WeirFoulds LLP

SECURITIES LAW QUARTERLY

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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 a more detailed analysis, please visit us online at www.weirfoulds.com. Click here for the previous issue of this newsletter.

In the third quarter of 2013, the Ontario Securities Commission ("**OSC**") and the Canadian Securities Administrators ("**CSA**") both provided updates to the market – the OSC on possible new prospectus exemptions and the CSA on potential regulation of proxy advisory firms. Both proposals appear to be still gathering steam, unlike the proposal for a specialized regime for TSX Venture Exchange ("**TSX-V**") issuers, which the CSA announced it is abandoning. In addition, two relatively newer concerns were raised by regulators this quarter – the first with regard to the potential risks from cyber crime and the second pertaining to the lack of women on boards and in senior management of Toronto Stock Exchange ("**TSX**") issuers. Next, a relatively older concept, that of a supra-provincial securities regulator, was in the news again this quarter with an announcement from the Federal government, Ontario, and British Columbia that they have agreed to establish a cooperative capital markets regulatory system. Finally, issuers were given fresh continuous disclosure guidance from both the courts (with respect to determining material changes) and from the CSA in the form of the results from its continuous disclosure review program.

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GENERAL COMPLIANCE & LIABILITY

Cooperative Securities Regulator Proposed by Federal Government, Ontario, and BC

On September 19, 2013, the Ministers of Finance of British Columbia, Ontario and Canada announced that they have agreed to establish a cooperative capital markets regulatory system. The proposal invites all provinces and territories to participate in a new system which would include (inter alia) the following agreed elements - a uniform act adopted by each participating province or territory (covering all of the areas that the securities legislation of the provinces currently address) along with a complementary federal act (to regulate "criminal matters and matters relating to systemic risk in national capital markets and national data collection"). The proposed national regulator – which would be known as the capital markets regulator ("**CMR**") – would administer both of these acts under delegated authority from participating jurisdictions. An expert board of independent directors with broad capital markets experience would be tasked with directing the new regulator, while a Council of Ministers from the participating jurisdictions would oversee the system. The agreement in principle states that the purposes of the new system include fostering more efficient and globally competitive capital markets in Canada, providing increased protection for investors, strengthening Canada's capacity to identify and manage systemic risk on a national basis, and enabling Canada to play a more empowered and influential role on international capital market regulatory initiatives. Based on the implementation timelines, the parties expect the CMR to be operational by July 1, 2015.

CSA Warns Market Participants about Cyber Crime

The CSA issued CSA Staff Notice 11-326 - *Cyber Security* on September 26, 2013 recommending that issuers, registrants and regulated entities consider and take steps to address the risks of cyber crime, which a recent report from the International Organization of Securities Commissions defined as *"a harmful activity, executed by one group (including both grassroots groups or nationally coordinated groups) through computers, IT systems and/or the internet and targeting the computers, IT infrastructure and internet presence of another entity."* The report stated that two kinds of attacks in particular have increased in frequency and sophistication - Denial of Service attacks and Advanced Persistent Threats. The notice highlights that strong, appropriately tailored, and regularly reviewed cyber security measures are part of ensuring reliability of operations and the protection of confidential information. The notice provides some high level guidance on what steps might be taken and specifically highlights that these matters may need to be disclosed by issuers, managed in accordance with prudent business practices for registrants, and especially considered by regulated entities involved in key market infrastructure.

DISTRIBUTIONS & TRADING

OSC Publishes Progress Report on Potential New Prospectus Exemptions

In late August 2013, the OSC issued OSC Notice 45-712 – Progress Report on Review of Prospectus Exemptions to Facilitate Capital Raising. The notice provides an update on the review and discusses the Commission's next steps. In particular, the paper describes that OSC staff have been directed to "undertake further work" on certain capital raising prospectus exemptions including (i) a crowdfunding exemption; (ii) a family, friends and business associates exemption; (iii) an offering memorandum exemption; (iv) a streamlined rights offering exemption and a possible exemption for distributions to a reporting issuer's existing security holders based on the issuer's continuous disclosure; and (v) an amended accredited investor exemption to allow fully managed accounts to purchase investment fund securities. The Commission has stated that its objective in undertaking this work is "to address the capital raising needs of small and medium-sized enterprises at different stages in their growth and business cycle, while maintaining an appropriate level of investor protection."

TSX-V Liberalizes Certain Minimum Pricing Rules and Capital Structure Amendments

On August 14, 2013 the TSX-V formally implemented certain policy changes to promote and facilitate financing and listing transactions. The amendments have the following principal effects: (i) a reduction of the minimum acceptable exercise price for share purchase warrants and incentive stock options from $0.10 to $0.05 per share which will apply to the full term of the warrant or option; (ii) a reduction in the minimum acceptable conversion price for debentures from $0.10 to $0.05 per share for the first year of the term of the debenture; and (iii) a reduction in the minimum acceptable offering price for a non-Capital Pool Company initial public offering from $0.15 to $0.10 per security. The TSX-V is also allowing applications (until January 31, 2014) from issuers who wish to re-price their existing incentive stock options in accordance with the new lower thresholds. Applications will be considered for certain options granted from January 1, 2013 to August 14, 2013 (subject to certain conditions).

Further, the TSX-V has also modified its rules with respect to shareholder approval for share consolidations so that an issuer need only seek shareholder approval for a share consolidation if a consolidation (when combined with any other consolidation conducted by the Issuer within the previous 24 months that was not approved by the Issuer's shareholders) would result in a cumulative consolidation of greater than 10 to 1 over such 24 month period.

CONTINUOUS DISCLOSURE

CSA Scrap Proposal for New Venture Regime

On July 25, 2013, securities regulators released CSA Notice 51-340 - *Update on proposed National Instrument 51-103 Ongoing Governance and Disclosure Requirements for Venture Issuers* which announces that they will not be implementing a new and distinct disclosure regime for venture issuers (proposed NI 51-103). However, the CSA has also announced that they are still considering implementing some of the changes within proposed NI 51-103 as amendments within the existing regulatory regime for venture issuers. The CSA has stated that any proposed amendments "will be published for comment, as necessary" so it is unlikely that amendments will occur in the near-term. Back in May 2010, the CSA had initiated a project examining whether a tailored regime for the venture market would be beneficial for issuers and investors. The proposals would have resulted in wide-ranging changes to certain prospectus and private placement requirements, as well as continuous disclosure and corporate governance obligations. The CSA reported that commentators were concerned that the proposal would place an additional burden on venture issuers in the form of costs to transition to a new regime and also with respect to compliance with new disclosure obligations, especially the mandatory annual report.

BCSC Panel Finds 'Spectacular' Drill Results Not Necessarily a Material Change

On August 7, 2013, a BCSC panel unanimously dismissed allegations against Canaco Resources Inc. ("**Canaco**") and four of its directors that stemmed from its failure to immediately disclose certain drill results. The BCSC executive director argued that the lack of disclosure was a contravention of the requirement to promptly notify the market of a material change. In determining whether the drill results were material, the panel first considered the drill results' effect on the value of the mineral deposit. The panel noted that "it is common in the exploration of gold deposits… to encounter a number of high to very high gold values in drillholes." They added, however, because these deposits can be "somewhat erratically distributed, and contain 'spiky' high grades" individual or even a small group of strong drill results do not necessarily change the overall value of the mineral property. Accordingly, they found that the drill results were not a material change or a material fact relating to Canaco.

CSA Publish Results of Continuous Disclosure Review Program

On July 18, 2013, the CSA released a staff notice setting out the results of its continuous disclosure review program for fiscal 2013. The program was established to facilitate reliable and accurate continuous disclosure from reporting issuers through regular review by the CSA. The notice itself summarizes the results of the continuous disclosure review program for fiscal 2013 and discusses certain areas where common deficiencies were noted by the regulators. During fiscal 2013, the CSA conducted a total of 1,336 continuous disclosure reviews (368 full reviews and 968 issue-oriented reviews). This represented a 7% increase over the previous year. The CSA reported that, in fiscal 2013, 47% of their review outcomes required issuers to take action to improve disclosure, compared to 56% in fiscal 2012. To assist issuers, the CSA provided three appendices which provide detailed guidance and examples of common deficiencies, these are: (i) financial statements deficiencies: judgements, impairment of goodwill, and going concern; (ii) MD&A deficiencies: liquidity, discussion of operations, related party transactions; and (iii) other regulatory disclosure deficiencies: mineral projects, oil & gas activities, and disclosure of controls and procedures and internal control over financial reporting in venture issuer's MD&A, and executive compensation.

CORPORATE GOVERNANCE

OSC Publishes Paper on Lack of Women on Boards and in Senior Management

Following on Ontario government's commitments in the 2013 Ontario Budget and at the request of the Minister of Finance, Charles Sousa, and the then Minister Responsible for Women's Issues, Laurel Broten, the OSC published OSC Staff Consultation Paper 58-401 – *Disclosure Requirements Regarding Women on Boards*

and in Senior Management in an effort to advance the representation of women on boards and in senior management. The paper includes: (i) a discussion about the current status of women on boards and in senior management in Canada; (ii) a summary of the relevant current corporate governance framework in Ontario; (iii) a summary of approaches to gender diversity disclosure in certain other jurisdictions; (iv) a discussion of a potential model of disclosure requirements (for TSX issuers only and not including venture issuers and investment funds). Specifically, the OSC is exploring whether it is appropriate to implement a "comply or explain" disclosure regime with regard to board and senior management gender diversity policies and practices. The OSC is asking for feedback from investors, issuers, and other market participants and advisors on the proposal.

CSA Update on Potential Regulation of Proxy Advisory Firms

Subsequent to the consultation paper they published on June 21, 2012, the CSA has recently released CSA Notice 25-301 - *Update on CSA Consultation Paper 25-401 Potential Regulation of Proxy Advisory Firms* which provides an update to market participants on the status of the consultation process. The consultation paper identified certain concerns about the services provided by proxy advisory firms and the potential impact on Canadian capital markets. In particular, the paper highlighted: (i) potential conflicts of interest; (ii) perceived lack of transparency; (iii) potential inaccuracies and limited dialogue between proxy advisory firms and issuers; (iv) potential corporate governance implications; and (v) the extent of reliance by institutional investors on the recommendations provided by proxy advisory firms. The update reviews the comments they received on the consultation paper and announces their conclusion that a CSA response is warranted. The updates states that the CSA believes that an appropriate response under the circumstances is a "a policy-based approach" that provides direction on recommended practices and disclosure for proxy advisory firms. They are in the process of developing that proposed approach, which they intend to publish for comment in early 2014.

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