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Ontario to Broaden Access to Capital Markets with New Offering Memorandum Prospectus Exemption

Effective January 13, 2016, business enterprises can expect to have a new tool for raising money from a broad range of investors in Ontario – the offering memorandum prospectus exemption. But there are some strings attached, including limits on the amounts that can be raised from certain individuals and new ongoing disclosure obligations.

Background

On October 29, 2015 the securities regulatory authorities in Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan announced amendments to the offering memorandum prospectus exemption contained in section 2.9 of National Instrument 45-106 – *Prospectus Exemptions* (the OM Exemption). The amendments will introduce the OM Exemption in Ontario and modify the existing OM Exemption in the other jurisdictions to introduce new investor protection measures. The amendments are expected to be implemented on January 13, 2016 in Ontario and on April 30, 2016 in the other jurisdictions.

New to Ontario, the OM Exemption is aimed at providing small and medium-sized business enterprises with a cost-effective way to access capital markets while, at the same time, maintaining appropriate investor protection mechanisms.

What You Need to Know

The key features of the OM Exemption include the following:

- **Offering memorandum.** An issuer raising money must prepare and deliver to investors an offering memorandum in the prescribed form, disclosing certain information about the issuer and including audited financial statements. An investor has certain rights against the issuer in connection with such an investment, including a two-business-day withdrawal right and a right of action for rescission or damages if the offering memorandum contains a misrepresentation.
- **Marketing materials.** Marketing materials used in connection with an offering memorandum must be incorporated by reference into the offering memorandum. As a result, the issuer is liable for misrepresentations contained in any marketing materials.
- **Investment limits.** The OM Exemption limits the amount of an investment that certain investors can make:

- An investor that is not an individual can invest an unlimited amount.
- An individual investor who is an accredited investor or who qualifies under the family, friends and business associates prospectus exemption can invest an unlimited amount.
- An individual who is an eligible investor (*i.e.*, meets certain financial asset or income thresholds) cannot purchase securities under the OM Exemption in excess of \$30,000 in a 12-month period. This limit can be increased to up to \$100,000 if the investor has received suitability advice from certain designated investment professionals.
- An individual who is a non-eligible investor cannot purchase securities under the OM Exemption in excess of \$10,000 in a 12-month period.
- **Ongoing disclosure.** Non-reporting issuers that use the OM Exemption will be required to provide to investors audited annual financial statements, prepared in accordance with Canadian GAAP applicable to publicly accountable enterprises, together with a notice that describes how the investment proceeds have been used. Disclosures may also be required if a non-reporting issuer changes its year-end. A non-reporting issuer that uses the OM Exemption in New Brunswick, Nova Scotia and Ontario must notify investors on a timely basis of a discontinuation of its business, a change in its industry or a change in its control.
- **No OSC review.** The offering memorandum is not subject to review by the Ontario Securities Commission prior to completion of the offering.
- **Public filing.** The offering memorandum and marketing materials filed with the Ontario Securities Commission are placed on the public record.
- **Record-keeping and compliance.** In Ontario, a non-reporting issuer that uses the OM Exemption is designated as a market participant and becomes subject to record-keeping requirements and compliance reviews under applicable securities legislation.
- **Translation.** When relying on the OM Exemption, the offering memorandum must be translated into French for purposes of distributing securities into Québec.
- **Exclusions.** In Ontario, the OM Exemption is not available to issuers that are investment funds or for issuances of short-term securitized products, specified derivatives or structured finance products.

Impact of the OM Exemption

The OM Exemption reflects a balancing of interests: issuers are provided with the opportunity to tap into a larger pool of investors, but must have in place the financial and human resources to prepare an offering memorandum and produce audited annual financial statements. For non-reporting issuers, the OM Exemption can best be thought of as a stepping stone to becoming a public company.

One impediment for non-reporting issuers is that the offering memorandum and marketing materials filed with the Ontario Securities Commission will be publicly filed and therefore available to all of the issuer's employees, customers, suppliers and competitors. In addition, small, early-stage issuers may not find the OM Exemption attractive due to the costs associated with preparing an offering memorandum and audited financial statements, ongoing disclosure obligations and potentially being designated as a market participant.

Reporting issuers, particularly junior issuers, may find the OM Exemption to be a cheaper and less time-consuming alternative to a prospectus offering.

The OM Exemption does not limit or affect the availability to issuers of other prospectus exemptions, such as the accredited investor or minimum amount exemptions.

Time will tell whether the OM Exemption is adopted and accepted by the capital markets. Although using the OM Exemption could help smaller issuers tap into a larger market, it comes at a cost that may be too high for some issuers to entertain.

If you have any questions regarding the foregoing, please contact [Mindy Gilbert](#) (416.367.6907) or [Steven Cutler](#) (416.367.7567) in our Toronto office or [Brian Kujavsky](#) (514.841.6401) or [Neil Kravitz](#) (514.841.6522) in our Montréal office.

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