

Corporate Securities Law

April 1, 2014

Four New Private Placement Exemptions Proposed

As a result of a comprehensive review of the exempt market commenced in 2011, the Ontario Securities Commission (OSC) published for comment four new prospectus exemptions. The proposed exemptions are intended to facilitate capital formation, particularly for start-ups and small and medium-sized enterprises. They would also further harmonize the Ontario private placement exemptions with those of other Canadian provinces. The comment period ends on June 18, 2014.

Proposed Prospectus Exemptions

The proposed prospectus exemptions are:

- an offering memorandum exemption;
- a family, friends and business associates exemption;
- an existing security holder exemption; and
- a crowdfunding exemption.

Except for the crowdfunding exemption, these exemptions are already available, with some variations, in several other Canadian jurisdictions. The proposed crowdfunding exemption was also published for comment in the provinces of Quebec, Manitoba, New Brunswick, Saskatchewan and Nova Scotia (these jurisdictions and British Columbia have also proposed a separate crowdfunding exemption which is more restrictive, tailored for earlier stage issuers, and based on a current Saskatchewan exemption).

Offering Memorandum Exemption

The proposed offering memorandum exemption would be available to both reporting issuers and non-reporting issuers (other than investment funds). It could be used for offerings of any form of security other than specified derivatives and structured finance products, using an offering memorandum in the form currently prescribed by Canadian securities laws.

Individual investors (other than accredited investors) would be subject to restrictions that would cap their total investment at \$30,000 for an eligible investor and \$10,000 for a non-eligible investor over any given 12-month period. The concept of an “eligible investor” is based on the net assets or the net income before taxes of an individual, alone or with a spouse, or in certain cases on access to investment advice from an “eligibility advisor” (a registered investment dealer). Investors would have a two-day “cooling-off” period, and individual investors would be required to sign a prescribed risk acknowledgement form.

Non-reporting issuers using this exemption would be required to fulfill limited continuous disclosure requirements post-offering, including audited annual financial statements with a notice detailing the use of the offering proceeds, and notice of certain material events.

Family, Friends and Business Associates Exemption

Similar to the offering memorandum exemption, Ontario is currently an outlier in that other provincial jurisdictions have a family, friends and business associates exemptions. Ontario has only a narrower founder, control person and family exemption. The exemption that the OSC is proposing encompasses (similar to the other provinces) broader concepts of “close personal friends” and “close business associates.” The OSC’s proposal provides expanded guidance on the meaning of those terms.

Though the exemption would be available for all issuers (other than investment funds), only certain forms of security could be issued, including common shares, non-convertible preference shares and securities convertible into the same. Non-convertible debt securities linked to a fixed or floating interest rate, as well as units of a limited partnership, and flow-through shares under Canada’s *Income Tax Act* could also be offered under this exemption.

Goodmans^{LLP} Update

This exemption would not restrict the allowable size of an offering by the issuer, and would not impose limits on investors. However, a prescribed risk acknowledgement form would need to be signed by the investor, the issuer and the director, executive officer, founder or control person of the issuer with whom the investor has asserted the relationship attesting to certain aspects of that relationship permitting the use of the exemption.

Existing Security Holder Exemption

The proposed existing security holder exemption would enable the following issuers (other than investment funds) to raise capital from existing security holders: issuers that: (i) have been reporting issuers for a minimum of 12 months, or have become reporting issuers by filing and obtaining a receipt for a prospectus, and (ii) have a class of equity securities listed on the Toronto Stock Exchange, TSX Venture Exchange or Canadian Securities Exchange.

This exemption would be available to each investor that represents in writing to the issuer that, as at the record date of the offering, the investor held, and continues to hold, the type of listed security that the investor is acquiring under this exemption. Subject to certain allowances, the aggregate amount invested by the investor in the previous 12 months under this exemption could not exceed \$15,000.

An offering by the issuer under this exemption could only consist of the class of equity securities listed on the above-mentioned exchanges of the issuer, or units consisting of the listed security and a warrant to acquire the listed security. An issuer could not conduct an offering under this exemption that results in an increase of more than 100% of the outstanding securities of the same class being offered. While each investor for which this exemption is available must be permitted to subscribe for the securities being distributed, any security that is not taken up by the existing security holders could thereafter be allocated to other existing security holders at the issuer's discretion.

Crowdfunding Exemption

Crowdfunding is a method of funding projects or ventures by raising small amounts of money from a large number of people through a funding portal. The proposed crowdfunding exemption would enable both reporting issuers and non-reporting issuers meeting certain criteria to raise up to \$1.5 million in the aggregate during any 12-month period. This exemption would not be available to investment funds, real estate issuers that are not reporting issuers, or issuers without a written business plan.

As a condition for this exemption, crowdfunding investments would have to be made through a funding portal registered under applicable securities laws. A framework for such portals has also been proposed.

Investors would be precluded from investing more than \$2,500 in a single investment under this exemption. They would also be precluded from investing more than \$10,000 per calendar year under this exemption. Investors intending to participate in crowdfunding would have to sign a prescribed risk acknowledgement form. Investors would also be given a 48-hour period before the disclosed offering deadline in which to withdraw their subscription.

The types of security available under this exemption would be restricted. Common shares, non-convertible preference shares and securities convertible into the same could be offered under this exemption. So too could non-convertible debt securities linked to a fixed or floating interest rate, units of a limited partnership and flow-through shares under Canada's *Income Tax Act*.

This exemption would also require certain disclosure materials to be made available to potential investors on the crowdfunding portal's website. There would also be certain ongoing disclosure obligations for issuers raising capital by this means. Any materials made available to investors containing a misrepresentation by the issuer would provide an investor with a right of action for damages or rescission.

For further information regarding any of the proposed prospectus exemptions, please contact any member of our Corporate Securities Group.