to the Offering Memorandum Exemption

December 1, 2015

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On October 29, 2015 the Canadian Securities Administrators released “Multilateral CSA Notice of Amendments to National Instrument 45-106 Prospectus Exemptions Relating to the Offering Memorandum Exemption” (the “Notice”). The Notice summarizes proposed amendments to National Instrument 45-106 Prospectus Exemptions (“NI 45-106”). Provided all ministerial approvals are obtained, these amendments will affect the use of the Offering Memorandum exemption in several jurisdictions in Canada, including Alberta, Saskatchewan, Quebec, New Brunswick and Nova Scotia, effective April 30, 2016, and they will introduce an Offering Memorandum exemption in Ontario, effective January 13, 2016. No changes have been proposed in British Columbia. The proposed amendments have been made in an attempt to harmonize the Offering Memorandum exemption in the various jurisdictions of Canada, while providing additional investor protections. Unfortunately however, as several jurisdictions have not participated, these changes will result in three distinct Offering Memorandum regimes, oppose to the two that previously existed.

There are several significant proposed changes to the Offering Memorandum exemption identified in the Notice, including the following:

1. Investment Limits - Annual investment limits will apply to individuals (but not corporations or other entities) acquiring securities under the Offering Memorandum exemption. Most notably, individuals will not be permitted to invest more than \$30,000 in any 12 month period. However, if an individual is an “eligible investor” and receives advice from a portfolio manager, investment dealer or exempt market dealer that the investment is suitable, this limit is increased to \$100,000. In the case of individuals that are “non-eligible” investors, they will not be permitted to invest more than \$10,000 in any 12 month period under the Offering Memorandum exemption. In light of these limits, it will be interesting to see if individuals will choose to make more investments through their holding companies. To do so however will require that the holding company not have been set up solely for the purposes of the investment. It must have been pre-existing and have a bona fide purpose.

It’s also worth noting that none of these limits apply to individuals that qualify under the “accredited investors” exemption (section 2.5 of NI 45-106) or the “family, friends or business associates” exemption (sections 2.5 or 2.6 NI 45-106).

2. New Schedules for the Risk Acknowledgement Form - Two new schedules have been added to the Risk

Acknowledgement form which individuals must complete when acquiring securities under the Offering Memorandum exemption. These schedules require individuals to confirm their investor status (i.e., as an eligible investor, noneligible investor, accredited investor, or family, friend or business associate) and that they are within the prescribed investment limits.

3. Disclosure Requirements - Non-reporting issuers selling securities under the Offering Memorandum exemption will be required to provide investors with, or make available to its investors, audited financial statements on an annual basis. Currently, many jurisdictions already have legislation that obligates a corporation to deliver annual audited financial statements to all its shareholders. However, this change will mean that all entities relying on the Offering Memorandum exemption in the participating jurisdictions, including limited partnerships and trusts, will be subject to similar requirements. It should be noted however that some jurisdictions currently provide relief from the audited financial statement requirement under the Offering Memorandum exemption if certain criteria are met.

In connection with providing these financial statements, the issuer will be required to provide a notice in prescribed form describing the use of proceeds raised under the Offering Memorandum exemption. This obligation will continue until the issuer has previously disclosed the use of the aggregate gross proceeds in accordance with the prescribed form.

In New Brunswick, Nova Scotia and Ontario, non-reporting issuers will be required to provide notice of key events, in the prescribed form, within ten days of the event occurring. These key events are limited to (i) a discontinuation of the issuer's business; (ii) a change in the issuer's industry; and (iii) a change of control of the issuer. These ongoing disclosure obligations are an interesting shift towards the continuous disclosure obligations that reporting issuers (such as those companies and other entities with securities listed on a stock exchange) must comply with.

4. Marketing Materials - Marketing materials used by issuers in distributions under the Offering Memorandum exemption must be (and will be deemed to be) incorporated by reference into their offering memorandum. This would include materials such as term sheets, investment summaries and power point presentations. Consequently, the information in these materials is subject to the same liability (including civil liability) as the disclosure provided in the offering memorandum in the event of a misrepresentation. Issuers should be particularly cautious of this where they intend to include future orientated financial information or forward looking information in marketing materials.

The introduction of these amendments will undoubtedly result in changes to current industry practices. Issuers will need to update legal documents such as offering memorandums and subscription agreements, and they will need to be more diligent when marketing their securities products. Issuers should also be cognisant of the added cost associated with the continuous disclosure obligation of preparing audit financial statements on an annual basis, and the additional reliance that they may need to place on registrants. Registrants will also need to be aware of these changes and the additional scrutiny that they may be under when providing suitability advice that affects their clients' investment limits. That said however, these changes should provide some added protections to investors and more transparency on the status of an issuer and its actual use of the proceeds derived from selling securities under the Offering Memorandum exemption.

It's also worth noting that the addition of the Offering Memorandum exemption in Ontario presents an exciting opportunity for issuers. It will be interesting to see the extent to which issuers embrace this new exemption in Ontario, a jurisdiction that has long denied the use of this controversial exemption.

For further information please contact Ryan Franzen, Matthew Burgoyne or any member of our Private Lending Group.