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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.

Recent developments include the implementation of amendments to the TSX Venture Exchange's (the "**TSX-V**" or the "**Exchange**") policies dealing with private placements, loan bonuses and finder's fees, and the Ontario Securities Commission's (the "**OSC**") adoption of new prospectus exemptions and changes to two specific prospectus exemptions. The OSC has also launched an online collection of compliance and regulation guidance. Women on boards continues to be a hot topic, with Canadian Securities Administrators (the "**CSA**") members adopting new disclosure requirements. New guidance is available from IIROC on underwriter due diligence, and finally, the Federal government has just announced two tax proposals that will benefit the Canadian resource sector.

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TSX-V Adopts Amendments to Private Placement, Loan Bonuses and Finder's Fees Policies

Effective January 26, 2015, the TSX-V adopted amendments to Policy 4.1 (Private Placements) and Policy 5.1 (Loans, Loan Bonuses, Finder's Fees and Commissions) of the TSX-V Corporate Finance Manual. While the amendments largely provide additional guidance on and clarification of the TSX-V's existing policies, substantive amendments to these policies include the discontinuance of the TSX-V's Expedited Filing System for private placements, the amendment of the "part and parcel" pricing exemption, and certain amendments to the limits on loan bonuses.

Private Placement Policies

Policy 4.1 has been revised to (a) provide more detailed guidance on each of the steps involved in the notice and acceptance process for a private placement; (b) amend the "part and parcel" pricing exemption to facilitate a better understanding of the existing pricing rules and to clarify the warrant exercise premium rules; (c) provide additional guidance related to the issuance of news releases relating to private placements; (d) provide additional guidance with respect to conditions to and timeframes for closing and final filing requirements, including a clarification to the effect that where a private placement will result in the creation of new insiders or control persons, the issuer cannot close on subscriptions from those persons until the TSX-V has provided its final acceptance; and (e) clarification with respect to the policies governing the issuance of convertible debentures, including the fact that any amendments to existing convertible debentures are subject to TSX-V acceptance and that interest on any convertible securities may only be converted into shares of an issuer at the then market rate.

Furthermore, the amendments to Policy 4.1 include guidance which clarifies that a private placement with a creditor where the cash received from the creditor will be used to repay the debt to the creditor, or where the creditor's subscription price is offset against the debt, will be subject to the TSX-V's policy regarding shares-for-debt transactions.

Electronic Filing

While the TSX-V has discontinued the Expedited Filing System for private placements, it has implemented a new system which it calls "V-File", a web-based application that allows for the electronic filing of private placement filing information with the Exchange. V-File automates parts of the TSX-V's review and acceptance process for private placements and is intended to improve turnaround time for receipt of TSX-V approval of private placements.

Loans, Bonuses, Finder's Fees and Commissions

The TSX-V amended Policy 5.1 to provide additional guidance on existing policy requirements. Additionally, Policy 5.1 was revised to (a) change the method of calculating the limits for bonus shares and warrants, such that these limits will now be calculated using the applicable "Market Price" instead of the "Discounted Market Price" (each as defined in TSX-V policies); (b) increase the limit on bonus warrants from 40% to 100% of the value of the applicable loan; (c) prohibit the issuance of bonus shares on loans having a term of less than one year; (d) clarify that the aggregate value of commissions or other compensation payable by an issuer in respect of a financing that includes shares and warrants cannot exceed 12.5% of the gross proceeds of the financing; and (e) prohibit both the payment of commission to an investor in connection with such person's own investment in the issuer and the payment of finder's fees to a vendor or purchaser in connection with such person's sale or purchase of assets or services to or from the issuer (all subject to certain exceptions).

OSC Adoptions of New Prospectus Exemptions and Changes to "Accredited Investor" and "Minimum Amount" Prospectus Exemptions

On Feb 19, 2015, the CSA announced the adoption of amendments to the "accredited investor" and "minimum amount investment" prospectus exemptions (the "**Amendments**") found in National Instrument 45-106 – Prospectus and Registration Exemptions ("**NI 45-106**"). Included in the Amendments are new requirements which will result in material changes when selling securities to individual investors, including the elimination of the $150,000 "minimum investment amount exemption" (the "**MA Exemption**") when selling to individuals, and the requirement to obtain a written "Risk Acknowledgment Form" from individual accredited investors pursuant to the "accredited investor exemption" (the "**AI Exemption**"). In addition, the OSC has announced the introduction of an existing security holder prospectus exemption (the "**Security Holder Exemption**") and a family, friends and business associates prospectus exemption (the "**FFBA Exemption**"). Each of these amendments will come into force on May 5, 2015.

Minimum Amount Exemption

The MA Exemption, which is generally available to purchasers investing a minimum amount of $150,000 at the time of distribution, will no longer be available to individual investors. However this exemption will remain available to holding companies provided they have not been created or used solely to purchase securities under the exemption.

Accredited Investor Exemption

A new category of accredited investor has been added to the definition of an "accredited investor". Pursuant to the Amendments, a trust established by an accredited investor for the benefit of the accredited investor's family members (provided all of the trustees are accredited investors and all of the beneficiaries fall within the prescribed classes of family members). Additionally, the OSC has amended the definition of an "Accredited Investor" in Ontario to allow fully managed accounts to purchase investment fund securities under the managed account category of the AI Exemption, which is consistent with the rest of the CSA jurisdictions.

Individual accredited investors (except those who qualify as a "permitted client" — e.g. an individual owning financial assets in excess of $5 million) must execute a new risk acknowledgement form (the "**Risk Acknowledgment Form**") in connection with any distribution under the AI Exemption. This form describes the categories of individual accredited investor, as well as the protections an investor is renouncing by purchasing securities under the AI Exemption, and requires the investor to indicate which category of accredited investor they satisfy. Any sales person or finder, whether registered or not, is also required to execute the Risk Acknowledgment Form.

Historically, when relying on the AI Exemption issuers have generally relied on representations or certification from a purchaser as to a purchaser's "accredited investor" status in order to determine whether the AI Exemption is available. The Amendments make it clear that, going forward, issuers must take additional steps to verify a purchaser's "accredited investor" status. These steps will include explaining the different tests and asking questions to obtain factual information from purchasers about their income or assets before discussing the investment. Accordingly, it is no longer sufficient to accept standard representations from the purchasers to verify that the investor meets the required status.

Existing Security Holder Prospectus Exemptions

The Security Holder Exemption permits certain reporting issuers to issue new securities to their existing security holders without having to file a prospectus. This Amendment came into force on February 11, 2015.

Under this exemption, the prospectus requirement does not apply to a distribution by an issuer listed on the Toronto Stock Exchange, the TSX-V, the Canadian Securities Exchange or the Aequitas NEO Exchange of security of its own issue to a security holder of the issuer purchasing as principal. In order for the Security Holder Exemption to apply, the issuer must be a reporting issuer in a Canadian jurisdiction, other than an investment fund, have complied with its continuous disclosure requirements, and have issued and filed an offering news release describing in reasonable detail the proposed offering.

To participate in the offering, a purchaser must represent to the issuer, in writing, that it held at the "record date" (a date determined by the issuer, which must be at least one day prior to the announcement date), and continues to hold, the listed security. A purchaser may only purchase an aggregate of up to $15,000 of listed securities in any 12-month period pursuant to the Security Holder Exemption, unless the purchaser has obtained advice regarding the suitability of the investment. If the purchaser is a resident of a jurisdiction of Canada, that investment advice must be from a person registered in that jurisdiction as an investment dealer.

In order to rely on the Security Holder Exemption, the issuer must represent to the purchaser in the subscription agreement that the issuer's continuous disclosure documents do not contain a misrepresentation, and that there is no material fact or material change related to the issuer which has not been generally disclosed. The OSC also updated its guidance to indicate that all security holders of the same class of securities must be treated fairly and in a manner that is perceived to be fair in connection with a distribution under the Security Holder Exemption. Nonetheless, this does not require that an issuer make the offer on a pro-rata basis to all of its security holders – it is sufficient that an offer be made available to all persons who, as of the record date, held a listed security to be distributed under the Security Holder Exemption, and an issuer should fairly allocate investment opportunities among the issuer's existing security holders.

Family, Friends and Business Associates Exemption

The OSC has announced that it is introducing the FFBA Exemption, which will provide Ontario with an exemption substantially similar to the exemption available in other Canadian jurisdictions.

The exemption will allow both reporting and non-reporting issuers (other than investment funds) to raise capital from the issuer's directors, executive officers, control persons and founders, as well as certain family members, close personal friends and close business associates of such persons without a prospectus or any other disclosure document at the time of distribution. Purchasers availing themselves of this exemption will also have to sign a Risk Acknowledgment Form. The FFBA Exemption will also include a prohibition against advertising to solicit investors and payment of any commission, finder's fee, referral fee or similar payment.

OSC Launches Online Compliance and Regulation Guidance

As of October 27, 2014, the OSC maintains a webpage, organized by topic, that provides links to existing OSC notices, reports and guidance, in order to help registrants find OSC guidance in respect of compliance and regulation matters. To view the webpage, click here.

Women on Boards – CSA Members Adopt New Disclosure Requirements

The CSA has announced the implementation of amendments to Form 58-101F1 in Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec and Saskatchewan to corporate disclosure obligations to require information be provided in regards to the representation of women on the boards of directors of reporting issuers. The amendments will apply to annual information forms and management information circulars that are filed in respect of an issuer's financial year, which end on or after December 31, 2014.

The adopting CSA jurisdictions will require *non-venture issuers* to disclose, on an annual basis: (a) the number of women on the board and in executive officer positions; (b) director term limits and other mechanisms of board renewal; (c) policies regarding the representation of women on the board; (d) targets regarding the representation of women on the board and in executive officer positions; (e) the board's or nominating committee's consideration of the representation of women in the director identification and selection process; and (f) the issuer's consideration of the representation of women in executive officer positions when making executive officer appointments.

IIROC Provides New Guidance on Underwriter Due Diligence

On December 18, 2014, IIROC issued guidance (the "**Guidance**") to its dealer members ("**Dealer Members**") in respect of underwriting due diligence in public offerings. The Guidance is designed to promote more consistent and enhanced underwriting due diligence standards among Dealer Members, and to assist Dealer Members to more effectively perform their role and to ensure the protection of the investing public. The Guidance sets out (i) the elements of the underwriting due diligence process; (ii) the types of policies and procedures needed by Dealer Members to support the underwriting due diligence process; and (iii) an appropriate supervisory and compliance framework.

The Guidance acknowledges that the role of due diligence now goes beyond addressing underwriter liability to investors under securities legislation, as underwriters (together with auditors and other professional advisors) act as "gatekeepers" whose activities are critical to fostering fair and efficient capital markets, in addition to the traditional role of due diligence procedures which exist to help underwriters guard against liability for misrepresentations contained in a prospectus. The Guidance describes a number of common practices and provides a number of suggestions that IIROC has noted are not intended to create a minimum or maximum standard of what constitutes reasonable due diligence or create new or modify existing legal obligations, while also identifying a number of key principles that should always be addressed by a Dealer Member in the course of conducting due diligence.

The Guidance is clear that Dealer Members are expected to have written policies and procedures in place relating to all aspects of the underwriting process, and supervision and oversight of these procedures. The Guidance sets nine principles which underwriters should consider in the context of their due diligence. IIROC reminds Dealer Members that reasonable due diligence requires exercise of professional judgment and planning, and notes that due diligence should always be customized to the particular circumstances. The Guidance provides Dealer Members with an opportunity to revisit their underwriting practices and identify gaps and potential enhancements of their due diligence policies and procedures.

Extension of CEE Treatment to Environmental Studies/Community Consultations and 15% Mineral Exploration Tax Credit for Individual Investors

In a speech to the Prospectors & Developers Association of Canada on March 1, 2015, the Federal government announced two tax proposals that will benefit the Canadian resource sector. First, the Government proposes to extend the "super flow-through share" program for an additional year. Second, the Government proposes that the costs associated with undertaking environmental studies and community consultations will not be denied treatment as Canadian Exploration Expenses (CEE – which are generally 100% deductible in the year incurred) solely because they are incurred as a condition to obtaining an exploration permit.

Under Canada's flow-through share program, a company is permitted to renounce and "flow-through" certain expenses associated with its Canadian exploration activities to investors of "flow-through shares". In turn,

such investors can generally deduct those expenses in calculating their own taxable income. Under the super flow-through share program, such investors can also claim a 15% tax credit in respect of certain renounced grassroots mining expenses, a tax credit that can generally be applied to reduce federal income taxes otherwise payable by the investors. Grassroots mining expenses include expenses incurred in conducting certain mining exploration activities from or above the surface of the earth for the purpose of determining the existence, location, extent or quality of one or more mineral resources in Canada.

Under the proposal, the super flow-through share program, which was set to expire on March 31, 2015, will be extended to apply in respect of flow-through share agreements entered into before April 1, 2016.

With respect to the second proposal, some provinces and territories in Canada require mining and oil and gas companies to undertake environmental studies and community consultations as a condition to obtaining an exploration permit. Historically, the Canada Revenue Agency has taken the position that the costs associated with undertaking such studies and consultations were not CEE because they formed part of the cost of the permit and therefore such costs were (i) not fully deductible in the year incurred and (ii) not eligible to be renounced to investors of flow-through shares.

Under the proposal, effective for expenses incurred after February 2015, the cost of *otherwise eligible* environmental studies and community consultations will not be denied treatment as CEE *solely* because they are incurred as a condition to obtaining an exploration permit. Notably, the proposal *does not* propose that all costs associated with undertaking environmental studies and community consultations will be considered CEE. For example, the proposal would not seem to impact the Canada Revenue Agency's previously expressed the view that costs associated with general baseline environmental assessments undertaken prior to carrying out a specific exploration activity are not CEE (on the basis that such expenses are not incurred *for the purpose* of determining the existence, location, extent or quality of one or more mineral resources in Canada).

SECURITIES PRACTICE

Our extensive experience enables us to advise on the operation and regulation of markets, both in Canada and abroad. We represent issuers, securities dealers and advisors, underwriting syndicates, financial institutions, lenders, investors, and venture capitalists, as well as foreign issuers and investors in the Canadian and US financial markets. We provide legal services to public and private companies, and to governmental organizations throughout Canada, to assist in entering and resolving matters related to capital markets, restructuring, and mergers and acquisitions. In addition, with the assistance of our litigation lawyers, we provide expert litigation support for a wide range of matters involving securities regulation.

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