

fullsail *Making Headway*

Reporting on the New Brunswick Securities Commission's *Fullsail* capital markets initiative



Securities legislation requires that purchasers of securities be provided with a prospectus that contains full, true and plain disclosure of all material facts relating to the securities being offered. However, there are exemptions from this requirement in situations where purchasers may not need the protections of the prospectus requirement or where alternative protections are available. One of these is the offering memorandum exemption (OM exemption).

An offering memorandum is a document that provides basic information about an entity and the securities being offered under the OM exemption. It contains information about who is raising money, the directors, management and promoters, the securities offered, the risks of the investment, and how the money will be used.

The purpose of the OM exemption is to give issuers a cost-effective way of raising capital. Over the past few years, we have heard from small and early-stage issuers that the exemption is too costly to use because of the audit requirement.

On 20 December 2012, the Commission approved [Blanket Order 45-504 Exemptions from Certain Financial Statement Requirements of Form 45-106f2 Offering Memorandum for Non-Qualifying Issuers](#).

Under the blanket order, certain issuers using the OM exemption are exempt from the requirement to obtain an audit on financial statements or other financial information and from the requirement for financial statements to be prepared using Canadian GAAP applicable to publicly accountable enterprises (IFRS).

There are restrictions on issuers relying on the blanket order, including that:

- the issuer is not a reporting issuer, investment fund, mortgage investment entity or an issuer engaged in the real estate business;
- the issuer is not distributing complex securities;
- the amount raised by an issuer group must never exceed \$500,000; and
- the aggregate acquisition cost of all securities distributed under the OM exemption by an issuer group to a purchaser in a distribution and in the 12 months preceding the date of such distribution, must not exceed \$2,000.

The complete details about requirements in the blanket order are available online: www.nbsc-cvmnb.ca/rules.

Certain conditions associated with using the OM exemption continue to apply even if issuer relies on the blanket order. They include, but are not limited to, the resale restrictions, the risk acknowledgment form requirement and the obligation to file reports of exempt distribution. Nothing in the blanket order modifies any rights, recourses or rights of action that an investor may have under securities legislation.

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An offering memorandum is a complex legal document that gives rise to significant legal obligations on the part of the issuer, as well as any individual agent who certifies the document on behalf of the issuer. Like other important legal documents, it should be drafted with the assistance of an experienced securities lawyer who has a thorough understanding of the business of the issuer.



HAVE YOUR SAY: Arthur T. Doyle and Chris Ryan



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The reduction in transaction costs entailed by the New Brunswick Securities Commission's (NBSC) Blanket Order 45-504 *Exemptions from Certain Financial Statement Requirements of Form 45-106F2 Offering Memorandum for Non-Qualifying Issuers* (December 20, 2012) (Blanket Order 45-504) will be welcomed by many issuers who are early stage businesses and other small and medium sized enterprises (SMEs). An audited financial statement can cost over \$20,000, but whether this savings is enough to increase reliance on the offering memorandum exemption (OM exemption) is questionable. Other concerns with the OM exemption remain, including: the cost of preparing it apart from an audit of financial statements; whether an OM prepared in accordance with the form requirements in NI 45-106 *Prospectus and Registration Exemptions* contains an overwhelming amount of information that is neither useful nor read by investors; the unavailability of the OM exemption in Ontario; and the differences between the British Columbia and Alberta models of the OM exemption.

Unlike the concept idea for an OM exemption in the Ontario Securities Commission's (OSC) Staff Consultation Paper 45-710 *Consideration for New Capital Raising Prospectus Exemptions* (December 14, 2012) (Consultation Paper 45-710), as well as the OM exemption (for non "eligible investors") available in those jurisdictions that follow the Alberta model, Blanket Order 45-504 does not prescribe a total annual limit on a purchaser's investments made in reliance on Blanket Order 45-504, although a purchaser's investment in a particular distribution of an issuer group cannot exceed \$2,000 annually.

This maintaining of the status quo in New Brunswick will be another welcome development to SMEs and investors alike. However, the justification is not clear for a limit of \$2,000 on the aggregate acquisition cost to a purchaser of securities of a particular issuer group. The OSC's concept idea in Consultation Paper 45-710 does not require audited financial statements where the proceeds of the offering are proposed to be less than \$500,000, yet the total annual limit on a purchaser's investment in securities of a particular issuer is \$2,500. The NBSC might consider increasing the annual limit on investors to maintain New Brunswick's competitiveness in Canada.

The eleven (11) securities regulatory authorities, including the NBSC, who have published a harmonized local order substantively similar to Blanket Order 45-504 have made it clear that their OM-form exemption orders are neither intended to address, nor be their response to, whether and in what way securities crowdfunding should be regulated. Nevertheless, Blanket Order 45-504 helps these discussions by sharpening the comparison between an available exemption (OM exemption) and a proposed exemption (securities crowdfunding). Blanket Order 45-504 might also provide SMEs with greater access to capital formation until a regulatory framework in New Brunswick for securities crowdfunding is published. Nevertheless, in the interim, Blanket Order 45-504 does little to advance discussions on the regulation of funding portals and investors in the context of securities crowdfunding.

The warnings in section B(III) of Blanket Order 45-504 that must be stated in bold on the face page of each offering memorandum may assume too high a level of financial literacy on the part of New Brunswick retail investors. One way to strengthen investor protection would be to briefly explain the meaning of "not audited".

Overall, Blanket Order 45-504 is a welcome development in New Brunswick: its purposes are to facilitate capital raising for SMEs and to maintain appropriate investor protection. The precise effects of Blanket Order 45-504 will be observed over the ensuing months.

Voluntary Pre-Filing of Draft Offering Memoranda

New Brunswick-based issuers may voluntarily pre-file a draft OM with the Commission pursuant to [Local Staff Notice 45-701 Voluntary Pre-Filing of Draft Offering Memoranda under National Instrument 45-106 Prospectus and Registration Exemptions](#). The scope of Commission staff's participation and what an issuer can expect when pre-filing a draft offering memorandum are set out in the local staff notice.

Prior to filing an OM with the Commission, issuers should ensure that they have reviewed [Multilateral CSA Staff Notice 45-309 Guidance for Preparing and Filing an Offering Memorandum under NI 45-106](#). The staff notice provides guidance to issuers that intend to rely on the OM exemption and also summarizes the common deficiencies staff have observed in offering memoranda prepared in accordance with Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers*.

We are preparing for our next *Fullsail* capital markets event and we need your input.

PLEASE SEND YOUR SUGGESTIONS TO:
Jeff.Harriman@nbsc-cvmnb.ca

Upcoming Entrepreneur Events

LEARNING THE ROPES: The Offering Memorandum Exemption

COMING SOON TO:
Moncton
Saint John
Fredericton

Check our website for dates, registration & details!

www.nbsc-cvmnb.ca/LearningtheRopes

Mutual Fund Fees



The Canadian Securities Administrators (CSA) recently published a discussion paper on mutual fund fees. [CSA Discussion Paper 81-407 Mutual Fund Fees](#) examines the mutual fund fee structure in Canada and identifies

potential investor protection issues arising from that structure. The Discussion Paper sets out various topics for discussion in order to evaluate the appropriate structure for Canada.

Canada's mutual fund fees have been the subject of much debate in recent years. Some research studies examining Canada's mutual fund fees, along with international reforms, have prompted greater interest in reviewing the issue of mutual fund fees in Canada.

To date, the CSA has focused its efforts on enhancing the transparency of mutual fund fees and commissions through initiatives such as the Point of Sale, and Cost Disclosure and Performance Reporting projects. While these initiatives remain a priority on behalf of investors, the CSA has determined that it is also necessary to consult extensively with investors and market participants to explore whether further issues remain.

The CSA welcomes feedback on the discussion paper, until 12 April 2013. All comments will be considered in the CSA's decision and next steps. They will also assist in the development of a roundtable planned with investors and industry participants in 2013.

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www.nbsc-cvmnb.ca/makingheadway

LEARNING THE ROPES

LEARNING THE ROPES is the Commission's capital markets development education series. To host an event in your region, please contact us. Various topics are available including: investment readiness for business, the offering memorandum exemption and the Small Business Investor Tax Credit program.



Hot Topic: CROWDFUNDING

We hosted a crowdfunding event in late November in Fredericton. This event sparked debate and on-going discussion. Speaker biographies and videos of the event are now available on our website:

www.nbsc-cvmnb.ca/crowdfunding

We encourage you to view the videos and share the link with those who are interested in this topic.

We look forward to future discussion on this important topic and would welcome any comments you have. Keep up-to-date on the topic by subscribing to the Capital Markets email list.

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We want to hear from you

information@nbsc-cvmnb.ca

Tell us what you'd like to read in the next edition of **Making Headway**. You can submit your story or send us an email telling us about something great that is happening in New Brunswick's capital markets.

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We protect investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in capital markets. We develop and enforce securities regulation, and offer impartial educational information and resources to New Brunswick residents about the investing process.

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