



Michael Hanley

Partner, Corporate Finance

PHONE

416 777 5431

EMAIL

mhanley@torkinmanes.com

Michael advises people involved in diverse businesses, providing solutions for legal matters and helping them achieve their business objectives.

The “Offering Memorandum” Exemption Arrives in Ontario

Effective January 13, 2016 the new ‘offering memorandum’ prospectus exemption (the “**OM Exemption**”) takes effect in Ontario. The OM exemption is designed to facilitate capital-raising by both early stage and established entities but is also tempered with obligations intended to protect investors. The following Q&A explains key aspects of the new OM Exemption.

Q: Who can use the OM Exemption?

Almost any entity may issue securities in Ontario without a prospectus under the OM Exemption except that an investment fund is not permitted to use the OM Exemption and it may not be used to issue short term securitized products, specified derivatives, or structured finance products of any entity.

Q: How Much Can an Entity Raise Using the OM Exemption?

There is no limit on the amount of funds that an entity can raise using the OM Exemption.

Q: Are there Investor Limits Under the OM Exemption?

Yes, individuals who are not ‘eligible investors’ cannot invest more than \$10,000 in any 12 month period under the OM Exemption. An ‘eligible investor’ includes an

individual whose net assets, alone or with a spouse, exceed \$400,000, whose net income before taxes exceeded \$75,000, or together with a spouse exceeded \$125,000, in the last 2 years and who expects such income level to increase. Individuals who qualify as ‘eligible investors’ may not invest more than \$30,000 in any 12 month period unless they have received suitability advice from a portfolio manager, investment dealer or exempt market dealer, in which case they may invest up to \$100,000 in any 12 month period. Individual investors who qualify as ‘accredited investors’ or under the ‘family, friends and business associates’ prospectus exemptions can invest an unlimited amount under the OM exemption. An investor which is not an individual can also invest an unlimited amount however the OM Exemption is not available to an

entity that was formed solely to purchase securities under the OM Exemption.

Q: What about the Offering Memorandum?

An entity that issues securities under the OM exemption must prepare and provide investors with a prescribed offering memorandum document (Form 45-106F2) which includes certain detailed information relating to the entity and the securities being issued. The offering memorandum must also include audited financial statements and must incorporate by reference any marketing materials used in selling the securities (other than a prescribed term sheet). Consequently, an issuer's marketing materials will be subject to the same liability for misrepresentations as the information within the offering memorandum. The offering memorandum, including the financial statements, and the marketing materials must be filed with the Ontario Securities Commission within 10 days of the first issuance of securities under the OM exemption and will be publicly accessible via the SEDAR web site.

Q: Will Investors Be Required to Sign a Risk Acknowledgment Form?

Yes, investors will be required to complete and sign a form 45-106F4 Risk Acknowledgment which describes certain risks associated

with investing under the OM Exemption. Investors who are individuals must also complete schedules to confirm their investor status and investment limits.

Q: Are there Ongoing Obligations Triggered by Using the OM Exemption?

Yes, entities which are not reporting issuers and which use the OM Exemption are required annually to provide investors with audited financial statements. All entities are required to include with their annual financials a notice that describes how the funds raised under the OM Exemption have been used, and must file those financial statements and the notice with the Ontario Securities Commission. The annual audited financials and the notice will be publicly accessible via the SEDAR web site. Entities which have used the OM Exemption must also notify investors within 10 days of a discontinuation of the entity's business, a change in the entity's industry, and a change of control of the entity.

Q: Is the Ontario OM Exemption the Same as the Offering Memorandum Exemption in Other Canadian Jurisdictions?

No. Although the offering memorandum exemptions are substantially similar across the Canadian jurisdictions there are some important differences. For example, while the form of offering memorandum,

risk acknowledgement form, and requirement to provide audited financial statements are harmonized across Canadian jurisdictions there are differences amongst Canadian jurisdictions in individual investor limits and not all Canadian jurisdictions prohibit investment funds from using an offering memorandum exemption or require marketing materials to be incorporated by reference into the offering memorandum, to name a few.

Commentary

Only time will tell us how much of an impact Ontario's new OM Exemption will have on fundraising in the exempt market. The OM Exemption expands the pool of potential 'public' investors beyond 'accredited investors' who account for a small percentage of the population and, for many issuers also represents a more cost-effective and expedient means of raising capital than a prospectus offering. However the OM Exemption also presents challenges, particularly for more early-stage non-reporting issuers for which the cost to prepare an offering memorandum and to audit the financial statements may be prohibitive and the publication of potentially sensitive information in the offering memorandum and financial statements may be an inhibiting factor.

For more information about this topic or matters relating to corporate finance, please call me.