

March 8, 2013

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Delivered Via E-Mail

John Stevenson
Secretary, Ontario's Security Commission
20 Queen Street West
19th Floor, Box 55
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Attention: John Stevenson

Dear Sir:

Re: OSC Staff Consultation Paper 45-710

Miller Thomson LLP is one of Canada's most respected national business law firms. Our firm offers a complete range of business, advocacy and personal legal services to corporations, financial institutions, entrepreneurs, governments, not-for-profit organizations and individuals. We have a strong banking and financial services sector, with specialties in the area of bank regulatory advice, consumer/retail financial services, financing/lending, project financing, and structured finance.

We appreciate the opportunity to comment on why we think the Offering Memorandum exemption (the "OM exemption") should be adopted in Ontario.

This letter is sent on behalf of the Alberta Miller Thomson offices and our other offices and lawyer (specifically Ontario) may submit letters of their own.

Our firm in Alberta is very experienced in the exempt market securities industry, and have seen first-hand how the exempt market allows entrepreneurs to efficiently raise capital and for investors to participate in a broader range of investment options while being adequately protected. With this in mind, we submit the following comments to OSC Staff Consultation Paper 45-710.

General Commentary:

The proposed OM exemption should be adopted in Ontario because it has the potential to be an efficient tool for business and investors.

The OM exemption is a great tool for Small and Medium Enterprises ("SMEs") that allows them to raise capital without the high costs of a prospectus. The Ontario business community

is starving for capital, as evidenced in the fact that in 2005 (the last year StatsCan has data), SMEs accounted for over 54% of Canada's GDP, while statistics in Ontario for 2009 note that SMEs only account for approximately 40% of the province's GDP.

Through our work with many small businesses, we recognize the difficulty small businesses have in obtaining financing. Financial institutions tend to finance ongoing businesses with proven cash flows rather than new ventures.

In terms of investors, an OM exemption is a great tool. An OM exemption means investors will be provided with plain language documents that are comprehensible, while still providing them with many of the same rights afforded by a prospectus. Given the public market volatility over the past number of years, investors are seeking out alternative investments.

While in 2005, the OSC chose not to adopt the OM exemption due to investor protection concerns, this ended up reducing investor choices. It disallowed 98% of the Ontario population that isn't accredited to diversify a portion of their portfolio into the exempt market during the greatest period of stock market turmoil in history.

Understandably, the OSC has concerns about dishonesty regarding Alternative Investment exemptions. Alternative investments are desirable, and people will make misrepresentations to be able to invest a prudent amount into an exempt market security. We have seen this resolved where people are provided with an honest way to invest that provides them with disclosure and purchasers' rights.

At our firm in Alberta, we conduct due diligence before we agree to represent a client, so we have seen very little material misrepresentations or misuse of funds by our clients.

Currently, individuals in Ontario with corporate pension plans are able to benefit from these funds investments in exempt market securities (and the accompanying returns) that they could not personally invest in. Meanwhile, individuals in Ontario who rely solely on their own RRSP for their retirement have little or no access to these markets. This is not the case in other provinces.

The major pension funds offered to Government of Ontario employees have significant holdings in private equity. At the same time, individuals who do not meet the lofty thresholds of being accredited are not allowed to hold a portion of their personal portfolio in the same type of investments.

Monetary Limits:

While monetary limits on the OM exemption may be reasonable, the proposed limits are impractical for EMDs, issuers, and investors.

One of the OSC's mandates is "fostering fair and efficient capital markets and confidence in capital markets". To restrict an investor to \$2,500 does not provide confidence. Rather, it provides fear of deal risk. Additionally, it is inefficient to require an issuer to sign up a minimum of 600 investors (3/business day) to get \$1,500,000.

For issuers, \$1,500,000 may not be a significant enough amount allowed to be raised via OM per year by an issuer. This is especially problematic when an issuer has to cover the costs



(legal, printing, reporting, etc.) associated with the hundreds of investors required due to the small investor limit. In addition, restricting issuers to \$2500 per investor forces them to obtain subscriptions from a large number of subscribers. This creates a serious risk of under capitalization. Knowledgeable investors may avoid a particular SME because \$2500 is just too small to be worth their time reviewing an OM.

The proposed limits OM exemptions impede an EMD (and their DRs). Since the suitability requirements should ensure that the client invests the right amount, there should not be a need for monetary caps within OMs involving sales by an EMD. Also, the small commission that a trade would yield to an EMD and their DR would likely preclude them from wanting to take on any liability and ongoing cost. \$1,500,000 generally would not be a sufficient amount for an EMD to warrant doing due diligence, product training, and market implementation on a product given how quickly that amount would be sold by their DRs.

For investors, limiting OM exemptions seems counterintuitive. For example, investors can invest \$10,000 on a penny stock through a discount broker even though they are provided with no disclosure documents and no suitability advice. However, they are restricted to investing \$2500 in a deal where they get the benefits of easy-to-read disclosure and professional suitability advice.

Crowdfunding:

It should be noted that crowdfunding and the OM exception are entirely separate ideas and should be treated as such. The OM exemption has been successfully utilized in every other Canadian jurisdiction for years. The crowdfunding exemption has not even been implemented in the United States, let alone tested.

Mandatory Disclosure:

Mandatory disclosure is important. Ontario would serve itself well to adopt the current 45-106F2 form used by all other jurisdictions because of the harmonization it would bring with other provincial regulators. The OSC should look at implementing an ongoing disclosure regime for private issuers of a certain size, particularly mandating annual audited financial statements. With thought towards meeting the test of a cost/benefit analysis, this would mitigate chances of fraud, which seem to be a primary concern of the OSC.

Registrant Involvement:

There should be registrant involvement as a condition of the OM exemption, and EMD should be included. To suggest that an EMD could not sell an exempt market security under a prospectus exemption would be illogical. The OSC should differentiate between those EMDs that sell related and non-related issuers. For those that exclusively sell non-related issuers, the OSC should not impose restrictions on arms-length transaction involving a group whose registration they have the power to revoke.

Sophistication-Based Exemption:

A sophistication based exemption would be useful for SMEs especially as the costs associated with preparing the underlying legal documentation should be minimal.



Educational Qualifications:

In order for this exemption to have a measurable impact, the relevant education requirements should be broadened to include: Chartered Accountant, Certified Financial Manager, Certified Financial Planner, Certified General Accountant, Chartered Financial Consultant, Certified Management Accountant, Chartered Professional Accountant, Financial Management Advisor, Juris Doctorate, Bachelor of Laws, Master of Laws, Professional Engineer, and Personal Financial Planner.

Our firm in Alberta currently services numerous clients with these designations who meet a sophistication based exemption, and we are confident in their ability to make sound investment decisions.

Notwithstanding an educational component being added to allow investors to qualify, many of our successful clients do not have any professional designation and they are very successful investors. They should not be excluded from investing only because they do not have a designation.

Conclusion:

The objective of this policy review is to consider how to best regulate the exempt market in a manner that:

- Enhances its role in raising capital for businesses, particularly SMEs;
- Provides retail investors with greater access to investment opportunities without compromising investor protection; and
- Better aligns the interest of issuers and investors.

The Alberta branch of Miller Thomson has seen first hand how well the exempt market securities industry can function with the appropriate provincial regulatory scheme in place. In Alberta and the numerous other provinces our firm operates in, we find entrepreneurs are able to efficiently raise capital and investors participate in a broader range of investment options, while maintaining adequate protection. With this in mind, we urge the OSC to seriously consider our position on OSC Staff Consultation Paper 45-710.

If you need any further information or wish to discuss this further, please contact me.

Yours truly,

MILLER THOMSON LLP

Per: 

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