



# Financing Options for SMEs: Tips and Tools for Raising Money in the Public and Private Markets

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# Presentation Outline

Topic	Page
Welcome and Introduction to the OSC SME Institute	4
Regulatory Landscape in Canada	6
Key Principles of Securities Regulation	12
Sales of Securities in the Private Markets	21
Sales of Securities in the Public Markets	64
Questions	85

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# Welcome and Introduction to the OSC SME Institute

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# Objectives

## **Our goal is to:**

- Help SMEs navigate the regulatory waters
- Demystify disclosure requirements so companies can focus on building their business
- Reduce SMEs' cost of compliance so that this money can be better spent on strategic initiatives

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# The Regulatory Landscape in Canada

# The Regulatory Landscape in Canada

- Securities regulatory authorities
- OSC Corporate Finance Branch
- OSC Compliance and Registrant Regulation Branch

# Securities Regulatory Authorities

- In Canada, securities regulation is a provincial and territorial responsibility
- Each jurisdiction of Canada has its own legislation and securities regulatory authority (e.g., Ontario Securities Commission)
- The securities regulatory authorities are members of the Canadian Securities Administrators (CSA)
- CSA assists in coordinating what securities regulatory authorities do



## Securities Regulatory Authorities (cont'd)

- Rules adopted by all jurisdictions are called “national instruments”
  - National instruments have forms (national instruments and forms have the force of law)
  - National instruments also have companion policies (which provide guidance on how the national instrument should be interpreted, but do not have the force of law)
- Copies of national instruments, forms and companion policies that apply in Ontario are available on the OSC website at [www.osc.gov.on.ca](http://www.osc.gov.on.ca)

# The OSC Corporate Finance (CF) Branch

- Branch of OSC that administers rules applicable to public companies and their insiders
- Disclosure of material information that investors and other market participants need to make informed investment decisions
- Continuous disclosure filings and prospectuses
- Applications for exemptive relief from legislative requirements
- Matters relating to reports of exempt distributions, insider reports, early warning reports and take-over bids
- Requirements related to securities offered under a prospectus exemption

# The OSC Compliance and Registrant Regulation (CRR) Branch

- The Compliance and Registrant Regulation branch is responsible for regulating firms and individuals who are in the business of advising or trading in securities and firms that manage investment funds in Ontario. We call these people/firms, registrants
- Securities legislation and the related rules set out registrant obligations and we monitor compliance with those obligations
- Conducts on-site compliance reviews and focused compliance reviews
- Applications for exemptive relief from registration and other regulatory requirements

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# Key Principles of Securities Regulation

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# The Prospectus Requirement

- If you are selling securities to an investor in a “distribution”, you must do so under a prospectus unless an exemption from the prospectus requirement is available
  - Section 53 Securities Act – prospectus requirement
  - Some prospectus exemptions found in Securities Act
  - National Instrument 45-106 *Prospectus Exemptions*
- A prospectus is a key investor protection tool
  - Provides investors with important information about the company and the securities being offered
  - Disclosure should help investors evaluate the prospectus and risks of the company so they can make an informed investment decision

# Key Concepts

- Security
- Trade
- Distribution
- Registration requirement
- Reporting issuer
- Relevant definitions in section 1(1) of the *Securities Act* (Ontario)

# What is a Security?

- A “Security” includes:
  - Common and preferred shares
  - Bonds, debentures, notes and other evidences of indebtedness
  - Rights, subscription receipts, warrants and options
  - Investment contracts
  - Inclusive definition that is purposely broad, flexible, with focus on substance over form to protect purchasers

# What is a Trade?

- A “Trade” includes:
  - Sale or disposition of security for valuable consideration
  - Any receipt by a registrant of an order to buy or sell a security
  - Any act, advertisement, solicitation, conduct or negotiations directly or indirectly in furtherance of a trade (pre-sale activities)



# What is a Distribution?

- A “Distribution” includes:
  - A trade in securities of an issuer that have not previously been issued
  - A trade in previously issued securities of an issuer by a control person
  - A trade in securities by investors who acquired those securities in reliance on certain prospectus exemptions
- A trade that is a distribution requires the purchaser to be provided with a prospectus, unless an exemption is available
- Deemed distribution on resale of securities issued under prospectus exemption unless resale rules complied with

# Registration Requirement

- Registration requirement
  - Must be registered to engage in the business of trading
  - OSA section 25
  - National Instrument 31-103 *Registration requirements, exemptions and ongoing registrant obligations*
- “In the business”
  - Is the activity for a business purpose?
    - Engaging in activities similar to a registrant
    - Intermediating trades or acting as a market maker
    - Directly or indirectly carrying on the activity with repetition, regularity or continuity
    - Being or expecting to be remunerated or compensated
    - Directly or indirectly soliciting purchasers

## Registration Requirement (cont'd)

- Entity that issues its own securities may have to register as a dealer
  - Frequently trades in securities
  - Employs or contracts with individuals to perform activities on its behalf that are similar to those performed by a registrant
  - Solicits investors actively
- In general, securities issuers with an active non-securities business do not have to register if they
  - Do not hold themselves out as being in the business of trading
  - Trade securities infrequently
  - Are not compensated for trading
  - Do not produce a profit from trading

# The Overall Framework Revisited

- General requirement – no distribution of securities without a prospectus
  - Prospectus is filed and receipted by the securities regulators
  - Sales can be made to anyone
  - Issuer becomes a “reporting issuer” (“public company”)
- Exemption from prospectus requirement
  - Referred to as “exempt market”
  - Issuing securities where no prospectus required
  - Sales can only be made to certain investors – depending on the limits in the exemption being relied on
  - Available to both reporting and non-reporting (private) issuers



# Sales of Securities in the Private Markets

# Sales of Securities Without a Prospectus

- Exempt distributions
- Background on the exempt market
- Rationale for exemptions
- Commonly used exemptions for capital raising
- Compliance and oversight
- Reports of exempt distributions
- OSC exempt market webpage
- Resale restrictions

## Exempt Distributions

- Sale of securities without a prospectus
- Saves time and cost
- Avoids public company (“reporting issuer”) responsibilities
- Several different exemptions available
- National Instrument 45-106 *Prospectus Exemptions*
- Ontario Securities Act

# Background on the Exempt Market

- Size of the exempt market in Ontario
  - The exempt market in Canada has become increasingly important for investors and issuers
  - In 2014, non-investment fund issuers raised a total of approximately \$80 billion through prospectus exempt distributions in Ontario
  - The accredited investor exemption was the most widely used prospectus exemption in Ontario
    - In 2014 it represented 92% of the capital raised



## Background on the Exempt Market (cont'd)

- Does not mean unregulated market
  - NI 45-106 specifies to whom securities can be sold and/or under what circumstances
  - Require some of the transactions in this market to be reported to us so that we can monitor compliance
  - NI 31-103 sets out registration requirements for those selling or advising in securities

# Rationale for Exemptions

- Idea that there is a reason in each case that full disclosure in a prospectus is not necessary
  - Balancing capital raising with investor protection
  - Nature of investor
    - Certain level of sophistication
    - Ability to withstand financial loss
    - Financial resources to obtain expert advice
  - Nature of security
    - Lower risk profile associated with security
  - Alignment of economic interests
    - e.g. between employees and employers
  - Alternative disclosure regime
    - e.g. offering memorandum
  - Regulation under another regime
-

# Exempt Market Review

- Amendments to three existing prospectus exemptions
  - Accredited investor exemption
  - Minimum amount investment exemption
  - Rights offering exemption
- Four new prospectus exemptions
  - Existing security holder exemption
  - Family, friends and business associates exemption
  - Offering memorandum exemption
  - Crowdfunding exemption
- Summary of Key Capital Raising Prospectus Exemptions in Ontario (published January 28, 2016)

# Commonly Used Exemptions for Capital Raising

Exemption	Available in Ontario	Available in Other Canada Jurisdictions	Reporting Requirements
Private issuer	Yes	Yes	No
Family, friends and business associates	Yes	Yes	Yes
Accredited investor	Yes	Yes	Yes
Minimum amount	Yes	Yes	Yes
Rights offering	Yes	Yes	Alternative disclosure in circular must be filed
Existing security holder	Yes	Yes	Yes
Securities for debt	Yes	Yes	Yes
Offering memorandum	Yes	Yes	Yes
Crowdfunding	Yes	Yes (MB, QC, NB, NS, SK)	Yes

# Private Issuer Exemption

Element of Exemption	Key Features
Issuer of security	<ul style="list-style-type: none"><li>• "Private issuer"<ul style="list-style-type: none"><li>• Maximum 50 securityholders (excluding employees)</li></ul></li></ul>
Purchaser	<ul style="list-style-type: none"><li>• Certain specific persons</li></ul>
Type of security	<ul style="list-style-type: none"><li>• Any security</li></ul>
Seller	<ul style="list-style-type: none"><li>• Any seller (issuer or one of specified persons)</li></ul>
Other key conditions	<ul style="list-style-type: none"><li>• Purchaser purchases as principal</li></ul>
Source	<ul style="list-style-type: none"><li>• Section 2.4 of NI 45-106</li></ul>

## Private Issuer Exemption (cont'd)

- Private issuer security holders include:
  - Director, officer, employee, founder or control person of issuer
  - Director, officer or employee of affiliate of issuer
  - Certain relatives of director, executive officer, founder or control person and certain relatives of spouse of director, executive officer, founder or control person
  - Close personal friend or close business associate of director, executive officer, founder or control person
  - Existing security holder of the issuer
  - Accredited investor
  - A person that is not the public

# Family, Friends and Business Associates Exemption

Element of Exemption	Key Features
Issuer of security	<ul style="list-style-type: none"><li>• Reporting issuers and non-reporting issuers but not investment funds</li></ul>
Purchaser	<ul style="list-style-type: none"><li>• Specified principals of the issuer, specified family members, close personal friends, close business associates</li></ul>
Type of security	<ul style="list-style-type: none"><li>• Not available for short-term securitized products</li></ul>
Seller	<ul style="list-style-type: none"><li>• Issuer or selling security holder</li></ul>
Other key conditions	<ul style="list-style-type: none"><li>• Risk acknowledgment form</li></ul>
Source	<ul style="list-style-type: none"><li>• Section 2.5 of NI 45-106</li></ul>

# Family, Friends and Business Associates Exemption (cont'd)

- Allows reporting and non-reporting issuers (but not investment funds) to raise capital from investors who are principals of the business or within the personal networks of principals of the business
  - Risk acknowledgement form
  - Guidance on determining whether an investor qualifies as a close personal friend or close business associate
  - Guidance explaining that in Ontario, the use of registrants, finders or advertising, as well as payment of commissions or fees to find purchasers is inconsistent with the exemption
  - Subject to resale restrictions
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# Accredited Investor Exemption

Element of Exemption	Key Features
Issuer of security	<ul style="list-style-type: none"><li>• Any issuer (investment funds and non-investment funds, reporting issuers and non-reporting issuers)</li></ul>
Purchaser	<ul style="list-style-type: none"><li>• Accredited investors</li></ul>
Type of security	<ul style="list-style-type: none"><li>• Any security</li></ul>
Seller	<ul style="list-style-type: none"><li>• Any seller</li></ul>
Other key conditions	<ul style="list-style-type: none"><li>• Accredited investor must purchase as principal</li><li>• Risk acknowledgment form for individuals</li></ul>
Source	<ul style="list-style-type: none"><li>• Section 2.3 of NI 45-106</li></ul>

## Accredited Investor Exemption (cont'd)

- Accredited investors include – individuals
  - Alone or with spouse certain net income (before taxes) in two most recent years
    - \$200,000 (alone)
    - \$300,000 (with spouse)
  - Alone or with spouse financial assets of at least \$1 million, net of related liabilities (excludes real estate)
    - Financial assets – generally liquid or easy to liquidate
      - Cash
      - Securities
      - Contract of insurance, deposit or evidence of deposit
  - Alone or with spouse net assets of at least \$5 million (includes real estate)

## Accredited Investor Exemption (cont'd)

- Accredited investors include – non-individuals
  - Canadian federal or provincial governments, crown corporations or government agencies
  - Canadian municipalities
  - Foreign governments
  - Canadian financial institutions
  - Pension funds regulated by the Office of the Superintendent of Financial Institutions or pension commission of jurisdiction of Canada
  - Registered charities
  - Certain investment funds

## Accredited Investor Exemption (cont'd)

- Individuals qualifying for the accredited investor income threshold are a small minority
- Available data suggests that persons with income at or above \$200,000 account for approximately:
  - 1.3% of tax filers in Ontario
  - 1.1% of tax filers across Canada
  - (Source: Statistics Canada)

## Accredited Investor Exemption (cont'd)

- Risk acknowledgment form for accredited investors
  - Only individual accredited investors described in paragraphs (j), (k) or (l) of the definition of accredited investor need to complete the form
  - Does not include permitted clients – defined in paragraph (j.1)
  - Describes key risks in plain language and requires investor to acknowledge each risk
  - Investor must confirm which category of individual accredited investor he or she qualifies under

# Accredited Investor Exemption Companion Policy Guidance

- Companion policy guidance on the steps sellers could take to verify the status of purchasers who acquire securities under certain prospectus exemptions
- Exemptions based on purchaser characteristics
  - Seller must obtain information from the purchaser to determine whether the purchaser meets the applicable test
  - Not sufficient for a seller to accept standard representations in a subscription agreement or an initial beside a category of accredited investor in the risk acknowledgment form

# Minimum Amount Investment Exemption

Element of Exemption	Key Features
Issuer of security	<ul style="list-style-type: none"> <li>Any issuer (investment funds and non-investment funds, reporting issuers and non-reporting issuers)</li> </ul>
Purchaser	<ul style="list-style-type: none"> <li>Non-individual investors only</li> </ul>
Type of security	<ul style="list-style-type: none"> <li>Any security</li> </ul>
Seller	<ul style="list-style-type: none"> <li>Any seller</li> </ul>
Other key conditions	<ul style="list-style-type: none"> <li>Purchaser purchases as principal</li> <li>Acquisition cost of security is at least \$150,000</li> <li>Must be paid in cash at time of distribution</li> </ul>
Source	<ul style="list-style-type: none"> <li>Section 2.10 of NI 45-106</li> </ul>

# Rights Offering Exemption

Element of Exemption	Key Features
Issuer of security	<ul style="list-style-type: none"> <li>• Reporting issuers</li> </ul>
Purchaser	<ul style="list-style-type: none"> <li>• Rights are distributed to each security holder on a pro rata basis</li> <li>• Rights holders may exercise their right to acquire the security</li> </ul>
Type of security	<ul style="list-style-type: none"> <li>• Right granted by the issuer to purchase a security of its own issue</li> </ul>
Seller	<ul style="list-style-type: none"> <li>• Issuer of the right</li> </ul>
Other key conditions	<ul style="list-style-type: none"> <li>• Prescribed disclosure in notice and circular</li> <li>• 100% dilution limit</li> <li>• Statutory secondary market civil liability</li> <li>• Pro-rata offer to existing security holders</li> </ul>
Source	<ul style="list-style-type: none"> <li>• Section 2.1 of NI 45-106</li> </ul>



# Rights Offering Exemption (cont'd)

## Process

- Issuer files and sends notice to all security holders, summarizing key terms of the offering
- Issuer files circular
- Issuer must comply with requirements of section 2.1 of NI 45-106

## Rights Offering Exemption (cont'd)

### **Key disclosure to be provided to security holders**

- Notice summarizing key terms of the offering and mailed to security holders
- Focus of disclosure in circular
  - Description of use of proceeds,
  - Various thresholds of use of proceeds, and
  - Liquidity for issuers in poor financial condition

# Existing Security Holder Exemption

Element of Exemption	Key Features
Issuer of security	<ul style="list-style-type: none"><li>• Reporting issuers (excluding investment funds) listed on specific exchanges</li></ul>
Purchaser	<ul style="list-style-type: none"><li>• Existing security holders of the issuer</li></ul>
Type of security	<ul style="list-style-type: none"><li>• Can only consist of a class of equity securities already listed on a specified exchange or units of the listed security and a warrant to acquire the listed security</li></ul>
Seller	<ul style="list-style-type: none"><li>• The listed reporting issuer</li></ul>
Other key conditions	<ul style="list-style-type: none"><li>• Offer must be made to all security holders</li><li>• 100% dilution limit per offering</li><li>• Investment limit of \$15,000 per investor in any 12-month period unless suitability advice is obtained from an investment dealer</li></ul>
Source	<ul style="list-style-type: none"><li>• Section 2.9 of NI 45-501</li></ul>

## Existing Security Holder Exemption (cont'd)

- Allows listed public companies to raise capital on a cost effective basis from existing investors in reliance on public disclosure record
- Disclosure
  - Issuer must issue a news release describing the proposed distribution and use of proceeds in reasonable detail
  - No prescribed form of point of sale disclosure but materials must be filed on SEDAR
- Investment limit of \$15,000 in the previous 12 months; can exceed if suitability advice obtained from a registered investment dealer
- Allows an increase of up to 100% in the number of outstanding securities of the same class

## Existing Security Holder Exemption (cont'd)

- Offer to security holders
  - Only available to security holders who held the listed security as at the record date
  - Duration of offer not prescribed
  - No requirement to allocate securities on a pro rata basis
  - Minimum subscription amount
- Secondary market civil liability applies to securities acquired under the exemption
- Subject to resale restrictions

# Existing Security Holder Exemption and Rights Offering Exemption - Compared

- Eligible investors
  - Only existing security holders may participate in the existing security holder exemption. In a rights offering, rights may be traded on the secondary market to a new security holder who may exercise the right to acquire securities of the company.
  - Investors are not subject to an annual investment limit under a rights offering
- Pro-rata allocation
  - Pro rata allocation of securities is required under the rights offering exemption
- Prescribed document
  - No prescribed document for existing security holder exemption
- Offer period
  - No prescribed offer period for existing security holder exemption
  - Minimum two day exercise period for rights offering exemption
- Resale restrictions
  - Securities distributed under the existing security holder exemption are subject to a four month hold period

# Securities for Debt

- Prospectus requirement does not apply to:
  - A trade/distribution
  - By a reporting issuer
  - In a security of the issuer
  - To a creditor
  - To settle a bona fide debt of the issuer
  - Section 2.14 of NI 45-106

# Offering Memorandum Exemption

Element of Exemption	Key Features
Issuer qualifications	<ul style="list-style-type: none"><li>• Available to both reporting and non-reporting issuers</li><li>• Not available to investment funds</li><li>• No industry or other restrictions</li></ul>
Type of securities	<ul style="list-style-type: none"><li>• Not available for distributions of specified derivatives and structured finance products</li></ul>
Offering parameters	<ul style="list-style-type: none"><li>• No limit on size of offering or number of offerings</li><li>• No restriction on length of time an offering can remain open</li></ul>
Registrant involvement	<ul style="list-style-type: none"><li>• No prohibition on using registrant that is related to an issuer</li></ul>
Marketing and advertising	<ul style="list-style-type: none"><li>• Marketing materials incorporate into an offering memorandum and therefore subject to liability if misrepresentation</li></ul>



# Offering Memorandum Exemption (cont'd)

Element of Exemption	Key Features
Investor qualifications	<ul style="list-style-type: none"> <li>• Concept of eligible investor:</li> <li>• Net assets, alone or with a spouse, in the case of an individual, exceed \$400,000</li> <li>• Net income before taxes exceeded \$75,000 alone or \$125,000 with a spouse, in each of the two most recent calendar years and reasonably expects to exceed that level in current year</li> </ul>
Investment limits — acquisition cost of all securities acquired under OM exemption in a 12 month period	<p><b>Individuals:</b></p> <ul style="list-style-type: none"> <li>• Accredited investors and investors who qualify under family, friends and business associates exemption - no limits</li> <li>• Eligible investors - \$30,000 per year</li> <li>• Eligible investors who receive advice from an investment dealer, portfolio manager or exempt market dealer that the investment is suitable - up to \$100,000 per year</li> <li>• Non-eligible investors - \$10,000 per year</li> </ul> <p><b>Non-individuals:</b></p> <ul style="list-style-type: none"> <li>• No investment limits</li> </ul>

# Offering Memorandum Exemption (cont'd)

Element of Exemption	Key Features
Risk acknowledgment form	<ul style="list-style-type: none"> <li>• Form to be completed by all investors – Form 45-106F4</li> <li>• Two schedules to be completed by individual investors to confirm investor status and investment limits</li> </ul>
Point of sale disclosure	<ul style="list-style-type: none"> <li>• Offering memorandum must be provided to investors</li> <li>• Subject to liability if misrepresentation</li> </ul>
Cooling off period	<ul style="list-style-type: none"> <li>• Investors have two business day right of withdrawal</li> </ul>
Resale restrictions	<ul style="list-style-type: none"> <li>• Subject to resale restrictions</li> </ul>
Ongoing disclosure	<p><b>Reporting issuers:</b></p> <ul style="list-style-type: none"> <li>• Continuous disclosure obligations under securities laws</li> </ul> <p><b>Non-reporting issuers:</b></p> <ul style="list-style-type: none"> <li>• Audited annual financial statements</li> <li>• Annual notice of use of proceeds – Form 45-106F16</li> <li>• In Ontario, New Brunswick and Nova Scotia, a notice of specified key events – Form 45-106F17</li> </ul>

# Crowdfunding Exemption

- Multilateral Instrument 45-108 (MI 45-108) available in Ontario, Manitoba, Québec, New Brunswick, Saskatchewan and Nova Scotia
- Alberta recently adopted MI 45-108 in October 2016
- What is crowdfunding?
- Method of funding a project or venture through amounts of money raised from members of the public over the internet via an online portal
- Different crowdfunding models
  - Donation model
  - Reward model
  - Pre-purchase model
  - Peer-to-peer lending model
  - Equity securities model
- Focus is on crowdfunding involving a distribution of securities to the public
- MI 45-108 includes crowdfunding prospectus exemption and a registration framework for funding portals

# Crowdfunding Exemption (cont'd)

Element of Exemption	Key Features
Issuer qualifications	<p><b>General:</b></p> <ul style="list-style-type: none"> <li>• Available to both reporting and non-reporting issuers</li> <li>• Not available to investment funds</li> <li>• Not available to blind pools</li> </ul> <p><b>Nexus to Canada:</b></p> <ul style="list-style-type: none"> <li>• Incorporated/organized in, head office in, majority of directors resident in Canada</li> <li>• Principal operating subsidiary, if any, incorporated/organized in Canada or the U.S.</li> </ul>
Type of securities	<ul style="list-style-type: none"> <li>• Only available for distributions of specified non-complex securities               <ul style="list-style-type: none"> <li>• Common shares</li> <li>• Non-convertible preference shares</li> <li>• Securities convertible into common shares or non-convertible preference shares</li> <li>• Non-convertible debt securities linked to an interest rate</li> <li>• Units of a limited partnership</li> <li>• Flow-through shares under the <i>Income Tax Act</i> (Canada)</li> </ul> </li> </ul>

# Crowdfunding Exemption (cont'd)

Element of Exemption	Key Features
Offering parameters	<ul style="list-style-type: none"> <li>• Issuer group cannot raise more than \$1.5 million under exemption in a rolling 12 month period</li> <li>• Distribution cannot remain open longer than 90 days</li> </ul>
Sufficient proceeds	<ul style="list-style-type: none"> <li>• Distribution cannot be completed unless sufficient proceeds have been raised to accomplish issuer's business objectives</li> <li>• Includes proceeds from distribution and any concurrent distribution(s) by issuer group</li> <li>• Can distribute securities under other prospectus exemptions with different price, terms and conditions</li> </ul>
Solicitation and advertising	<ul style="list-style-type: none"> <li>• Prohibition on advertising and soliciting</li> <li>• Exceptions:               <ul style="list-style-type: none"> <li>• <b>Issuer:</b> <ul style="list-style-type: none"> <li>• May only inform purchasers that it proposes to distribute securities under the crowdfunding prospectus exemption and direct purchasers to the funding portal</li> </ul> </li> <li>• <b>Funding portal:</b> <ul style="list-style-type: none"> <li>• Permitted to advertise its business operations</li> <li>• Prohibited from recommending or endorsing a particular issuer or distribution, including highlighting or showcasing an issuer or its distribution</li> </ul> </li> </ul> </li> </ul>

# Crowdfunding Exemption (cont'd)

Element of Exemption	Key Features
Investment limits	<p><b>Non-accredited investor:</b></p> <ul style="list-style-type: none"> <li>• \$2,500 per investment</li> <li>• In Ontario and Alberta, \$10,000 in total in a calendar year</li> </ul> <p><b>Accredited investor:</b></p> <ul style="list-style-type: none"> <li>• \$25,000 per investment</li> <li>• In Ontario and Alberta, \$50,000 in total in a calendar year</li> </ul> <p><b>Permitted client:</b></p> <ul style="list-style-type: none"> <li>• In Ontario and Alberta, no investment limits</li> <li>• In Ontario and Alberta, Form 45-108F3 <i>Confirmation of Investment Limits</i></li> <li>• Validation by funding portal</li> </ul>
Risk acknowledgment	<ul style="list-style-type: none"> <li>• Prior to entering online funding portal's platform</li> <li>• Prior to purchasing (Form 45-108F2 <i>Risk Acknowledgement</i>)</li> </ul>
Resale restrictions	<ul style="list-style-type: none"> <li>• Subject to resale restrictions</li> </ul>

## Crowdfunding Exemption (cont'd)

Element of Exemption	Key Features
Cooling off period	<ul style="list-style-type: none"> <li>Investors have 48 hours after date of purchase agreement to withdraw</li> </ul>
Point of sale disclosure	<ul style="list-style-type: none"> <li>Crowdfunding offering document in Form 45-108F1 must be provided to investors               <ul style="list-style-type: none"> <li>must be accompanied by financial statements</li> </ul> </li> <li>Term sheets, videos and other summaries can also be made available</li> <li>Subject to liability               <ul style="list-style-type: none"> <li>Non-reporting issuers - untrue statement of a material fact</li> <li>Reporting issuers - misrepresentation</li> </ul> </li> </ul>
Ongoing disclosure	<p><b>Reporting issuers:</b></p> <ul style="list-style-type: none"> <li>Continuous disclosure obligations under securities laws</li> </ul> <p><b>Non-reporting issuers:</b></p> <ul style="list-style-type: none"> <li>Annual financial statements with scaled attestation requirements</li> <li>Annual notice of use of proceeds</li> <li>In Ontario, New Brunswick, and Nova Scotia, notice of specified key events</li> </ul>

## Crowdfunding Exemption (cont'd)

Element of Exemption	Key Features
Registration	<ul style="list-style-type: none"> <li>• Restricted dealer</li> <li>• Exempt market dealer or investment dealer</li> </ul>
Obligation of the funding portal	<ul style="list-style-type: none"> <li>• Conduct background checks on the issuer and its directors, officers and promoters</li> <li>• Review the offering document and other permitted materials</li> <li>• Deny access to the platform in certain circumstances</li> </ul>
Recommendation and advice	<p><b>Restricted dealers:</b></p> <ul style="list-style-type: none"> <li>• Not permitted to provide a recommendation or advice</li> </ul> <p><b>Investment dealers and exempt market dealers:</b></p> <ul style="list-style-type: none"> <li>• Must comply with all of the requirements of their registration, including KYC, KYP and suitability</li> </ul>
Prohibited activities	<ul style="list-style-type: none"> <li>• Cannot distribute securities of related issuer</li> <li>• Cannot advertise or solicit (may advertise its business operations)</li> </ul>



# Exempt Market Compliance and Oversight

- OSC has recently developed a compliance and oversight program to monitor distributions under the new and existing capital raising prospectus exemptions
- The Corporate Finance and Compliance and Registrant Regulation branches have primary responsibility for exempt market compliance
- The compliance and oversight program has three main elements:
  - Assessing compliance
  - Enhancing awareness
  - Data gathering

# Assessing Compliance & Enhancing Awareness

## **Assessing Compliance**

- Intake of reports of exempt distribution
- Appropriate use of exemptions
- Compliance with investment limits
- Risk acknowledgement form
- Due Diligence
- Offering documents and disclosure to investors

## **Enhancing Awareness**

- External training
- Monitoring activities

## Data Gathering

- Assist in refining the OSC's compliance and oversight program
- Assist in public reporting of exempt market activity
- Inform future policy making
- New report of exempt distribution, Form 45-106F1, came into force in all CSA jurisdictions on **June 30, 2016**

# Reports of Exempt Distributions

- New report of exempt distribution is harmonized across all CSA jurisdictions
  - Tailored to type of issuer: Investment funds and Non-investment funds
  - New information requirements include:
    - Additional details about the issuer
    - Identities of the directors, executive officers and promoters for certain issuers
    - Additional details about the securities distributed and documents provided in connection with the distribution
    - Additional details about compensation paid
  - Filing Requirement and Filing Systems
-

# OSC Exempt Market Webpage

The screenshot displays the OSC Exempt Market Webpage. At the top is a dark red navigation bar with the OSC logo and menu items: About, Securities Law & Instruments, Proceedings, News & Events, Investors, and Industry. Below this is a grid of nine main content tiles. The top-left tile is a large dark blue header titled "What is the exempt market?". The remaining eight tiles are arranged in two rows of four. The first row contains: "Who needs to register?", "What do investors need to know?", "What are the available prospectus exemptions?", and "How do companies raise capital in the exempt market?". The second row contains: "Exempt market data", "Exempt market publications", "Reports of exempt distribution", and "Check registration (opens in new tab)". To the right of the grid is a white sidebar menu titled "On this page" with links for "What's New?", "Forms and Filing Requirements" (with sub-links for reports of exempt distribution, offering materials, and other forms), "Exempt Market Data", "Exempt Market Publications", "Resources", and "Contact Us".

# CSA Staff Notice 45-308

CSA Staff Notice 45-308 (Revised) *Guidance for Preparing and Filing Reports of Exempt Distribution under National Instrument 45-106 Prospectus Exemptions*

- To assist issuers, underwriters and their advisors in preparing and filing reports of exempt distribution
  - Incomplete or inconsistent information
  - Tips for Completing a Filing Report
  - Checklist of Information Requirements introduced in the 2016 Report
  - Frequently Asked Questions
-

# Resale Restrictions

- There are resale restrictions on securities sold under an exemption
  - In addition to restrictions on share transfers to qualify as a private issuer
- Rules complex and fact specific
  - Prescribed in NI 45-102 *Resale of Securities*



# Sales of Securities in the Public Market



# Common Methods of “Going Public”

- Initial public offering
- Reverse take-over
- TSXV capital pool program

# Initial Public Offering

- Traditional method of going public
- Involves preparation and regulatory clearance of prospectus
  - Prospectus provides material information about company and securities being distributed
- Advantage — facilitates broad distribution
- Disadvantage — cost and time considerations

# Reverse Take-over

- Also known as reverse merger or back door listing
- Public company acquires private company
- Generally subject to approval of public company shareholders

# TSXV Capital Pool Program

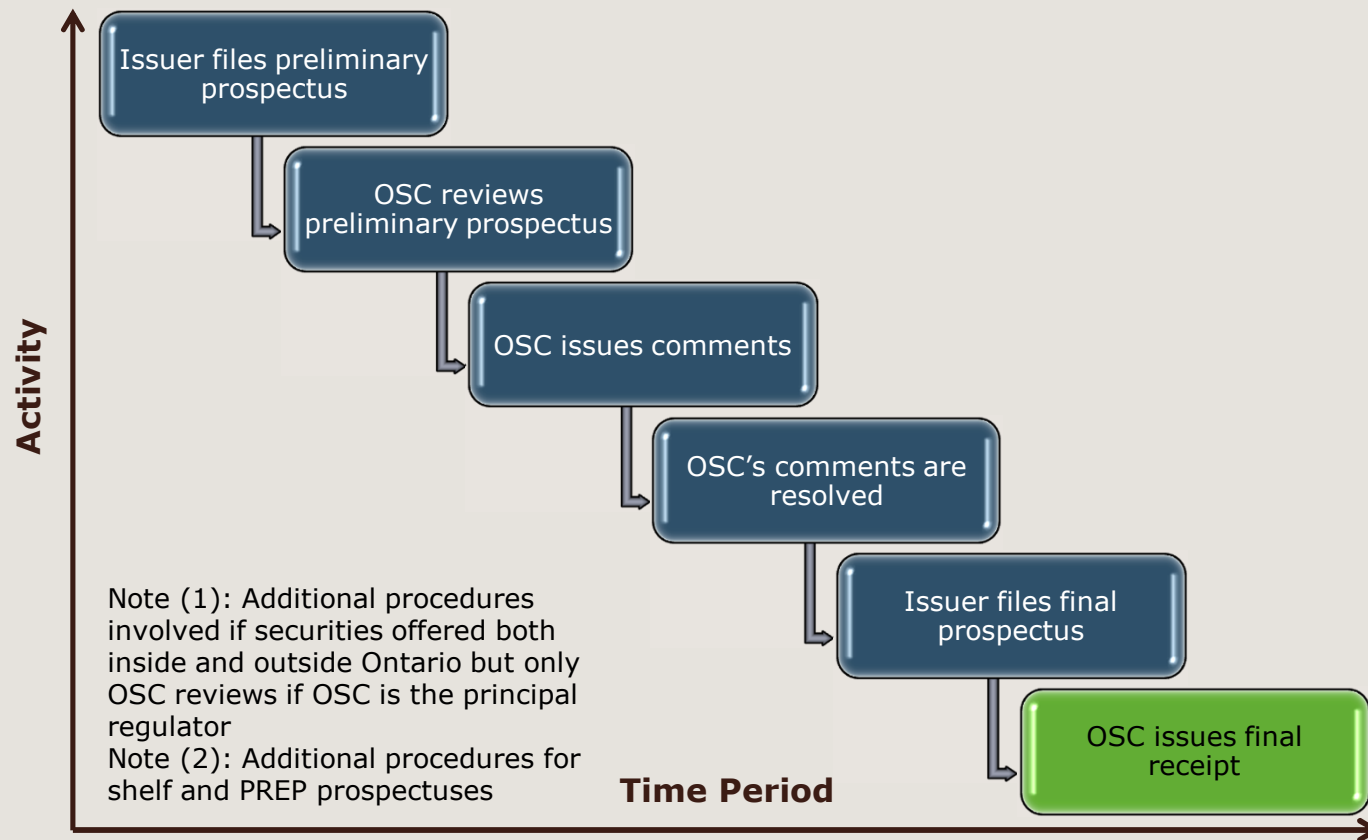
- Capital pool company (CPC) with no assets other than cash from seed round financing and no operations conducts IPO and becomes listed on TSXV
- CPC must identify appropriate business as its “qualifying transaction” within 24 months of listing
- CPC must then prepare and file filing statement or information circular with TSXV
  - Prospectus level disclosure required for CPC, private company and resulting issuer
  - Shareholder approval not required by TSXV for arm’s length QT
  - Resulting company must qualify for TSXV listing
- More information available at:  
*[http://www.tmx.com/en/listings/listing\\_with\\_us/ways/capital\\_company.html](http://www.tmx.com/en/listings/listing_with_us/ways/capital_company.html)*

# Initial Public Offering (IPO)

- Conducting the IPO
- Regulatory Issues
- Venture Issuer Requirements
- Outcomes of Prospectus Reviews
- Dealing with the OSC

# Conducting the IPO

## General sequence of events



# Regulatory Issues

- Quality of prospectus disclosure
- Offering structure and size
- Financial statements
- Management's discussion and analysis
- Escrow

## Regulatory Issues (cont'd)

### **Quality of prospectus disclosure**

- Meets requirements of relevant prospectus form
  - Company's business, securities being offered and use of proceeds
- Balanced discussion
- Marketing materials disclosed in or derived from prospectus
- Covers material information
- Internally consistent
- Uses plain language



## Regulatory Issues (cont'd)

### Offering structure and size

- Must have sufficient proceeds to accomplish purpose of issue following prospectus offering
  - Must be able to continue operations for a reasonable period of time
  - Director must refuse a receipt under s. 61 of the Act if
    - s. 61(2)(c) - insufficient proceeds to accomplish purpose of issue
    - S. 61(1) of Act – not in the public interest
  - Guidance published in CSA Staff Notice 41-307 *Concerns Regarding an Issuer's Financial Condition and the Sufficiency of Proceeds from a Prospectus Offering*
  - Concerns may be addressed by underwriting or minimum best efforts offering
  - Broad enough distribution and public float to meet stock exchange original listing requirements
-

# Regulatory Issues (cont'd)

## Financial statements

- In general, an issuer's prospectus must include the following:

### Annual:

For the three most recent annual periods:

- Statement of comprehensive income
- Statement of changes in equity
- Statement of cash flows

For the two most recent annual periods:

- Statement of financial position

### Interim:

- Comparative interim financial report for most recent interim period (subsequent to most recent financial year end).

- In cases of a reverse take-over transaction or other transactions, must know who the issuer is
- Requirements set out in item 32 of Form 41-101F1

# Regulatory Issues (cont'd)

## Financial statements (cont'd)

- Financial statements also required for any significant or probable business acquisitions
- Generally, the same financial disclosure requirements as required by NI 51-102 *Continuous Disclosure Obligations*, Part 8 – Business Acquisition Reports
  - Two years of financial statements
  - Most recent year audited
  - Interim financial statements if necessary
  - Pro-forma financial statements
- Requirements set out in item 35 of Form 41-101F1

# Regulatory Issues (cont'd)

## Management Discussion & Analysis

- MD&A relating to most recent annual and interim financial statements must be included in the prospectus
- Must be reviewed/approved by issuer's audit committee/board of directors
- Requirements set out in item 8 of Form 41-101F1
  - Generally the same as Form 51-102 F1
- MD&A is a narrative explanation "through the eyes of management"

# Regulatory Issues (cont'd)

## Management Discussion & Analysis (cont'd)

Area	Common Deficiencies
Discussion of operations	<ul style="list-style-type: none"><li>• Disclosure simply repeats differences in the financial statements without explanation of why changes occurred</li><li>• Few details on the performance by business segments or lines of business</li></ul>
Liquidity and capital resources	<ul style="list-style-type: none"><li>• Incomplete working capital discussion</li><li>• Unclear disclosure of liquidity needs and how funded</li><li>• Going concern uncertainty in financial statements unaccompanied by MD&amp;A discussion</li></ul>
Related party transactions	<ul style="list-style-type: none"><li>• Discloses the relationship or position of the related party but not their identity</li><li>• Specific business purpose of transaction not disclosed</li></ul>
Risk disclosure	<ul style="list-style-type: none"><li>• Laundry list of risks – no detail or discussion included on impact on business</li><li>• Irrelevant risks – not relevant to entity's business or circumstances</li><li>• Unclear discussion of how risks are managed</li></ul>

# Regulatory Issues (cont'd)

## Escrow

- Escrow policy set out in NP 46-201 *Escrow for Initial Public Offerings*
- Purpose to tie principals to issuer for a period following IPO to carry out plans described in prospectus
- “Principals” includes senior officers, directors, promoters and large shareholders
- Share releases
  - Over 18 months for TSX issuers and TSXV Tier 1 issuers (“established issuer”)
  - Over 36 months for smaller issuers (“emerging issuer”)

# Venture Issuer Requirements

- Streamlined disclosure requirements for venture issuers
- Recognize stage of development
- Reduce burden

# Venture Issuer Requirements (cont'd)

## **MD&A Quarterly Highlights**

- Tailored and focused
- Discusses material information
- Only for interim periods
- Optional



## Venture Issuer Requirements (cont'd)

### **Business acquisition reporting**

- Significance threshold raised to 100% from 40%
- No longer requirement for pro forma financial statements
- Consistent approach among filing types

## Venture Issuer Requirements (cont'd)

### **Prospectus disclosure**

- Annual financial statement history for two years
- Harmonized:
  - MD&A
  - BAR
  - Executive compensation

## Venture Issuer Requirements (cont'd)

### **Audit committee requirements**

- Majority of members must be independent
- Can't be executive officers, employees or control persons
- Aligns with existing TSXV requirements

# Dealing with the OSC

- Responding to OSC comment letters
  - Provide a comprehensive response to each question asked
  - Include detailed analysis, if requested, which reconciles to financial statements and other filings
  - Cite authoritative accounting references in response to questions related to financial statements
  - Call for clarification
  - Address observations in future filings



# Questions?

# Contact Information

Contact	Information
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