WeirFoulds LLP

WEIRFOULDS SECURITIES LAW QUARTERLY

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FOR MORE INFORMATION OR INQUIRIES

Michael Dolphin
416.947.5005
» *full bio*

Zachary Goldenberg
416.619.6291
» *full bio*

WeirFoulds LLP
66 Wellington Street West
Suite 4100, PO Box 35
TD Bank Tower
Toronto, Ontario, Canada
M5K 1B7
Office 416.365.1110
Facsimile 416.365.1876
weirfoulds.com

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Recent developments include:

- Canadian Securities Administrators (the "**CSA**") final amendments to the early warning system effective May 9, 2016;
- CSA changes to the take-over bid regime, also effective May 9, 2016;
- Toronto Stock Exchange (the "**TSX**") Staff Notice 2016-0002 and TSX Venture Exchange (the "**TSX-V**") Corporate Finance Bulletin regarding rights offerings;
- Ontario Securities Commission (the "**OSC**") results of insider reporting compliance review; and
- Reminder to mortgage investment entities of registration requirements.

CHANGES TO THE EARLY WARNING SYSTEM EFFECTIVE MAY 9, 2016

On February 29, 2016, the CSA published final amendments to the early warning system which, upon receiving all Ministerial approvals, will come into force on May 9, 2016. The amendments are designed to provide greater transparency regarding the holdings of reporting issuers' securities and to enhance the quality and integrity of the early warning reporting system. The following is a summary of changes to the early warning system.

Decreases in Ownership

Disclosure will now be required of decreases in ownership of 2% or more for securityholders subject to reporting, as well as disclosure when a securityholder's ownership falls below the early warning reporting threshold of 10%. Currently only increases in positions of 2% or more or a material change to a previously reported fact are subject to reporting.

Exemption for Certain Securities Lending Arrangements

Lenders have been provided an exemption from including securities that are lent or transferred pursuant to a specified securities lending arrangement for purposes of determining the 10% reporting threshold. A specified securities lending arrangement requires, among other things, that the lender have an unrestricted ability to recall the securities before a meeting of securityholders and/or that the lender can require the borrower to vote the securities as instructed by the lender.

Exemption for Short Selling Borrowers

A new exemption from the reporting threshold trigger is being provided to borrowers in connection with certain short sales. This exemption can be relied upon on the condition that the borrowed securities are disposed of by the borrower within three business days and that the borrower does

not currently or intend to vote the securities. The CSA has clarified the application of this exemption and has indicated that any securities lending arrangements in effect at the time of a reportable transaction will be required to be disclosed in an early warning report, even if the triggering transaction did not involve a securities lending arrangement.

Alternative Monthly Reporting

The alternative monthly reporting system is made unavailable to eligible institutional investors who solicit, or intend to solicit, proxies from securityholders of a reporting issuer on matters relating to the election of directors or a reorganization, amalgamation, merger, arrangement or similar corporate action involving the securities of the reporting issuer.

Enhanced Disclosure

The amendments also now require disclosure in the early warning report of the material terms of any related financial instruments, securities lending arrangements and other agreements, involving securities. The amendments will require more detailed information regarding the intentions of the acquiror and the purpose of the transaction be provided in the early warning report. The early warning report will now be required to be certified and signed as opposed to just signed as is the case currently.

Timing for Issuance of News Release and Early Warning Report

The amendments have clarified that an early warning news release is to be filed no later than the opening of trading on the business day following the acquisition and the early warning report must be filed no later than two business days following the acquisition.

Streamlining of Information in News Release

The information required in a news release filed in connection with the early warning reporting requirements has been further streamlined by allowing the news release to make reference to the early warning report for specified further details.

CHANGES TO THE TAKE-OVER BID REGIME EFFECTIVE MAY 9, 2016

The CSA have published substantial changes to the take-over bid rules which are expected to come into force on May 9, 2016 under National Instrument 62-104 – *Take-Over Bids and Issuer Bids* ("**NI 62-104**"). Ontario has made legislative changes to the *Securities Act* (Ontario) to accommodate the adoption of NI 62-104.

Minimum Tender Requirement

Once in effect, the amendments will require that all non-exempt take-over bids meet a minimum tender requirement of more than 50% of the outstanding securities that are subject to the bid, excluding securities owned by the bidder itself or any person acting jointly or in concert with the bidder (the "**Minimum Tender Requirement**").

105 Day Minimum Deposit Period

The amendments will require a minimum deposit period of 105 days, which may be shortened in the following circumstances: (a) at the discretion of the target board announcing a shorter deposit period of not less than 35 days through the issuance of a news release, during which time all contemporaneous bids are to remain open for at least the number of days in the shorter deposit period; or (b) in the event that the issuer issues a news release announcing its intention to enter into a specified alternative transaction, during which time all contemporaneous take-over bids are to remain open for a deposit period of at least 35 days.

10 Day Extension Requirement

The minimum deposit period will be subject to an extension period of a minimum of 10 days after the Minimum Tender Requirement is satisfied and all other conditions are met. Under the existing regime, non-exempt take-over bids must remain open for 35 days and are not subject to any minimum tender requirement or an extension requirement once the bidder has taken up deposited securities.

Practical Implications to Shareholder Rights Plans

In light of the minimum deposit period being extended to 105 days from 35 days under the current regime, in our view the ability for target boards to rely on shareholder rights plans as a defensive measure to an unsolicited take-over bid may be stifled, and the incentive of implementing a shareholders rights plan "strategically" at an annual meeting or "tactically" in the face of a bid will be

mitigated. The amendments to the take-over bid regime do not include any changes to the CSA's approach to shareholder rights plans and other defensive measures as set out in National Policy 62-202 – *Take-Over Bids – Defensive Tactics* ("**NP 62-202**"), and historically, securities commissions have cease traded shareholders rights plan within 50 to 70 days of commencement of an offer [we do note that there have been some recent decisions where courts have cease traded shareholder rights plans outside this 50-70 day period, such as the Alberta Securities Commission's decision in November 2015 with respect to Suncor Energy Inc.'s proposed take-over bid of Canadian Oil Sands Limited, where the rights plan was cease traded after more than 90 days following commencement of the hostile bid], which is well within the timeframe of the new minimum deposit period. The CSA has noted that NP 62-202 continues to apply to capital market participants following amendments to NI 62-104 and that securities regulators will continue to monitor the activities of target boards to determine whether their conduct is interfering with the rights of securityholders.

Due to the lack of guidance by the CSA and uncertainty of the position proxy advisory firms will take with respect to best practices implementing or amending a shareholder rights plan following the amendments to NI 62-104, we recommend that issuers defer implementing or amending their shareholder rights plan until the amendments to NI 62-104 come into effect in May, 2016.

TSX STAFF NOTICE 2016-0002 ("TSX NOTICE") AND TSX-V CORPORATE FINANCE BULLETIN ("TSX-V BULLETIN") REGARDING RIGHTS OFFERINGS (TOGETHER THE "NOTICES")

In light of the recent adoption by the CSA of amendments relating to rights offerings (the "**CSA Amendments**"), the TSX and the TSX-V (together, the "**Exchanges**") recently provided guidance with respect to Section 614 - *Rights Offerings* of the TSX Company Manual and Policy 4.5 – *Rights Offerings* of the TSX-V Corporate Finance Manual (together, the "**Manuals**") in order to clarify the Exchanges' positions in light of the CSA amendments.

The Exchanges intend, subject to all regulatory approvals, to amend the Manuals to formally incorporate the guidance contained in the TSX Notice and the TSX-V Bulletin. In the interim, the Exchanges provided listed issuers and their advisors with the following guidance.

TSX Notice

Pre-clearance of Rights Offering Documents

Even though a rights offering circular is no longer subject to CSA review and approval prior to delivery to a listed issuer's securityholders, pre-clearance of rights offering documents is still required by the TSX, including the rights offering notice, together with the rights offering circular, or rights offering prospectus (the "**Rights Offering Documents**"). Rights Offering Documents should be filed in draft form with TSX at least five trading days prior to finalization.

Determination of Record Date

Subsection 614(e) of the TSX Company Manual currently requires that all deficiencies raised by TSX be resolved at least seven trading days in advance of the record date, which effectively means that the record date cannot be determined until the Rights Offering Documents are in final form. Effective immediately, the TSX has reduced the advance notification period to set the record date for all rights offerings from seven trading days to five trading days. The TSX is of the position that five trading days is sufficient time to advise market participants of the commencement of ex-rights trading in the listed securities, which typically begins two trading days prior to the record date.

TSX-V Bulletin

The TSX-V provides listed issuers and their advisors with similar guidance to that of the TSX with respect to the pre-clearance of rights offering documents and the determination of the record date. However, the TSX-V does not provide a minimum number of days in which the Rights Offering Documents must be filed with the TSX-V, and instead requires that the Rights Offering Documents be filed with the TSX-V in draft form to provide the TSX-V with a sufficient review period.

The TSX-V has also provided guidance with respect to the following:

Minimum Rights Subscription Price - $0.01

The TSX-V is proposing to amend Policy 4.5 to provide that the subscription price for securities acquired on the exercise of rights

cannot be less than $0.01. Until the amendments to Policy 4.5 come into effect, the TSX-V will, on application, grant waivers of the current $0.05 minimum subscription price, as long as the subscription price for the securities acquired on the exercise of rights is not less than $0.01.

Minimum Warrant Exercise Price

Policy 4.5 is proposed to be further amended to provide that the minimum exercise price of a warrant forming part of a unit being acquired on the exercise of a right must not be less than the greater of the market price prior to the news release announcing the rights offering and $0.05.

Optional Listing of Rights

It is proposed that references to the rights being listed for trading on the TSX-V be amended to expressly provide that rights may be, but are not required to be, listed for trading on the TSX-V, at the election of the issuer. Until the proposed amendments come into effect, the TSX-V will, on application, approve a particular rights offering where the Issuer elects not to list the rights for trading. An Issuer that has applied or intends to apply for a waiver of the listing requirement for a rights offering must specifically disclose that it has made such application or intends to make such application in the press release announcing the rights offering. In any case, as required by subsection 5.1 of Policy 4.5, all rights must remain transferable.

New Large Shareholders

The TSX-V is proposing to amend Policy 4.5 to provide that shareholder approval for the creation of a new control person as a consequence of a stand-by commitment for a rights offering generally will not be required provided that the rights are listed for trading on the TSX-V and the subscription price for the rights is at a "significant discount" to the market price. A "significant discount" would be equal to at least the maximum discount to market price allowed for private placements. If either of these criteria is not satisfied, the Exchange may first require shareholder approval for the creation of a new control person.

Personal Information Form (Form 2A)

Any individual who may own or control, beneficially or as nominee, directly or indirectly, securities representing more than 10% of the voting rights attached to all outstanding voting securities of an issuer (or where the securityholder is not an individual, any director, officer or insider of that securityholder) on the completion of the rights offering must first file with the TSX-V a duly completed Personal Information Form (Form 2A) or, if applicable, a Declaration (Form 2C1) before the Exchange will accept a rights offering which includes a stand-by commitment.

OSC RELEASES RESULTS OF INSIDER REPORTING COMPLIANCE REVIEW

On February 19, 2016 the OSC published its Staff Notice 51-726 - *Report on Staff's Review of Insider Reporting and User Guides for Insiders and Issuers*, which sets out the results of its review of the continuous disclosure records and insider filings of 100 reporting issuers whose principal regulator is the OSC.

Staff examined the filings of approximately 1,500 reporting insiders on the System for Electronic Disclosure by Insiders ("**SEDI**") to assess compliance with NI 55-104 - *Insider Reporting Requirements and Exemptions* and related securities legislation. Overall, the review found that the compliance rate for insider reporting could be substantially improved. Staff also found material insider reporting deficiencies in approximately 70% of the issuers reviewed, with approximately 200 reporting insiders filing new insider reports to address material deficiencies and 150 reporting insiders filing correctional reports.

Reporting insiders are reminded that it is their responsibility to file insider reports with the commissions in a timely fashion regardless of whether a third party agent is used, and reporting insiders should conduct periodic checks of the information contained on SEDI to ensure that their reports are being filed correctly and the information on SEDI is reported accurately.

Issuers should conduct annual reviews of their insider trading policies to ensure they are in compliance with current Canadian securities legislation, and appoint a senior officer to approve and monitor the trading activity of all insiders, officers and senior employees. It is also recommended that issuers implement a written policy prohibiting derivative-based transactions, granting stock options and setting of the exercise price during blackout periods.

REMINDER TO MORTGAGE INVESTMENT ENTITIES OF REGISTRATION REQUIREMENTS

The OSC recently entered into settlement agreements with certain mortgage investment entities ("**MIEs**"), mortgage brokers, administrators and their principals involved in trading in securities without registration, contrary to the *Securities Act* (Ontario). These settlements involved substantial penalties and costs being levied against businesses and individuals, as well as the requirement to reimburse investors where the investment was not suitable.

Entities whose business involves trading in securities such as units or common shares of MIEs, may be required to register with the OSC in addition to registration with the Financial Services Commission of Ontario. Entities are encouraged to review the registration requirements and obtain legal advice if necessary.

Registration requirements under Ontario securities law are set out in the *Securities Act* (Ontario) and National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. Guidance on how these requirements apply to MIEs and entities that invest their assets in mortgages can be found in CSA Staff Notice 31-323 *Guidance Relating to the Registration Obligations of Mortgage Investment Entities* and OSC Staff Notice 81-722 *Mortgage Investment Entities and Investment Funds*.

SECURITIES PRACTICE

WeirFoulds' 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.

ABOUT THIS NEWSLETTER

WeirFoulds LLP has established itself as one of Canada's premier regional law firms and has provided strategic, cost-effective and innovative legal advice to our clients since 1860. WeirFoulds has thrived by becoming a true partner to our clients' businesses, ensuring that our legal advice addresses their priorities. We remain successful by constantly adjusting the scope of our services to better serve our clients' needs. Focused on four core areas - litigation, corporate, property and government law - WeirFoulds' lawyers are recognized leaders of the Canadian legal profession, having acted in many of the nation's landmark cases and most significant mandates. We are proud of our heritage, and our reputation for excellence that has been built on a long history of establishing and protecting our client relationships. Our recent ranking as the top regional firm in Ontario by *Canadian Lawyer* magazine, and our number one ranking in *Novae Res Urbis*' 2015 Top 10 Development Law Firms in the GTA, are each a testament to our commitment to exceptional service. Our size lets us offer clients access to world-class legal services without the burden of extensive cost overheads. Across all practice areas, we work in a flexible and integrated manner to deliver efficient results.Information contained in this publication is strictly of a general nature and readers should not act on the information without seeking specific advice on the particular matters which are of concern to them. WeirFoulds LLP will be pleased to provide additional information on request and to discuss any specific matters.

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