

WeirFoulds Securities Law Update: Concise, Informative Updates on Securities Law Developments for the Canadian Marketplace

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Recent developments include:

- The publication of the draft *Capital Markets Act* for public consultation;
- The proposed consolidation of IIROC and MFDA and creation of a new investment protection fund;
- Changes to the governance structure of the OSC; and
- Changes to the TSXV's security based compensation policy.

CAPITAL MARKETS ACT

On October 12, 2021, the Government of Ontario published a draft of the *Capital Markets Act* (the "**CMA**") for public consultation. This follows the release of the Capital Markets Modernization Taskforce (the "**Taskforce**") final report on January 22, 2021, which included 74 policy recommendations to modernize and encourage competitiveness and innovation in Ontario's capital markets, beginning with the introduction of the CMA as a legislative vehicle to implement the Taskforce's recommendations.

The CMA, if passed, would replace the existing *Securities Act* (Ontario) and the *Commodity Futures Act* and would restructure the Ontario Securities Commission (the "**OSC**") to enhance the OSC Staff's enforcement powers and increase investor protection. To increase flexibility in the wake of market developments, the CMA would take a "platform approach" to capital markets regulation, setting out the fundamental provisions of the law while leaving specific requirements to be implemented through OSC rules. Under the CMA, decision-making functions held by the "Director" and "Executive Director" under the current regime would be allocated to the "Chief Regulator," who would also have the power to make various compliance orders, including orders addressing non-compliance with continuous disclosure requirements and prospectus exemptions.

PROPOSED CONSOLIDATION OF IIROC AND MFDA

The New SRO

On August 3, 2021, the Canadian Securities Administrators ("**CSA**") published CSA Position Paper 25-404 – *New-Self Regulatory Organization Framework* (the "**CSA Position Paper**") and announced the CSA's intention to consolidate the Investment Industry Regulatory Organization of Canada ("**IIROC**") and the Mutual Fund Dealers Association of Canada ("**MFDA**") and establish a new self regulatory organization (the "**New SRO**").

The New SRO will have an enhanced governance structure and will initially include investment dealer, mutual fund dealer, and

marketplace member registration categories. The New SRO aims to:

- eliminate duplicative costs and minimize regulatory inefficiencies;
- promote access to advice for all investors;
- reduce investor confusion;
- enhance structural flexibility;
- acknowledge proportionate regulation;
- establish a graduated proficiency model;
- streamline the complaint process;
- increase controls and improve transparency of enforcement mechanisms; and
- enhance market surveillance.

On May 12, 2022, the regulators of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Québec, Saskatchewan and Yukon (the “**Recognizing Regulators**”) published for comment CSA Staff Notice and Request for Comment 25-304 – *Application for Recognition of New Self-Regulatory Organization*. It includes: *Appendix A – Application for recognition of the New SRO*; *Appendix B – Draft Recognition Order for the New SRO*; and *Appendix C – Draft MOU among the Recognizing Regulators regarding oversight of the New SRO* (collectively, the “**Draft Documents**”). Notably, Appendix A includes draft bylaws, interim rules, and terms of reference for the New SRO and requirements applicable to Québec.

The Draft Documents reflect the recommendations from the CSA Position Paper and include the following key features:

- clarifying and reinforcing the New SRO’s public interest mandate;
- improving the New SRO’s governance structure by ensuring that the board of directors and board committees are composed of a majority of independent directors;
- articulating clear criteria for independent directors; and
- ensuring the New SRO’s appropriate cooperation with the Recognizing Regulators, including alignment of strategic plans, annual statements of priorities and budgets.

The New IPF

The CSA Position Paper also recommended the amalgamation of the Canadian Investor Protection Fund (“**CIPF**”) and the MFDA Investor Protection Corporation (“**MFDA IPC**”) into a single compensation and contingency fund (the “**New IPF**”) which will be independent from the New SRO. On May 12, 2022, the Recognizing Regulators published for comment CSA Staff Notice and Request for Comment 25-305 – *Application for Approval of the New Investor Protection Fund*. It includes: *Appendix A – Application for approval and acceptance of the New IPF*; *Appendix B – Draft Approval Order for the New IPF*; and *Appendix C – Draft MOU*. Notably, Appendix A contains the draft bylaws of the New IPF, draft coverage policies, draft claims procedures, and draft appeal committee guidelines.

The CSA is seeking comments on all aspects of the New SRO application, New IPF application and related documents until June 27, 2022.

Appointment of Board Members for the New SRO and the New IPF

On May 12th, 2022, the CSA also announced the proposed chair and directors of each of the New SRO and the New IPF. The board members of the New SRO were recommended by a Special Joint Committee comprised of IIROC and MFDA board members and independent members, all of which were appointed by the CSA. Also, the proposed appointments of the New SRO board members

were reviewed by the CSA and approved by the boards of IIROC and the MFDA. The board members of the New IPF will comprise of existing directors of CIPF and MFDA IPC. All of the appointments are scheduled to take effect January 1, 2023, concurrent with the amalgamation of IIROC and the MFDA.

CHANGES TO THE GOVERNANCE STRUCTURE OF THE OSC

The *Securities Commission Act, 2021* (the “Act”), which was introduced in March 2021 to implement recommendations by the Taskforce regarding the governance and accountability of the OSC, came into force on April 29, 2022. The Act brings about certain structural and governance changes to the OSC.

Separation of the OSC Chair and CEO Roles

The OSC has separated the Chair and the CEO into two distinct roles. The Chair of the board of directors of the OSC will deal with governance, whereas the Chief Executive Officer of the OSC will focus on regulation. Grant Vingoe has been appointed as the first dedicated CEO of the OSC, and Heather Zordel is the non-executive Chair of the board of directors of the OSC. The OSC’s [organizational chart](#) can be viewed on its website.

Separation of the Regulatory and Adjudicative Responsibilities of the OSC

Under the Act, the OSC’s tribunal and regulatory functions have been separated. The regulatory role of the capital markets will be undertaken by the OSC, which will be supervised by a board of directors appointed by the Lieutenant Governor in Council. The CEO of the OSC will be the chief regulator responsible for managing and supervising the OSC. The CEO will exercise policy and regulatory authority and may grant orders such as exemption orders, information disclosure orders, compliance orders, cease trade orders, etc.

The adjudicators of the newly created Capital Markets Tribunal, which is independent from the OSC, will perform the tribunal functions. Capital Markets Tribunal members will also be appointed by the Lieutenant Governor in Council. This tribunal will make adjudicative decisions (e.g., orders in the public interest). Tim Moseley is the first Chief Adjudicator of the Capital Markets Tribunal appointed to manage and supervise the operations of the Capital Markets Tribunal.

CHANGES TO THE TSXV’S SECURITY BASED COMPENSATION POLICY

Recognition of Additional Types of Security Based Compensation

On November 24, 2021, the TSX Venture Exchange (the “TSXV”) significantly amended its previous Policy 4.4 – *Incentive Stock Options* (the “Former Policy”) and renamed it “Policy 4.4 – *Security Based Compensation*” (the “Revised Policy”). Pursuant to the Revised Policy, the TSXV now recognizes, in addition to traditional stock options, that restricted share units, stock appreciation rights, performance share units, deferred share units, and any other compensation or incentive mechanism involving the issuance or potential issuance of securities from treasury (collectively, the “Additional Securities”) can be governed by a security based compensation plan.

Addition of New Plan Categories

The Revised Policy also expanded the number of compensation plans available to issuers from two to four. Specifically, the previous categories have been expanded to permit the issuance of the Additional Securities and the two new categories are designed to provide additional flexibility to issuers in meeting their compensation needs. In some circumstances, the plans will require shareholder approval.

Cashless Exercise and Net Exercise

The Revised Policy now allows stock options to be exercised using “cashless exercise” or “net exercise”. Generally, for “cashless exercise” the optionee receives a loan from a broker, arranged by the issuer, to exercise the stock options and receives the balance of cash or shares minus any costs. For “net exercise”, there is no cash payment to the issuer and the optionee receives shares based on a formula using the five-day volume weighted average trading price of the underlying shares.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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