WeirFoulds LLP

SECURITIES LAW QUARTERLY

Q4 2012

A Newsletter Providing Concise Updates on Securities Law Developments

Our coverage is succinct and targeted to serve the needs of issuers and their advisors. For more detailed analysis, please visit us online at www.WeirFoulds.com. Click here for the previous issue of this newsletter.

In the fourth quarter of 2012, market participants and regulators focused on new measures to support positive economic activity while enhancing investor protection. To improve market efficiency, notice-and-access measures are now available for the 2013 proxy season, the Ontario Securities Commission ("**OSC**") continues to examine opportunities to improve financing via the exempt market - even looking into crowdfunding, the TSX Venture Exchange ("**TSXV**") has also extended some temporary relief measures it put in place in August 2012. On the investor protection side, the Canadian Securities Administrators ("**CSA**") released a consultation paper exploring whether to impose a fiduciary duty on dealers and advisors and the Toronto Stock Exchange ("**TSX**") has tightened its rules for director elections. Alongside these regulatory developments, there has also been a policy focus on emerging market issuers. The OSC has released a paper containing helpful guidance for issuers and the TSX and TSXV are evaluating changes to their rules for emerging market issuers.

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Distributions & Trading

TSXV Extends Temporary Relief from Certain Private Placement Requirements

The TSXV is extending the relief measures it put in place on August 17, 2012 to April 30, 2013 (the "**Relief Period**"). The relief measures are with regard to certain existing pricing requirements related to private placement financings. The three temporary measures allow: (1) a share/unit offering with an offering price below $0.05; (2) a debenture offering with a debenture conversion price below $0.10; and (3) an offering involving a warrant with an exercise price below $0.10. There are specific conditions associated with the use of all relief measures including compliance with existing policy obligations; timing requirements (i.e. the private placement must be completed during the Relief Period); price protection is available by news release only; issuers are not entitled to expedited filings; and NEX listed issuers may avail themselves of the relief measures only if they comply with certain additional measures.

Continuouse Disclosure

Notice-and-Access Measures Available for 2013 Proxy Season

On November 29, 2012, the CSA announced the adoption of amendments to National Instrument 54-101 Communication with Beneficial Owners of Securities of a Reporting Issuer and National Instrument 51-102 Continuous Disclosure Obligations (along with related forms and companion policies). The amendments are intended to improve the shareholder communication process by allowing greater use of the internet to send proxy-related materials to securityholders.

The biggest change is the availability of a "notice-and-access" mechanism whereby issuers are permitted to deliver proxy materials by (i) posting them on a website other than SEDAR (the issuer's website or a service provider website, for example) and (ii) sending of a notice package to beneficial owners to inform them how to access the materials online. There is a potentially significant cost savings to issuers who will no longer have to print and mail documents such as financial statements, MD&As, and information circulars.

Four important items to note if an issuer chooses to use the "notice-and-access" mechanism: (i) the record date for meetings where notice-and-access will be used must be at least 40 days prior to the meeting (regular meetings are only 30 days); (ii) the materials must be posted and the notice package must be sent at least 30 days before the meeting; (iii) reporting issuers must provide advance notice of their intention to use notice-and-access for the first time (at least 25 days, so 65 days in total before the meeting date) – this notice can be filed on SEDAR; and (iv) this mechanism is only available to an issuer if it is permissible under the issuer's constating corporate documents.

The amendments will come into force on February 11, 2013 but issuers will only be able to take advantage of the amendments for securityholder meetings taking place on or after March 1, 2013. The amendments also simplify the process by which beneficial owners are appointed as proxy holders in order to attend and vote at shareholder meetings and require reporting issuers to provide enhanced disclosure regarding the beneficial owner voting process.

Registrants

CSA Explore Fiduciary Duty for Dealers and Advisors

On October 25, 2012, the CSA published a consultation paper exploring the desirability and feasibility of introducing a statutory "best interest" duty to address potential investor protection concerns regarding the current standard of conduct that advisers and dealers in Canada owe to their clients. Since the global financial crisis began, there has been significant debate on the standard of conduct that advisers and dealers owe to their clients when they provide advice on investing in financial products.

The paper is intended to facilitate public consultation and discussion and no decision has been made as to whether a statutory best interest standard should be adopted. Nonetheless, it is worth noting that several international securities regulators are also reconsidering the relationship between clients and their securities advisors. The U.K. and E.U. already impose a qualified best interest standard on their advisors, Australia has passed legislation making such a standard mandatory by July 1, 2013, and in the U.S., staff of the U.S. Securities and Exchange Commission have recommended such a uniform standard be introduced for broker-dealers and investment advisers.

OSC Releases Annual Report for Dealers, Advisers, and Investment Fund Managers

On November 22, 2012, the OSC released OSC Staff Notice 33-738 - OSC Annual Summary Report for Dealers, Advisers, and Investment Fund Managers which was prepared by their Compliance and Registrant Regulation branch and provides important information to assist registrants. The report summarizes five key areas: (i) new and proposed rules and initiatives affecting registrants; (ii) know-your-client requirements, know-your-product and suitability assessments by registrants; (iii) notable registrant misconduct cases from the past year; (iv) registration of firms and individuals; and (v) key findings and outcomes from the OSC's ongoing compliance reviews of registrants.

The report is essential reading for registrants in the province, particularly as a self-assessment tool. Compliance has been a key focus of the OSC in recent years and the regulator has intensified its efforts through a greater volume of reviews. A dedicated "Registrant Conduct and Risk Analysis Team" was created to focus on registrant delinquency during the reorganization of the Compliance and Registrant Regulation Branch of the OSC in March 2010.

Exempt Market

OSC Considers "Crowdfunding" and Other New Exemptions

On December 14, 2012 the OSC published Consultation Paper 45-710 – Considerations For New Capital Raising Prospectus Exemptions, which discusses concepts for new prospectus exemptions in Ontario. The Consultation Paper describes and explores four concept ideas

on which the OSC is seeking feedback: (i) an exemption to allow crowdfunding subject to limits for issuers and retail investors; (ii) an offering memorandum exemption; (iii) an exemption based on an investor's investment knowledge; and (iv) an exemption based on an investor receiving advice from a registrant.

The OSC is considering some new prospectus exemptions including one allowing crowdfunding, which it defines as "a method of funding a project or venture through small amounts of money raised from a large number of people over the internet via an internet portal intermediary." The crowdfunding discussed in the paper involves the distribution of a security although there are at least five different models of crowdfunding discussed: donation model, reward model, pre-purchase model, peer-to-peer lending model, and equity securities model.

Interestingly, the paper also discusses a potential model for an offering memorandum exemption for Ontario (this exemption is already available in other Canadian jurisdictions). The release of the consultation paper is in line with several other moves by Canadian regulators to examine the available exemptions. These include the CSA review of the accredited investor and minimum amount exemptions which began in November 2011 and also the June 2012 OSC expansion of the CSA review, which broadens the scope to consider whether new prospectus exemptions should be introduced.

During the comment period, the OSC plans to hold public consultation sessions, conduct investor research and solicit feedback from interested stakeholders. The comment period for this Consultation Paper closes February 12, 2013.

Corporate Governance

TSX Changes to Director Election Process

For companies listed on the TSX, the New Year will bring new rules for director elections. The TSX will be strengthening corporate governance standards by incorporating changes to the TSX Company Manual. Effective December 31, 2012, these amendments to the Manual will require Issuers listed on the TSX to: (1) elect directors individually; (2) hold annual elections for all directors; (3) disclose annually in their Management Information Circular: (a) whether they have adopted a majority voting policy for directors for uncontested meetings; and (b) if not, to explain: (i) their practices for electing directors; and (ii) why they have not adopted a majority voting policy; (4) advise the TSX if a director receives a majority of "withhold" votes (if a majority voting policy has not been adopted); and (5) promptly issue a news release providing detailed disclosure of the voting results for the election of directors.

Securityholder meetings which have already been set and for which proxy materials have already been approved by the TSX, will be unaffected by the amendments until their next meeting at which directors are to be elected. As a result, Issuers with meetings scheduled for early 2013 will likely be unaffected by the amendments. For a more detailed analysis of these changes, please click here.

Update on Empty Voting

Last quarter, we discussed a case out of the British Columbia Supreme Court (Telus Corporation v CDS Clearing & Depository Services Inc.) that negatively commented on a hedge fund's practice of empty voting and suggested that a dissident's right to requisition a shareholder meeting might be impaired by its economic motives. The case has since been overturned. While the Court of Appeal found empty voting to be a "cause for concern", it also found no basis for the court to intervene in these circumstances. Further, the Court of Appeal stated "to the extent that cases of 'empty voting' are subverting the goals of shareholder democracy, the remedy must lie in legislative and regulatory change."

Emerging Markets

OSC Provides Guidance to Emerging Market Issuers

On November 9, 2012, the OSC released OSC Staff Notice 51-720 Issuer Guide for Companies Operating in Emerging Markets (the "**Guide**") in response to recent concerns involving Canadian public companies with significant business operations in emerging markets ("**Emerging Market Issuers**" or "**EMIs**"). The purpose of the Guide is to: (i) highlight to Emerging Market Issuers and their directors and management potential areas of risk or red flags that may warrant further scrutiny; (ii) set out questions that directors and management of Emerging Market Issuers should consider when deciding how to address risks of doing business in emerging markets; and (iii) outline OSC expectations regarding compliance with existing disclosure requirements.

The OSC will be looking to boards to ask relevant questions of management and to ensure that proper policies, procedures and reporting requirements are in place to meet the issuer's obligations. These areas will not only be reviewed by the OSC (for example in connection with a prospects offering) but also by the TSX/TSXV in connection with a listing or change of business and by brokers in connection with, among other things, financing diligence.

TSX and TSXV Issue Emerging Market Consultation Paper

The TSX and TSXV have also turned their attention to EMIs. On December 17, 2012 the TSX and TSXV issued a joint consultation paper on emerging market issuers. The exchanges are in the process of reviewing the listing requirements applicable to issuers with a significant connection to an emerging market jurisdiction (defined by the exchanges as any jurisdiction outside of Canada, the United States, Western Europe, Australia and New Zealand). There are three principal purposes of this consultation paper - present risks, provide guidance, and solicit feedback. The exchanges have asked for comments from market participants on matters related to listing EMIs, including possible new guidance or requirements that TSX or TSXV may implement.

In the paper, the exchanges have identified and presented the principal risks associated with listing EMIs. They note that they are particularly concerned with the following potential risks associated with EMIs: (i) management and corporate governance; (ii) financial reporting; (iii) non-traditional corporate/capital structures; and (iv)

legal matters relating to title and ability to conduct operations.

The paper also provides some preliminary guidance to issuers and their advisors with respect to listing considerations applicable to EMIs. Of note, the exchanges recommend that issuers with significant connections to an emerging market should arrange a "pre-filing conference" with the applicable exchange. The exchanges also state that they are unlikely to waive the sponsorship requirement in assessing EMIs. Further, in connection with an original listing, the exchanges may call for ongoing requirements from issuers to mitigate particular risks. These may include pre-clearance of a change of auditors and pre-clearance of new board members or new senior management.

These changes, along with those from the OSC (mentioned above), have created a regulatory environment which is very cautious in dealing with EMIs. As a result, EMIs can expect to see increases in the time frames associated with regulatory approvals and a rise in related costs. This state of affairs will be the "new normal" for EMIs for the foreseeable future and business plans and business expectations will need to adjust accordingly.

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Securities Practice

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If you would like more information, please contact Michael Dolphin, Kim Lawton or another member of the securities group.

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