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Securities Law Newsletter – Q4 2015

December 2, 2015

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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. Recent developments include the adoption by the Canadian Securities Administrators (the **"CSA"**) of new disclosure obligations for venture listed issuers, including changes to interim management discussion and analysis, executive compensation disclosure, the threshold for completion of a Business Acquisition Report and the composition of audit committees. The CSA has also provided guidance to mining issuers with respect to investor presentations and other disclosure posted on the Internet. Lastly, the Ontario Securities Commission (the **"OSC"**) has adopted new prospectus exemptions and amended certain other prospectus exemptions, including introducing a new crowdfunding exemption, adopting the family, friends and business associates exemption, and amending the prospectus exemption rules governing rights offerings and offering memorandums.**New Disclosure Obligations for Venture Issuers**The CSA announced changes to certain continuous disclosure requirements for venture issuers that came into force June 30, 2015. The intent of these changes is to improve the quality and relevance of the disclosure for investors by simplifying the requirements and lessening the burden of preparation for management.*Changes to Interim MD&A Disclosure*One of the key changes for venture issuers is that they will now be able to choose to satisfy the requirement for interim management discussion and analysis ("MD&A") by instead providing quarterly highlights disclosure. Such "quarterly highlights" will be a short discussion of all material information about the venture issuer's operations, liquidity and capital resources, including:

- an analysis of the company's financial condition, financial performance and cash flows, and any significant factors that have caused period-to-period variations in those measures;
- known trends, risks or demands;
- major operating milestones;
- commitments, expected or unexpected events, or uncertainties that have materially affected the company in the interim period or are reasonably likely to have a material effect going forward;
- any significant changes from disclosure previously made about how the company was going to use proceeds from any financing and an explanation of variances; and
- any significant transactions between related parties that occurred in the interim period.

The CSA expects that venture issuers will consider the needs of their investors when deciding which disclosure option to elect. Venture issuers will not be allowed to use quarterly highlights for their first post-IPO interim MD&A and year-end disclosure will continue to be included in the annual MD&A whose form remains the same.The ability to choose to file quarterly highlights in lieu of the interim MD&A is available for financial years beginning on or after July 1, 2015.*Changes to Executive Compensation Disclosure*Starting in respect of financial years beginning on or after July 1, 2015, venture issuers may use a scaled-down form of disclosure for executive and director compensation arrangements. The new Form 51-102F6V is narrower in scope than the existing Form 51-102F6 in the following ways:

- the number of individuals for whom disclosure is required has been reduced from a maximum of five individuals to three: this will include the CEO, CFO and the next highest paid executive officer whose total compensation exceeds $150,000 annually;

- two years of compensation disclosure is required to be disclosed (down from three years); and
- the summary compensation tables for named executive officers and directors have been combined, and the requirement to provide the grant date fair value of securities issued as compensation has been removed.

Venture issuers will have to provide enhanced disclosure regarding stock options and other compensation securities and the new form also introduces staggered thresholds for perquisite disclosure.*Changes to Business Acquisition Report Threshold*Prior to the amendments to the continuous disclosure requirements, the threshold for whether an "acquisition" (as defined in NI 51-102) of a venture issuer was considered a "significant acquisition", and therefore required the venture issuer to file a Business Acquisition Report (**"BAR"**), was 40% based on the asset and investment tests set out in NI 51-102. As of June 30, 2015, the threshold for whether an acquisition is significant has increased from 40% to 100% based on the existing tests. This change will also apply to both prospectuses and management information circulars, which means that venture issuers that complete acquisitions above 40% but below 100% will no longer have to go to the expense of preparing a comprehensive BAR report (which also involves preparing financial statements). A BAR filed by a venture issuer is also no longer required to include pro forma financial statements.*Changes to Audit Committee Requirements*Starting with financial years beginning on or after January 1, 2016, venture issuers will be required to have an audit committee composed of at least three directors, a majority of whom cannot be executive officers, employees or control persons of the issuer or of an affiliate. This was already a requirement of the TSX Venture Exchange, so this new rule will not be a significant change for venture issuers already listed on that exchange.There are certain exemptions to this rule that have been introduced to allow an executive officer or control person to serve on the audit committee for a limited period of time where a vacancy on the committee is the result of death, incapacity or resignation of an audit committee member, or where a member becomes a control person outside his or her reasonable control.*Changes to Prospectus Disclosure*Effective June 30, 2015, the prospectus requirements for a venture issuer were amended so that only two years of audited financial statements and the issuer's business history need to be disclosed rather than three years, as previously required.**CSA Provides Guidance to Mining Issuers on Investor Presentations Posted to Websites** Mining issuers should be aware that investor presentations and other forms of investor relations materials provided on company websites are captured by the definition of "written disclosure" and the associated disclosure rules in NI 43-101 Standards of Disclosure for Mineral Projects.On April 9, 2015, the CSA published CSA Staff Notice 43-309 Review of Website Investor Presentations, which highlighted findings from a review of investor presentations on mining issuer's websites conducted by securities regulators. The review found that of the 130 investor presentations reviewed, 57% had issues of minor noncompliance and 25% suffered from major non-compliance concerns. The most significant areas of non-compliance were:

- failure to name the qualified person and their relationship to the issuer;
- disclosure of the results of a preliminary economic assessment (**"PEA"**) without the appropriate cautionary statements for the public to understand limitations of the results of the PEA and to highlight the viability of mineral reserves;
- lack of a clear statement as to whether the mineral resources reported in the presentation included or excluded mineral reserves;
- exploration targets that were not expressed as ranges and that were not accompanied by cautionary statements outlining the target limitations;
- historical estimates that failed to include reference to the source, date, reliability and key assumptions, and that were not accompanied by the required cautionary statements; and
- the use of statements that were overly promotional or misleading, which could potentially result in a misrepresentation under securities legislation.

The CSA indicated that mining issuers should use the Staff Notice as a self-assessment tool to improve their compliance with securities legislation. The Staff Notice reminded mining issuers that first-time written disclosure of mineral resources, mineral reserves or the results of a PEA triggers the obligation to file a supporting technical report. In addition, the CSA recommended that the qualified person responsible for particular technical information review all investor presentations and other website disclosure prior to the posting of such materials.Issuers identified as having disclosure deficiencies are generally requested to correct the deficiency by amending or removing the website disclosure and/or filing a clarifying news release, but could suffer further sanctions until the

deficiency is corrected.**New Rules Governing Rights Offerings in Canada**Significant amendments to the rules governing rights offerings in Canada are scheduled to take effect on December 8, 2015. These amendments are intended to streamline the conduct of prospectus-exempt rights offerings, however the new rules are only applicable to reporting issuers that are not investment funds. In addition, private issuers will no longer be able to conduct rights offerings and will have to rely on other prospectus exemptions. The amendments will repeal NI 45-101 *Rights Offerings*, and the revised rights offering prospectus exemption will be provided in an amended section 2.1 of NI 45-106 *Prospectus Exemptions*.In a rights offering, an issuer raises capital by offering rights to purchase securities to its existing securities holders. Under the existing rules, a prospectus-exempt rights offering is an unappealing way to access financing because of the length of time it takes to complete the offering due to regulatory compliance requirements and because of the cap on the size of the offering, being 25% of the issuer's outstanding securities. The amendments aim to address each of these concerns.The most significant change is the elimination of any requirement for prior regulatory review of the rights offering circular, which will substantially reduce the time frame in which an issuer can complete a rights offering. The exercise period for the rights must be no less than 21 days and no more than 90 days, and must commence the day after the rights offering notice is sent to security holders. The basic subscription privilege must be available, on a pro rata basis, to all security holders resident in Canada. An additional subscription privilege may be included, but under this additional privilege, each holder of a right is entitled to receive no more than a pro rata portion of the securities available after giving effect to the basis subscription privilege.The CSA is adopting a new form of rights offering circular presented in a question-and-answer format, which is intended to make the circular more comprehensible to the general public and easier for issuers to prepare. The circular will not require disclosure about the business of the issuer if that information is already in the issuer's continuous disclosure record on SEDAR. Issuers will no longer be required to send the offering circular to security holders, rather they can file the circular on SEDAR and send a notice informing security holders as to: (i) where they can access the circular; and (ii) certain key facts relating to the offering.In addition, liability for an issuer's continuous disclosure record will attach to securities issued in a rights offering. Issuers must certify in the circular that there are no material facts or material changes which have not been generally disclosed, which gives investors under rights offerings the same rights of actions as those who buy securities in the secondary market. The dilution limit will be increased to 100% of the applicable class of securities (up from the current dilution limit of 25%) in any 12-month period and rights offerings must be priced below the prevailing market price where there is a public market for the securities. The new amendments provide clarity on how market price is determined.Finally, the amendments establish a prospectus exemption for securities issued under stand-by commitments, whereby a person who is not a security holder commits to purchase securities represented by any unexercised rights. Securities purchased under the stand-by commitment prospectus exemption are not subject to a four-month hold period and the same is true of securities purchased under the rights offering prospectus exemption.**New and Amended Prospectus Exemptions***Crowdfunding*On November 5, 2015, the security regulatory authorities in Manitoba, Ontario, Quebec, New Brunswick and Nova Scotia announced the publication of MI 45-108 *Crowdfunding*, which includes a crowdfunding prospectus exemption for issuers and a registration framework for funding portals, which allows businesses to have access to capital from online investors through a funding portal operated by a registered dealer. The objective of MI 45-108 is to enable start-ups and small and medium-sized enterprises to access capital that might otherwise not be accessible while maintaining an appropriate level of investor protection and regulatory oversight.Under MI 45-108, issuers are only able to offer non-complex securities and are required to prepare an offering document that contains all of the information about the issuer and its business that an investor should know before purchasing the issuer's securities. In addition, the aggregate funds raised in reliance on the crowdfunding prospectus exemption must not exceed $1,500,000 within a 12-month period. Investors must complete a Risk Acknowledgement Form requiring them to confirm that they understand the risky nature of the investment and are subject to the following investment limits:

- an investor that does not qualify as an accredited investor is limited to:

    1. $2,500 per investment; and
    2. in Ontario, $10,000 total investment in a calendar year; and

- an accredited investor is limited to:

1. $25,000 per investment; and
2. in Ontario, $50,000 total investment in a calendar year.

Issuers can only distribute securities through a single funding portal that is registered as an investment dealer, exempt market dealer or restricted dealer, and must post the offering document and other permitted materials solely on that funding portal's online platform.MI 45-108 is expected to come into force in the participating jurisdictions on January 25, 2016. The MI 45-108 crowdfunding regime is complementary to the start-up crowdfunding exemptions adopted by British Columbia, Saskatchewan, Manitoba, Quebec, New Brunswick and Nova Scotia on May 14, 2015.*Offering Memorandum*The offering memorandum prospectus exemption (the **"OM Exemption"**) is expected to come into force in Ontario on January 13, 2016. Amendments to the existing OM exemptions in Alberta, New Brunswick, Nova Scotia, Quebec and Saskatchewan will come into force on April 30, 2016. Prior to the amendments, Ontario was the only jurisdiction in Canada not to have an OM exemption.The OM exemption features investor protection mechanisms such as imposing investment limits that range from $10,000 to $100,000 based on the acquisition cost of securities purchased over the preceding 12 months. These investment limits will not apply to accredited investors or to investors who qualify to invest under the family, friends and business associates exemption. The required Risk Acknowledgement Form will have two additional schedules that must be completed by investors who are individuals.While the OM exemption is available to non-redeemable investments funds or mutual funds that are reporting issuers in Alberta, Nova Scotia and Saskatchewan, it will not be available to investment funds in New Brunswick, Ontario and Quebec.*Family, Friends and Business Associates*Ontario has recently adopted the family, friends and business associates exemption (the **"FFBA exemption"**). The Ontario FFBA exemption is substantially similar to exemptions that have existed in other Canadian jurisdictions for some time, which allow issuers to distribute securities to directors, executive officers, control persons and founders of an issuer, as well as family members, close personal friends and close business associates of directors, executive officers, control persons or founders. The issuer or selling security holder must ascertain that a close personal relationship exists with the potential investor. The Companion Policy to NI 45-106 provides additional guidance on determining whether a person is a close personal friend or business associate of a director, executive officer, control person or founder.In connection with this exemption, the OSC requires that the investor sign a Risk Acknowledgement Form acknowledging the risks related to the investment and identifying the relation relied upon. The person at the issuer who claims to know the investor must confirm the relationship and complete and sign the form. The issuer making the distribution must retain the signed form for eight years after the distribution.Unlike other jurisdictions, investment funds cannot rely on the FFBA exemption in Ontario. The FFBA exemption can be used by an issuer or a selling shareholder for any distribution of securities other than a short-term securitized product or under the private issuer exemption. There is no cap on the size of offering where the FFBA exemption may be used and there are no investment limits. Advertising and payment of fees or commissions are inconsistent with the FFBA exemption and are prohibited.*Know Your Investor*The Companion Policy to NI 45-106 has been revised to make it clear that issuers relying on a prospectus exemption must take reasonable steps to ensure that the investor meets the conditions relating to that exemption. It is no longer sufficient for the issuer to simply rely on representations made in the subscription agreement or RAF.When relying on a prospectus exemption, the issuer now has to gather information on: (a) how the issuer identified or located the potential purchaser; (b) what category of accredited investor the potential purchaser claims to be; (c) what type of relationship the purchaser claims to have and with which director, executive officer, founder or control person of the issuer; and (d) how much and what type of background information is known about the potential purchaser in order to reasonably confirm that the potential purchaser meets the condition for the accredited investor exemption. This information must be documented and kept for eight years.

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