

Offering Memorandum Exemption

This guide provides information about using the Offering Memorandum Exemption to raise equity capital in New Brunswick. This is a general overview. For specific guidance, obtain professional advice from a securities lawyer.

Exemptions

What is an Offering Memorandum?

An Offering Memorandum (OM) is a document that provides basic information about an entity and the securities offered under the OM exemption in New Brunswick securities law.

The document contains disclosure about:

- the company or the entity that is raising money
- the directors, management and promoters
- the securities offered
- the risks of the investment
- how the money will be used

The OM exemption can be used to:

- raise money for a community venture
- raise money to finance the development of an existing business
- raise money for operations
- finance a new project
- other initiatives

An OM is a complex legal document that gives rise to significant legal obligations on the part of the issuer as well as any

The OM and supporting financial statements must be given to each potential investor. Because the securities are being distributed under an exemption, the level of disclosure required in an OM is significantly less than in a prospectus.

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 issuer's business.

Securities Law

A common misconception is that securities laws only apply to companies listed on a stock exchange. The truth is that securities laws apply to any issuer of securities, incorporated or unincorporated, existing businesses, community-based capital raising initiatives and start-up companies.

This material will provide a general understanding of securities laws related to raising capital using the OM exemption.

There are two basic requirements for trading and advising in securities: registration and a prospectus. Registration helps protect investors by setting standards and qualifications for those who act as an adviser or are in the business of trading in securities or derivatives. A prospectus helps protect investors by providing them with information to make an informed investment decision.

The Financial and Consumer Services Commission (FCNB) recognizes that the prospectus requirements are not always necessary. The OM exemption relieves issuers from the prospectus obligations in certain circumstances. For information on other exemptions, refer to the FCNB's publication: [Capital Raising Exemptions](#).

New Brunswick securities laws prohibit making misrepresentations of conducting unfair practices when trading in securities.

What you need to know about using an offering memorandum

To whom can I sell securities?

The OM exemption allows an issuer of securities to sell to any eligible resident of New Brunswick, so long as the issuer is registered in and complies with the local securities laws of that jurisdiction.

Every purchaser must sign a [Form 45-106F4: Risk Acknowledgement](#). The form is a one-page document that clearly outlines the risks associated with investing in securities when they are sold under an exemption. Along with this form, two schedules must be completed by each investor. The first schedule asks investors to confirm their status as an eligible investor, non-eligible investor, accredited investor or

an investor who would qualify to purchase securities under the “family, friends and business associates” exemption. The second schedule requires confirmation that the investor is within the investment limits, where applicable. Investors that are not individuals are not required to complete these two schedules.

The format and wording of the *Risk Acknowledgement Form* is prescribed by securities laws. Please refer to [Form 45-106F4](#) for additional information.

Are there investment limits?

New Brunswick and a number of other provinces have adopted limits for both eligible and non-eligible investors who are individuals (other than those who qualify under either the “accredited investor” or under the “family, friends and business associates” exemptions).

The investment limits will apply to all securities acquired under the OM exemption as follows:

- Non-eligible investors can acquire securities within a 12-month period up to \$10,000.
- Eligible investors can acquire securities within a 12-month period up to \$30,000.
- In the case of an eligible investor who receives advice from a portfolio manager, investment dealer or exempt market dealer confirming the offering is appropriate for their circumstances, they can acquire securities within a 12-month period up to \$100,000.

Who can sell my securities?

An officer, director or employee of the business or initiative can sell the securities, as well as a registered individual who is sponsored by an investment dealer or an exempt market dealer. Individuals registered

solely under the mutual fund dealing representative category cannot sell these securities.

An individual who is not registered under the *Securities Act* may sell these securities on your behalf. However, if they are in the business of trading or advising in securities, they are required to be registered with FCNB.

Any compensation arrangements for those selling the security must be disclosed in the OM.

Will I need to have audited financial statements?

The use of the OM exemption allows an issuer to sell securities to the general public. As such, audited financial statements are required in most circumstances. Audited financial statements are not required if the amount raised by an issuer does not exceed \$500,000, and if individual investors relying on this exemption do not invest more than \$2,000. The instructions to [Form 45-106F2: Offering Memorandum for Non-Qualifying Issuers](#) along with the information contained in [Blanket Order 45-507 In the Matter of Exemptions from Certain Financial Statement Requirements of Form 45-106F2](#) provide more detail about the type of financial statements required to accompany an OM.

Do I need to be registered?

If you are not acting as an adviser or in the business of trading in securities or derivatives, you do not need to be registered with FCNB.

Individuals and/or firms must register if they are:

- in the business of trading or advising in securities or derivatives

- holding themselves out as being in the business of trading or advising in securities or derivatives
- acting as an underwriter or as an investment fund manager

If raising capital to finance your business is not your primary activity, you may not be required to register. Please refer to section 1.3 of the Companion Policy to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*.

How many shareholders can I have?

The OM exemption permits as many shareholders as required to raise sufficient capital for the initiative.

Do I need a lawyer to help me prepare an OM?

Issuers are not required to use a lawyer, but it is highly recommended.

Do the financial statements need to be prepared according to Canadian GAAP for Publicly Accountable Enterprises (IFRS)?

Notwithstanding the instructions in the Form, certain New Brunswick-based issuers selling securities exclusively to New Brunswick residents may be allowed to include financial statements prepared using the Accounting Standards for Private Enterprises of the Canadian Generally Acceptable Account Principles (GAAP). Please review the [Blanket Order 52-502 An Exemption from the Requirement to Include Financial Statements Prepared in Accordance with Canadian GAAP Applicable to Publicly Accountable Enterprises in Form 45-106F2 Offering Memorandum for Non-Qualifying Issuers](#).

Blanket Order 52-502 only applies to investors located in New Brunswick.

If you are using the OM exemption for investors outside of New Brunswick, the financial statements must be completed according to IFRS.

For many start-up businesses with a basic business structure, having your financial statements audited is usually a straight-forward process.

For more complex business structures, pre-planning may be required. Talk to an accountant to determine the best solution for your situation.

Will the OM work with the New Brunswick Small Business Investor Tax Credit?

The Small Business Investor Tax Credit (SBITC) is a program that provides an income tax credit to purchasers of shares issued by qualified New Brunswick-based issuers. The SBITC program can work in conjunction with the OM exemption as well as other exemptions from the prospectus and registration requirements under securities laws. For more information about the SBITC, refer to the Government of New Brunswick's website: gnb.ca.

Purchaser's Rights

A purchaser can cancel the agreement to purchase a security offered under an OM within two business days of signing the agreement to purchase. The purchaser also has a right of action under the *Securities Act* to sue for rescission or damages against the issuer if the OM contains a misrepresentation.

Advertising to find investors

An issuer that is using the OM exemption to raise capital may advertise for potential investors. Any advertising must comply

with requirements under securities laws and must not contain any misrepresentation. When advertising for potential investors, issuers can use various means including the Internet, email, direct mail, radio or newspapers.

The ability to advertise for potential investors is a key benefit to an issuer using the OM exemption. [National Instrument 45-106 Prospectus Exemptions](#) provides several other exemptions that an issuer may use to raise capital. When an issuer relies on these other exemptions, advertising may not be appropriate.

Refer to [Part 3 of the Companion Policy to NI 45-106](#) for additional information before initiating any advertising.

Filing with FCNB

Each time an issuer makes a distribution under the OM exemption, the issuer must file a [Form 45-106F1 Report of Exempt Distribution](#) report with FCNB within 10 days. All Form 45-106F1 filings must now be made through [SEDAR](#). More than one purchaser can be reported on the same form.

In addition, a copy of the OM in the specified format must be filed with FCNB within 10 days of the distribution. There is a \$350 filing fee. If the issuer is conducting multiple distributions, the OM must be filed after the first distribution. However, there is no need to file it again unless it has been changed or amended.

NOTE: While FCNB staff cannot provide legal advice in preparing an OM, a New Brunswick-based issuer may pre-file a draft OM with FCNB on a voluntary basis to seek staff comments before a final version is filed. For additional information, please refer to

[Local Staff Notice 45-701 Voluntary Pre-Filing of Draft Offering Memoranda](#). There is a one-time filing fee of \$350 when filing a draft OM. There are no subsequent filing fees when the finalized version of the OM is filed. Please refer to Local Rule 11-501 Fees for additional information. Please contact us well in advance of the intended distribution date.

Prior to filing an OM with FCNB, issuers should review **[Multilateral CSA Staff Notice 45-309 Guidance for Preparing and Filing an Offering Memorandum](#)**. The staff notice provides guidance to issuers that intend to rely on the OM exemption and also summarizes the common deficiencies.

Resale restrictions

If you issue or sell securities using the OM exemption, the securities may be subject to resale restrictions. This means the securities cannot be resold by the purchaser unless certain requirements are met. This includes keeping the securities for a specific period of time, often referred to as a seasoning or restricted period. The rules and additional guidance on resale restrictions can be found in National Instrument **[45-102 Resale of Securities](#)**.

If you are a private issuer, the securities you issue or sell are also subject to restrictions on transfer as outlined in the private issuer's articles, memorandum, bylaws or a shareholders' agreement. Generally, this means the purchasers must obtain approval from the private issuer's board of directors before selling the securities.

If the purchaser has claimed the Small Business Investment Tax Credit, they are also subject to holding requirements that are distinct and separate from those listed above.

You will find the National Instruments (NI) along with the plain language Companion Policies and Blanket Orders referenced in this material on the FCNB website (**[fcnb.ca](#)**) in the **[Securities section](#)**.

LR 11-501
Fees

NI 31-103
Registration Requirements, Exemptions and Ongoing Registrant Obligations

NI 45-102
Resale of Securities

NI 45-106
Prospectus Exemptions and its Forms

Blanket Order 45-507
In the Matter of Exemptions from Certain Financial Statements Requirements of Form 45-106F2

FCNB Staff Notice 45-701
Voluntary Pre-Filing of Draft Offering Memoranda under National Instrument 45-106 Prospectus and Registration Exemptions

Blanket Order 52-502
An Exemption from the Requirement to Include Financial Statements Prepared in Accordance with Canadian GAAP Applicable to Publicly Accountable Enterprises in Form 45-106F2 Offering Memorandum for Non-Qualifying Issuers

Misrepresentation

Your OM must contain the statement:

“This Offering Memorandum does not contain a misrepresentation.”

A misrepresentation is an untrue statement of material fact or an omission to state a material fact. This statement must be true when the OM is given to the purchaser and when the purchaser signs the purchase agreement.

For example, if you give the OM to a potential purchaser and they do not immediately decide to purchase, but comes back three months later to purchase, the OM must still be accurate. If a material change affected your business (including new financial statements), then you must give the purchaser an updated OM before they acquire the securities. The updated OM must be filed with FCNB.

TIP: There may be a significant impact on a business that is changing its structure from a closely held ownership with one or two shareholders to a structure with many shareholders. Issuers should consider how they will keep shareholders informed on a regular basis.

Contact us

You can find more information about any of the exemptions and forms in the [Accessing Capital](#) section of our website or contact us.

Financial and Consumer Services Commission

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Industry terms

Distribution

A trade in securities by, or on behalf of, an issuer.

Issuer

A company or entity that has issued or proposes to issue a security.

Prospectus

A comprehensive document that discloses material information about the issuer and the securities being sold.

Security

Includes common and preferred shares, options, warrants and other convertible instruments, debentures, notes and other instruments of indebtedness, limited partnership units, certificates of shares or interest in a trust, estate or association and investment contracts.

Trade

Includes a sale of securities as well as acts, advertisements and other conduct in furtherance of a trade.

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