

Goodmans^{LLP} Update

Canadian Securities Administrators Propose Changes to the Offering Memorandum Prospectus Exemption

The Canadian Securities Administrators (CSA) recently published for comment proposed amendments to the offering memorandum prospectus exemption (the “**OM Exemption**”) for issuers engaged in “real estate activities” and issuers that are “collective investment vehicles”. The proposed amendments would result in new disclosure requirements for these types of issuers who wish to issue securities in reliance on the OM Exemption, as well as make a number of more general amendments aimed at clarifying or streamlining certain aspects of National Instrument 45-106 – *Prospectus Exemptions* (“**NI 45-106**”). The comment period for the proposed amendments will close on December 16, 2020.

Background

The OM Exemption, found in section 2.9 of NI 45-106, was originally intended to help early stage businesses raise capital from a large pool of investors without having to comply with the more costly prospectus regime. However, according to the CSA's analysis, in practice, the OM Exemption has been relied upon to a significant extent by larger and more complex issuers than originally envisioned, including issuers engaged in “real estate activities” and issuers that may be “collective investment vehicles”. In addition, CSA compliance reviews indicated that under the current OM Exemption, issuers do not always clearly understand what kind of industry-specific disclosure must be provided in an offering memorandum to satisfy the OM Exemption requirements.

The Proposal

If adopted, the proposed amendments will require issuers with “real estate activities” and issuers that are “collective investment vehicles” to provide new disclosure to investors in an offering memorandum.

Issuers Engaged in Real Estate Activities

Issuers engaged in real estate activities will be required to include in an offering memorandum an independent appraisal of real property, if the issuer:

- discloses in the offering memorandum a value for the real property, other than in its financial statements;
- intends to spend a material amount of the proceeds of the offering to acquire an interest in real property; or
- has or proposes to acquire an interest in real property from a related party (as defined in NI 45-106).

Issuers engaged in real estate activities would also be required to complete new Schedule 1 *Additional Disclosure Requirements for an Issuer Engaged in Real Estate Activities* to Form 45-106F2, which includes:

- disclosure relevant to issuers that are developing real property, such as a description of the approvals or permissions required, and milestones of the project;
- disclosure relevant to issuers that own and operate developed real property, such as the age, condition and occupancy level of the real property;
- disclosure of penalties, sanctions, bankruptcy, insolvency and criminal or quasi-criminal convictions for parties other than the issuer, such as a party acting as developer; and

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- disclosure of any purchase and sale history of the issuer's real property with a related party, so investors can better evaluate transactions involving related parties.

The CSA indicated that, to avoid creating an undue disclosure burden on issuers, the Schedule 1 disclosure would not apply to any real property that, collectively, would not be significant to a reasonable investor.

Issuers that are Collective Investment Vehicles

The CSA is also proposing additional disclosure requirements that would apply to a “collective investment vehicle” – an issuer whose primary purpose is to invest money provided by its security holders in a portfolio of securities, including portfolios of mortgages, other loans or receivables. To the extent they are permitted to use the OM Exemption, the definition would also include investment funds.

Issuers that are collective investment vehicles would be required to complete a new Schedule 2 *Additional Disclosure requirements for an Issuer that is a Collective Investment Vehicle* to Form 45-106F2, which includes:

- a description of the issuer's investment objectives;
- disclosure of penalties, sanctions, bankruptcy, insolvency and criminal or quasi-criminal convictions for persons involved in the selection and management of the investments;
- disclosure of information regarding the portfolio; and
- disclosure regarding the performance of the portfolio.

General Amendments

The CSA is also proposing a number of non-industry specific amendments to the OM Exemption based on issues that have arisen in the CSA's ongoing review of offering memorandums. The amendments include clarifying the general disclosure standards applicable to an offering memorandum, requiring that an offering memorandum be filed in a form that allows for electronic word searching and a number of changes to the specific disclosure requirements set out in the offering memorandum form (Form 45-106F2).

Overall, the CSA believes the proposed amendments will set out a clearer framework for issuers, giving them greater certainty as to what they must disclose, while giving investors more complete and relevant disclosure to inform their investment decisions.

Market participants should note that the amendments apply only to offering memoranda used in connection with a distribution of securities in reliance on the OM Exemption. Many issuers provide offering memorandum to investors as part of distributions that rely on other prospectus exemptions (such as the accredited investor exemption or the private issuer exemption). There is no prescribed format or content for those kinds of offering memoranda and the proposed amendments therefore have no direct bearing on the disclosure required in an offering memorandum not intended to be used in connection with the OM Exemption.

For further information on these proposed amendments or to discuss potential changes to securities legislation that could impact your business, please contact any member of our [Corporate Securities Group](#).