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NEW CHANGES TO OFFERING MEMORANDUM RULES

Richards Buell Sutton Securities Law Update

Changes to the **offering memorandum** prospectus exemption were recently announced that will affect clients distributing securities in Alberta, Ontario, Saskatchewan, Quebec, Nova Scotia and New Brunswick. These changes will have a significant impact, and are scheduled to take effect on **January 13, 2016 in Ontario**, and on **April 30, 2016** in the other named provinces.

We provide the following brief summary of these changes, but encourage interested clients to contact us for further discussion.

Offering Memorandums in Ontario

The new changes mark the first introduction of the offering memorandum exemption into Ontario. The offering memorandum exemption was not available in Ontario beforehand.

Annual Disclosure Requirements

The most significant change to the offering memorandum rules is the creation of annual filing obligations.

In Alberta, Ontario, Saskatchewan, Quebec, New Brunswick and Nova Scotia, non-reporting issuers utilizing the offering memorandum exemption will be required to file audited annual financial statements with the applicable securities commissions, accompanied with a "Use of Proceeds" notice in a prescribed form. This requirement will continue until the issuer either ceases to carry on business or becomes a reporting issuer (at which point it will have increased disclosure obligations). The annual financial statements and notice must be filed, with some exceptions, within 120 days after the end of the issuer's fiscal year.

In Ontario, New Brunswick and Nova Scotia, issuers will also be required to file notice if the issuer discontinues its business, changes its industry, or if a change of control occurs.

Investment Limits

Under the current offering memorandum regime, certain provinces require that investors relying on the offering memorandum exemption either qualify as eligible investors, or limit their investment to \$10,000.



Under the new changes, additional investment limits will be introduced.

An “eligible investor” is, quite generally, a person that meets specified financial criteria pertaining to their income or net worth. For example, the following persons are considered “eligible investors” (the following list is not exhaustive):

- A person whose net assets, alone or with a spouse, exceed \$400,000; or
- A person whose net income before taxes exceeded \$75,000 (or, together with a spouse, exceeded \$125,000) in each of the 2 most recent calendar years and who reasonably expects to exceed that income level in the current calendar year.

Under the new changes, the following new investment limits will apply:

- For non-eligible investors that are individuals, the acquisition cost of all securities acquired by the investor under the offering memorandum exemption in the preceding 12 months cannot exceed \$10,000;
- For eligible investors that are individuals, the acquisition cost of all securities acquired by the investor under the offering memorandum exemption in the preceding 12 months cannot exceed \$30,000; and
- For eligible investors that are individuals and who receive advice from a portfolio manager, investment dealer or exempt market dealer that an investment above \$30,000 is suitable, the acquisition cost of all securities acquired by the investor under the offering memorandum exemption in the preceding 12 months cannot exceed \$100,000.

Please note that these new investment limits do not apply to British Columbia residents.

Marketing Materials and New Schedules

Under the new changes, any marketing materials provided to investors in conjunction with an offering memorandum distribution must be incorporated by reference into the offering memorandum. All marketing materials must also be filed with the applicable securities commissions. This new requirement will, in effect, extend an issuer’s liability for any misrepresentations in the offering memorandum to the marketing materials as well, and thus heightens the importance of scrutinizing all disclosures in marketing materials meticulously.

Additionally, offering memorandum investors in Alberta, Ontario, Saskatchewan, Quebec, New Brunswick and Nova Scotia, will be required to complete two new schedules. The first schedule requires the investor to confirm that they fit within the “eligible investor” criteria. The second schedule requires the investor to



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confirm that they have adhered to the investment limits described above.

Effective Dates

The new changes described above will be effective on January 13, 2016 in Ontario, and on April 30, 2016 in Alberta, Saskatchewan, Quebec, New Brunswick and Nova Scotia.

The new offering memorandum changes create additional obligations for issuers and may impact on plans to complete offering memorandum distributions outside of British Columbia. We encourage all interested clients to contact us directly to plan for these new changes accordingly.



700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA

TELEPHONE
604 682 3664

FAX
604 688 3830

RBS.CA