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## OFFERING MEMORANDUM EXEMPTION

### By Bill Johnstone

Finally, Ontario has adopted an Offering Memorandum Exemption. The exemption becomes effective in Ontario on January 13, 2016 (and in Alberta, New Brunswick, Nova Scotia, Quebec and Saskatchewan, where existing legislation is being modified, on April 30, 2016). This new exemption arguably levels the playing field in all jurisdictions in Canada. It is the kind of offering that the junior markets are familiar with and provides for access to capital from non-accredited investors on a private placement basis with the delivery of a disclosure document. This exemption is available for private issuers (subject to some continuous disclosure obligations) but this memo focuses on public companies. The basic criteria for an Offering Memorandum exempt financing by a reporting issuer in Ontario are as follows:

1. the issuer prepares and delivers an Offering Memorandum (Form 45-106F3 with incorporation by reference of certain existing continuous disclosure or Form 45-106F2 where an Issuer does not want to incorporate continuous disclosure by reference) to the Purchaser;
2. the issuer obtains a signed risk acknowledgement (Form 45-106F4 with Schedules 1 and 2) from the Purchaser;
3. a statutory right of action or a contractual right of action is granted to the Purchaser for rescission or damages in the event of a misrepresentation in the Offering Memorandum;
4. the Purchaser is given a contractual right to cancel the purchase of securities not later than midnight on the 2nd business day after the Purchaser signs the agreement to purchase the securities;
5. the acquisition cost to a non-eligible investor, who is an individual, for all securities acquired under this exemption (in respect of all issuers) in the preceding 12 months cannot exceed \$10,000;
6. the acquisition cost to an eligible investor, who is an individual, for all securities acquired under this exemption (in respect of all issuers) in the preceding 12 months cannot exceed \$30,000;

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**Bill Johnstone**  
Partner  
416-865-6505  
[bjohnstone@grllp.com](mailto:bjohnstone@grllp.com)



GARDINER ROBERTS

### GARDINER ROBERTS LLP

40 King Street West, Suite 3100, Scotia Plaza, Toronto, ON M5H 3Y2  
Tel: 416 865 6600 Fax: 416 865 6636 [www.grllp.com](http://www.grllp.com)

7. if the eligible investor receives advice from a portfolio manager, investment dealer or exempt market dealer that the investment is suitable, the acquisition cost to such eligible investor, who is an individual, cannot exceed \$100,000 for the preceding 12 months (in respect of all issuers);
8. there are no restrictions on the amount of funds that can be raised from accredited investors, pursuant to the family, friends and business associates exemption, or from non-individual investors (provided they have not been created or used solely to purchase securities under this exemption);
9. there are no limits to the amount that can be raised by the issuer (subject to any stock exchange rules) or to the use of proceeds under the Offering Memorandum Exemption; and
10. pricing would be subject to any applicable stock exchange rules and the securities issued are subject to a four month hold period.

An eligible investor is an individual who has either net assets, alone or with a spouse, which exceed \$400,000; net income before taxes that exceeded \$75,000 in each of the 2 most recent calendar years and reasonably expects to exceed that income level in the current calendar year; or net income before taxes, alone or with a spouse, that exceeded \$125,000 in each of the 2 most recent calendar years and reasonably expects to exceed that income level in the current calendar year.

The Offering Memorandum and any OM marketing materials (referred to below) are filed with the relevant securities commissions within 10 days following distribution of the securities. There is a subsequent obligation to disclose the use of the aggregate proceeds raised by the issuer in accordance with Form 45-106F16.

The legislation is not harmonized across the country and there are still three levels of investment criteria (B.C. and Newfoundland and Labrador have no investment restrictions and Manitoba, Northwest Territories, Nunavut, Prince Edward Island and Yukon only limit non-eligible investors to \$10,000 per investment) but the Ontario level would satisfy the requirements in any other jurisdiction. The form of Offering Memorandum is expected to be concise, easy to read and understand and to use clear, plain language. The Offering Memorandum needs to be certified by the CEO, CFO and two directors (and any promoter of the issuer). For junior resource issuers, if technical information is included in the Offering Memorandum then National Instrument 43-101 would require a current technical report to support the technical information in the Offering Memorandum.

While there would be costs to preparing the Offering Memorandum, there is no review by the Securities Commissions (but there may be some level of review by an exchange). An issuer can go to market with an Offering Memorandum exempt financing as quickly as the Offering Memorandum can be prepared. The



Offering Memorandum Exemption allows companies to go to former accredited investors who may no longer meet the accredited investor criteria but are eligible investors and still have a belief in the junior capital markets. The Offering Memorandum Exemption can be used in conjunction with an existing shareholder private placement where an existing shareholder could invest up to \$15,000 without any eligibility criteria.

In addition to the Offering Memorandum, the issuer can prepare a term sheet (the “**OM standard term sheet**”) which is subject to strict criteria under the legislation. If any other marketing materials (the “**OM marketing materials**”) are prepared beyond the OM standard term sheet, the Offering Memorandum must incorporate the OM marketing materials into the document by reference thus creating secondary market liability for the issuer and its officers and directors in the event of a misrepresentation in the OM marketing materials.

Now that Ontario has adopted an Offering Memorandum Exemption, an issuer in Ontario can raise funds from non-accredited investors in any jurisdiction in Canada subject to the restrictions on the maximum amount that non-eligible and eligible investors can invest in any twelve (12) month period. Accredited investors would not be subject to any restrictions on the amount of investment. This exemption is therefore a reasonably useful tool to access a segment of the market that until now was unavailable to Ontario issuers. The adoption of the

Offering Memorandum Exemption is one more significant step by the Canadian Securities Administrators to increase the access to capital for junior companies. In conjunction with the adoption of the Friends, Family and Business Associates exemption in Ontario, the Existing Shareholder Exemption and the new Rights Offering exemption, junior issuers now have substantially more flexibility to access the much needed capital to ensure the survival and continued viability of the junior capital markets.

**Bill Johnstone** is a partner and Practice Leader of the Securities Law Group at Gardiner Roberts. He can be contacted at 416.865.6605 or [bjohnstone@grllp.com](mailto:bjohnstone@grllp.com).

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