WeirFoulds LLP

SECURITIES LAW QUARTERLY

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A newsletter providing concise updates on securities law developments.

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In the first quarter of 2013, regulators proposed new measures to increase board flexibility in the face of unsolicited or hostile take-over bids, while also proposing changes to enhance the transparency of investor interests in public companies which would result in increased shareholder reporting obligations. Regulators also announced the adoption of new and increased client disclosure requirements applying to all dealers and portfolio managers, the Canadian securities regulators confirmed their intention to prohibit Exempt Market Dealers from conducting brokerage activities and the Investment Industry Organization of Canada announced that it will not proceed with the new member class of "Restricted Dealer Member". The Federal Government released its Budget 2013 containing several proposals relevant to the mining sector, including the extension of the mineral tax credit, but also including the phase-out of certain mine development expenses as "Canadian Exploration Expenses", as well as the phase-out of the mining-specific accelerated capital cost allowance. The British Columbia Securities Commission released a report outlining the results of its review of mining industry technical disclosure which found systemic deficiencies in technical reporting disclosure, while the Ontario Securities Commission released its statement of priorities for 2013 and 2014.

Contents

Distributions & Trading
- CSA Proposes New Rule to Govern Shareholder Rights Plans 1
- Quebec Publishes Consultation Paper Regarding Take-over bid Defensive Tactics 1
- CSA Proposes Changes to Early Warning Reporting Regime 1
- CSA Releases Amendments to Prospectus Rules 2

Budget 2013
- Federal Government Announces Plan for National Securities Regulator 2
- Budget Measures Affecting the Mining Sector 2

Continuous Disclosure
- BCSC – 2012 Mining Report 3
- Timely SEDAR Document Accessibility 3

Exempt Market
- CSA's New Client Disclosure Requirements 3
- IIROC will Not Proceed with "Restricted Dealer Member Class" and CSA to Prohibit EMDs from Conducting Brokerage Activities 3

Regulatory Outlook
- OSC Releases Proposed Statement of Priorities for 2013 and 2014 4

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Distributions & Trading

CSA Proposes New Rule to Govern Shareholder Rights Plans

On March 14, 2013, the Canadian Securities Administrators (the "**CSA**") published for comment **Proposed National Instrument 62-105 *Security Holder Rights Plans*** and **Proposed Companion Policy 62-105CP *Security Holder Rights Plans***, (the "**Proposed Rule**") which together would establish a comprehensive regulatory framework in respect of shareholder rights plans (poison pills) in Canada.

The Proposed Rule is designed to address concerns raised by stakeholders with respect to the current regulatory framework which include the limited ability of target companies to respond to an unsolicited or hostile take-over bid by implementing a rights plan. The proposed rule would provide a target company's board and shareholders with more discretion in the use of rights plans. Specifically, a rights plan would be effective immediately once adopted by a board of directors and shareholder approval would be required within 90 days from the date of adoption (or within 90 days from the commencement of a take-over bid if the rights plan is adopted after a take-over bid has been made), however a rights plan could not be implemented within 12 months of non-approval or termination by shareholders (except when adopted in response to a subsequent hostile bid). A rights plan could continue to remain in place indefinitely, subject to shareholder approval on an annual basis. Shareholders would be able to terminate a rights plan at any time by majority vote.

Under the current system, a rights plan is generally only used in order to facilitate the efforts of a target company board to achieve a superior-value transaction. Securities regulators will generally cease trade a rights plan after a limited period of time, once the board has had sufficient time to respond to a take-over bid. The Proposed Rule is designed to provide increased flexibility and, with shareholder approval, would allow the board of a target company to "just say no" to a hostile take-over bid. Again, the CSA's Proposed Rule would allow a rights plan to survive, provided it receives shareholder approval within the specified time frames.

Under the Proposed Rule, Canadian securities regulators will no longer be asked to consider rights plans on a case-by-case basis. Instead, shareholders can remove a rights plan if they wish to accept a take-over bid and a bidder can challenge a rights plan by requisitioning a meeting of the shareholders to approve the termination of the rights plan.

The comment period for the Proposed Rule is open until June 12, 2013.

Quebec Publishes Consultation Paper Regarding Take-over bid Defensive Tactics

Concurrently with the CSA's release of the Proposed Rule, Quebec's Autorité des marché financiers ("**AMF**"), a member of the CSA, published a consultation paper entitled ***An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics*** (the "**AMF Proposal**") laying out an alternative to the CSA's Proposed Rule.

The stated primary objective of the AMF Proposal is to restore the regulatory balance between bidders and target boards and to update the policy framework of the current take-over bid regime to reflect the current legal and economic environment and market practices respecting unsolicited take-over bids. To that end, the AMF Proposal goes further than the CSA's Proposed Rule and addresses not only shareholder rights plans but also the use of defensive tactics, generally.

The AMF Proposal would see the replacement of **National Policy 62-202 *Take-Over Bids – Defensive Tactics*** with a new policy on defensive tactics that would recognize the fiduciary duty of a board in responding to an unsolicited take-over bid and would only allow regulators to intervene on the grounds of public interest. Under the AMF Proposal, securities regulators will view defensive tactics as not being prejudicial and, accordingly, will limit their intervention. Provided conflicts of interest are adequately managed (and the AMF Proposal identifies a number of factors which can be considered in assessing the reasonableness of a target board's actions), deference will be given to the decisions and actions of a target company's board.

The AMF Proposal would also change the take-over bid rules to require that any bid (and not just those subject to a rights plan) contain an irrevocable minimum tender condition of more than 50% of the outstanding securities not owned by the bidder, and that any bid be automatically extended for 10 days in the event such a condition is met. The AMF Proposal would implement this "voting mechanism" in order to reduce what the AMF views as the "structural coercion" of the current take-over bid system, by reducing the pressure on minority shareholders to tender to a bid for fear of being left as part of a minority.

As with the CSA's Proposed Rule, the comment period with respect to the AMF Proposal is open until June 12, 2013.

CSA Proposes Changes to Early Warning Reporting Regime

On March 13, 2013 the CSA **proposed** significant changes to Canada's existing "early-warning" reporting regime with a view towards improving the transparency of investor interests in securities of reporting issuers in light of growing shareholder activism and recent concerns regarding "empty voting" and "hidden ownership" of securities.

The proposed amendments include the lowering of the early warning reporting threshold from 10% to 5%, which would bring the Canadian early warning reporting regime in line with the United States, the United Kingdom and other major foreign jurisdictions. Currently, an investor that acquires beneficial ownership of, or control or direction over, 10% of a class of a reporting issuer's securities is subject to the early warning reporting disclosure rules. Additional disclosure is then required with each incremental acquisition of 2% of such class of securities. The proposed amendments reduce the initial early warning reporting threshold to 5%, which is also the percentage shareholders of Canadian companies are generally required to hold in order to requisition a shareholder meeting. This reduction would apply to both regular early warning requirements as well as the alternative monthly reporting regime which exists for eligible institutional investors. In addition, the proposed amendments clarify that the subsequent reporting trigger applies to any 2% *decrease* in ownership, as well as a decrease below the new 5% threshold.

Additionally, the proposed amendments would narrow the scope of eligible institutional investors who can avail themselves of the relaxed reporting requirements of the alternative monthly reporting regime. The

CSA is concerned that the use of this system by eligible institutional investors who intend to actively engage shareholders and solicit proxies is not consistent with the policy rationale underlying this regime.

The proposed amendments also include measures meant to address concerns of "hidden ownership" and "empty voting", which we discussed in both our **Q3, 2012** and **Q4, 2012** Newsletters. "Hidden ownership" refers to the use of derivatives to accumulate a substantial economic interest in a company without triggering disclosure obligations, where this interest can potentially be converted into voting securities in order to exert influence over the company. Conversely, "empty voting" refers to the practice of using derivatives or securities lending arrangements to acquire voting interests in a company without holding an equivalent economic stake in the company. The CSA is concerned that these types of interests do not trigger disclosure requirements under the current early warning reporting regime, which is based on the concepts of beneficial ownership, control or direction. Accordingly, the proposed amendments would: (i) require investors calculate their ownership levels by including any equity derivative positions which are substantially equivalent in economic terms to conventional equity holdings; (ii) cause securities transferred under certain securities lending arrangements to trigger early warning reporting requirements; and (iii) require that early warning report disclosure include the "deemed" control of a company's securities by an investor, as well as the material terms of any existing "related financial instrument" or existing securities lending arrangement.

Finally, the proposed amendments would enhance the contents of the disclosure required under the early warning reporting regime, which the CSA currently views as often-times generic and of little value to the market. Under the new regime, investors would be required to provide more detailed and customized disclosure with respect to their intentions in acquiring securities, and the purpose of any such acquisition.

The CSA has requested comments on the proposed amendments, and the comment period is open until June 12, 2013.

CSA Releases Amendments to Prospectus Rules

On February 28, 2013, the CSA released the **final version of amendments to the prospectus rules** (the "**Prospectus Rules**") set out in NI 44-101 *General Prospectus Requirements*, National Instrument 44-101 *Short Form Prospectus Distributions*, National Instrument 44-102 *Shelf Distributions* and National Instrument 81-101 *Mutual Fund Prospectus Disclosure*, and their respective Companion Policies. The amendments are a product of the CSA's ongoing review of issues which have arisen in connection with the Prospectus Rules since the implementation of NI 44-101 in March, 2008. The amendments were originally published for comment on July 15, 2011.

These final amendments are intended to clarify certain provisions of the Prospectus Rules, address gaps in the Prospectus Rules and modify the rules to enhance their effectiveness, to remove and streamline certain requirements deemed overly burdensome for issuers and of limited value to security holders and to codify certain prospectus relief which has been granted in the past.

Specifically, the amendments: (i) include clarification with respect to the contractual rights of rescission to be provided to purchasers of convertible securities under a prospectus; (ii) add further disclosure requirements with respect to the use of proceeds in a best-efforts offering where there is no minimum offering amount; (iii) add the requirement that all non-Canadian directors attorn to a Canadian jurisdiction and appoint an agent for service in Canada upon filing of a final prospectus; and (iv) include changes to the personal information form ("**PIF**") filing requirement, including changes to the form of PIF itself.

Subject to ministerial approval, the amendments to the Prospectus Rules will take effect on May 14, 2013.

Budget 2013

Federal Government Announces Plan for National Securities Regulator

In the **federal budget ("Budget 2013")** released on March 21, 2013, the federal government announced its intention to proceed with the creation of a national securities regulator. Budget 2013 states that the federal government's preferred approach is to establish a national securities regulator co-operatively with the provinces and territories, however, if a negotiated agreement is not reached in a timely manner, the government will propose legislation to carry out its regulatory responsibilities consistently with the Supreme Court of Canada's 2011 decision on the subject.

Budget Measures Affecting the Mining Sector

Budget 2013 contains several proposals relevant to the mining sector. In brief, the relevant proposals include:

Extension of Mineral Tax Credit
Budget 2013 proposes to once again extend the Mineral Exploration Tax Credit for an additional year. The Mineral Exploration Tax Credit is an additional investment tax credit for investors in "flow-through shares" and equals 15% of certain mineral exploration expenses incurred in Canada and renounced to investors. Consistent with the past several federal budgets, the expiry of the Mineral Exploration Tax Credit has been extended for one year, this time from March 31, 2013 to March 31, 2014.

Phase-out of Pre-Production Mine Development Expenses as Canadian Exploration Expenses
In an effort to align the treatment of intangible pre-production and post-production development expenses between the mineral and oil and gas sectors, Budget 2013 proposes to phase-out the treatment of pre-production mine development expenses as "Canadian exploration expenses" ("**CEE**"). Currently, such expenses are treated as CEE and may be deducted in full in the year incurred. Budget 2013 proposes that, from 2015 to 2017, these expenses shall be transitioned to "Canadian development expenses", and as a result shall only be deductible at a rate of 30% per year on a declining-balance basis.

Phase-out of Accelerated Capital Cost Allowance for Certain Mining Assets
Budget 2013 also proposes to phase-out the additional 100%

capital cost allowance ("**CCA**") that applies to the remaining cost of eligible assets acquired for use in a new mine or an eligible mine expansion. The additional allowance, which is currently in addition to the base 25% CCA for machinery, equipment and structures used in a mine or oil and gas project, will be phased-out from 2017 to 2020. The accelerated CCA will remain available for assets acquired before 2018 pursuant to an existing written agreement (as of budget day) or for projects under construction or for which engineering and design work had commenced as of budget day. Again, this proposal appears to serve to align the deductions available between the mineral and oil and gas sectors.

Continuous Disclosure

BCSC – 2012 Mining Report

On January 24, 2013, the British Columbia Securities Commission (the "**BCSC**") released a **report** outlining the disclosure and interpretive issues under National Instrument 43-101 *Standards of Disclosure for Mineral Projects* ("**NI 43-101**") identified by the BCSC during its review of mining technical disclosure.

According to the Report, some of the most common deficiencies identified by the BCSC in mining technical disclosure during its continuous disclosure reviews include: (i) failure to file current or fully compliant technical reports; (ii) failure to include the required cautionary statements for preliminary economic assessments, historical estimates, and exploration targets; (iii) non-compliant disclosure of mineral resources and mineral reserves; (iv) restricted or misleading references to mining studies; and (v) failure to name the qualified person ("**QP**").

The Report outlined the BCSC's review of issuers' "voluntary disclosure", including website disclosure, investor relations materials, corporate presentations, emails and social media presentations and promotions, and found that compliance is less likely in these instances (50% compliant) than when compared with "required filings" (65% compliant), such as news releases, technical reports and management discussions and analysis.

With respect to technical report disclosure, the Report identified some common issues, including: (i) missing or altered statements in certificate and consents of the QP; (ii) prohibited disclaimers or statements of reliance on other experts; and (iii) non-compliant disclosure of mineral resources and mineral reserves, historical estimates, and exploration targets. The Report recommends that companies review and comply with best practice guidelines adopted by the Canadian Institute of Mining, Metallurgy and Petroleum (and similar organizations in other jurisdictions) and sets out additional recommendations based on the BCSC's review of technical disclosure.

Issuers are recommended to review the Report and to be mindful of compliance with technical disclosure standards and industry best practices whenever publishing or disseminating technical information in any form.

Timely SEDAR Document Accessibility

Effective April 6, 2013, the CSA implemented certain enhancements to the System for Electronic Document Analysis and Retrieval ("**SEDAR**"). As a result, public filings and updates to reporting issuer profiles made on SEDAR will now be available on the SEDAR website within 15 minutes of the original submission (as opposed to the following day).

Exempt Market

CSA's New Client Disclosure Requirements

On March 28, 2013, the CSA announced that it has adopted amendments to **National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*** and its Companion Policy ("**NI 31-103**") which will apply to all firms registered to deal in securities or act as portfolio managers. The amendments will take effect on July 15, 2013, subject to ministerial approval.

The amendments to NI 31-103 will result in new requirements for cost disclosure by registrants to investors. Registrants will be required to provide additional information with respect to expected product and service costs, transaction costs and any deferred costs, and an annual summary of charges and other fees paid to the registered firm, such as trailing commissions and commissions on bond trades. In addition, the amendments require registered firms to provide investors with an annual investor performance report, and also prescribes a methodology for determining the market value of securities for the purpose of reporting to clients.

A sample report on charges and compensation and a sample investment performance report is included in the amended NI 31-103.

IIROC will Not Proceed with "Restricted Dealer Member Class" and CSA to Prohibit EMDs from Conducting Brokerage Activities

On February 7, 2013, the Investment Industry Organization of Canada ("**IIROC**") **announced** that it will not proceed with the proposed introduction of a new IIROC member class of "Restricted Dealer Member". This announcement follows IIROC's consideration of comments received with respect to the proposed new class of IIROC member, which IIROC first published for comments in June, 2012. The proposal, which was developed in response to policy concerns relating primarily to the practice of certain U.S. based (FINRA member) broker dealers who are also exempt market dealers ("**EMDs**") carrying out brokerage activity in Canada, received overwhelmingly negative comments from industry stakeholders. A summary of these comments is included in IIROC's announcement.

Concurrently with IIROC's announcement, the CSA released a **notice** confirming their intention to publish proposed amendments to NI 31-103 which would have the effect of prohibiting EMDs from conducting brokerage activities. Until such time as the amendments take effect, and the proposed amendments are not expected to be published until later in 2013, EMDs conducting brokerage activities and FINRA members granted restricted dealer registrations (and any related exemptive relief) that are conducting brokerage activities may continue to do so in accordance with the terms of their registrations. However, these firms will likely be subject to restrictions in the future.

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Regulatory Outlook

OSC Releases Proposed Statement of Priorities for 2013 and 2014

On April 4, 2013 the Ontario Securities Commission (the "**OSC**") released for comments its draft statement of priorities outlining the key priorities the commission intends to focus on during the current and upcoming fiscal years. These priorities include:

- Increasing investor protection by: (i) expanding the OSC's outreach to investors and community leaders to gather feedback to inform the development of effective regulatory policy; (ii) working with investors and self-regulatory organizations to understand the impact of imposing a "best interest" (as discussed in our Q4, 2012 Newsletter) on dealers and advisors; (iii) providing investors with more effective and meaningful disclosure (by, for example, implementing the new client reporting requirements discussed [above]); and (iv) advancing the discussion of mutual fund fees and fees for other investment products.

- Delivering responsive regulation by: (i) completing stakeholder consultations on exempt market consultation paper published in December, 2012 (and discussed in our Q4, 2012 Newsletter); (ii) examining issues surrounding the evolution of Canadian capital markets, including the impact of the order protection rule and electronic trading; and (iii) reviewing the OSC's regulation of the fixed income market.

- Delivering effective enforcement and compliance by: (i) reducing financial crime by identifying and taking appropriate action in serious cases which should be investigated as quasi-criminal or criminal offenses; and (ii) completing the OSC's focused compliance review on high-risk areas and registrants.

- Support and promote financial stability by: (i) developing rules for and working with the CSA to begin implementation of an OTC derivatives regulatory regime; and (ii) working with the CSA to begin implementation of same.

The comment period for the draft statement of priorities is open until June 3, 2013.

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