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 second quarter of 2013, the Ontario Securities Commission (the "**OSC**") reviewed compliance with Forward-Looking Information ("**FLI**") disclosure requirements and identified areas needing improvement. The OSC also reviewed technical reports filed by mining issuers and found compliance with disclosure requirements to be "unacceptable". The Ontario government passed a budget bill that increases the OSC's ability to share information across borders and prosecute insider trading and fraud violations. The U.S. Securities and Exchange Commission (the "**SEC**") adopted significant amendments that came into force this September. Most notably, the Canadian Securities Administrators (the "**CSA**") published final amendments which would have the effect of eliminating the prohibition against general solicitation in offerings. The final amendments published by the CSA will, when they come into force, increase permissible pre-marketing and marketing activities permitted by issuers and investment dealers in connection with prospectus offerings. Finally, Prime Minister Stephen Harper announced that Canada will adopt a G8 initiative requiring Canadian companies in the extractive sectors to disclose payments to foreign and domestic governments, however, the details of this new initiative have yet to be determined.

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OSC Reviews Forward-Looking Information Disclosure Compliance

The OSC published ***Staff Notice 51-721 – Forward-Looking Information Disclosure*** (the "**Notice**") on June 13, 2013. The Notice summarized the OSC's review of 60 issuers' compliance with the FLI disclosure requirements. The Notice is intended to provide guidance to assist issuers in preparing FLI disclosure.

FLI is the disclosure about possible events, conditions or financial performance that is based on assumptions about future economic conditions and courses of action. The disclosure requirements that govern FLI are found in National Instrument 51-102 – *Continuous Disclosure Obligations* ("**NI 51-102**"). Though FLI disclosure is not mandatory, many companies provide FLI in continuous public disclosure documents, news releases and marketing materials. FLI, when prepared properly, gives investors insight into a company's business and how that company intends to achieve its future objectives. The Notice identified four areas that need improvement, namely:

(1) Clear identification of FLI: Issuers must clearly identify material FLI. In the OSC's review, most issuers provided cautionary language that FLI existed in their continuous disclosure documents but only 47% clearly identified the issuer-specific FLI used. Disclosure should be identified with sufficient clarity so that investors are not confused and treat FLI as historical information.

(2) Material factors or assumptions: Issuers must disclose relevant material factors and assumptions used to develop FLI. They must be reasonable, supportable, entity-specific, and tied to FLI. Where possible, issuers must also quantify their assumptions. The OSC stated that many issuers continue to provide general boilerplate disclosure that does not properly describe key assumptions. In the OSC's review, 24% of issuers did not disclose any material factors or assumptions used to develop their FLI.

(3) Updating previously disclosed FLI: Issuers are required to discuss events and circumstances that are reasonably likely to cause actual results to differ materially from previously disclosed FLI. The expected difference must also be disclosed. In the OSC's review, only 36% provided adequate discussion.

(4) Comparison of actual results to previously disclosed FLI: Issuers must disclose material differences between actual results for the relevant period and any previously disclosed future-oriented financial information or financial outlook FLI. Comparing actual results to previously disclosed FLI is important for investors in their assessment of the effectiveness of management and of current and future business performance. In the OSC's review, only 33% of issuers provided this comparison.

The Notice also provided a list of practice points to assist issuers and their advisors in complying with FLI requirements. Specifically, the Notice emphasized: (i) the importance of providing investors with qualitative, entity-specific and quantitative assumptions, (ii) the timely provision of ongoing progress updates, (iii) the provision of key performance indicators, (iv) the presentation of FLI in a separate section distinct from historical information so as to allow investors to easily identify information constituting material FLI, and (v) the important role played by audit committees and boards of directors in the oversight of FLI.

The Notice confirms that Ontario reporting issuers must improve the quality of FLI they disclose. The OSC warned that issuers who have not complied with FLI disclosure requirements will be expected to take corrective action.

OSC Finds Compliance with Disclosure Requirements "Unacceptable"

The OSC conducted a review of technical reports ("**Technical Reports**") filed by mining issuers under National Instrument 43-101 - *Standards of Disclosure for Mineral Projects* ("**NI 43-101**") and Form 43-101F1. On June 27, the OSC published ***OSC Staff Notice 43-705 – Report on Staff's Review of Technical Reports by Ontario Mining Issuers*** (the "**Report**") summarizing the results. Overall, the OSC stated that qualified persons and issuers must improve their disclosure. The OSC found that 80% of the Technical Reports had some form of non-compliance and 40% had at least one major non-compliance concern. The five areas of major concern identified by the OSC are the following:

(1) Mineral resource estimates: The OSC emphasized that qualified persons and issuers must disclose all assumptions regarding "reasonable prospectus for economic extraction".

(2) Environmental studies, permitting and social or community impact: Any environmental permits and potential social or community factors related to the project must be discussed in a Technical Report for an "advanced property".

(3) Capital and operating costs: The OSC emphasized that qualified persons need to provide more context and justification for capital and operating cost estimates for an "advanced property" and not merely a "single bottom-line number".

(4) Economic analysis: The OSC warned that it is potentially misleading for a Technical Report on an "advanced property" to disclose only pre-tax cash flows and economic outcomes or to disclose only positive metal price changes or only up-side sensitivity analysis.

(5) Interpretation and conclusions: Qualified persons should consider including a table in the "Interpretation and Conclusions" section of Technical Reports that shows significant project specific risks, potential outcomes, mitigating factors and supplementary discussions and possible opportunities.

The OSC provided further guidance to issuers in other areas of concern. Specifically, the OSC stressed that qualified persons should briefly summarize "key findings" about the property, include the

required cautionary language set out in section 2.4 of NI 43-101 every time a historical estimate is disclosed and include all the required statements pursuant to subsection 8.1(2) of NI 43-101 regarding qualified persons' certificates.

The OSC will continue to review Technical Reports and warned that when an issuer has not met the disclosure requirements, they can anticipate a request for refiling, additional disclosure or other staff action.

Securities Act Amendments that Tighten Up Insider Trading Provisions Now in Force

The Ontario Government recently passed a budget bill, the ***Prosperous and Fair Ontario Act (Budget Matters), 2013,*** that contains amendments to the Ontario Securities Act, increasing the OSC's ability to share information across borders and prosecute insider trading and fraud violations. As discussed in a previous Update, WeirFoulds Securities Update, May 2013, the OSC has now changed the definition of "person or company in a special relationship with the reporting issuer" regarding insider trading restrictions. The definition has been expanded to include not only persons and companies associated with those "proposing" to make a take-over bid of a reporting issuer, but also those associated with a party "considering or evaluating" certain actions.

SEC Eliminates Private Placement Solicitation and Advertising Ban

On July 10, the U.S. Securities and Exchange Commission (the "**SEC**") adopted several significant amendments that will become effective on September 23, 2013. Notably, the SEC approved rules to eliminate the prohibition against general solicitation in offerings exempt from registration under Rule 506 of Regulation D and Rule 144A under the Securities Act of 1933, as amended (the "**Securities Act**").

Under the new Rule 506(c), an issuer may utilize general solicitation or general advertising in a Rule 506 offering, provided that (i) all purchasers qualify as accredited investors, (ii) issuers take reasonable steps to verify that the purchasers are accredited investors, and (iii) all other provisions of Regulation D, including resale restrictions, are satisfied.

The SEC also introduced "bad actor" disqualifications which prohibit persons who have engaged in securities fraud or other violations of specified laws from relying on Rule 506.

Finally, the SEC amended Rule 144A. Securities sold under Rule 144A may now be offered to persons other than qualified institutional buyers. Securities can still only be sold to qualified institutional buyers or persons the seller reasonably believes to be a qualified institutional buyer. Unlike the amendments to Rule 506, it is not required that reasonable steps be taken to verify qualified institutional buyer status.

Pre-Marketing and Marketing Amendments to Prospectus Rules

On May 30, 2013, the CSA published **final amendments** (the "**Amendments**") that increase pre-marketing and marketing activities permitted by issuers and investment dealers in connection with prospectus offerings. The Amendments are primarily to National Instrument 41-101 – *General Prospectus Requirements* ("**NI 41-101**"). The Amendments are scheduled to come into force on August 13, 2013.

The CSA stated that the purpose of the amendments are to ease certain regulatory burdens facing issuers and investment dealers while still protecting investors, and to provide a "level playing field" for market participants involved in prospectus offerings by clarifying certain matters.

Specifically, the amendments will: (i) allow non-reporting issuers, through an investment dealer, to determine interest in a potential offering by communicating with accredited investors, and (ii) allow investment dealers to use marketing materials and conduct road shows after the announcement of a bought deal, during the "waiting period" and following the receipt of a final prospectus.

Among other things, the Amendments provide as follows:

Testing the Waters Exemption for IPO Issuers: The Amendments provide an exemption from the general prohibition against pre-marketing by allowing issuers to communicate with "accredited investors" for a period lasting up until 15 days before the filing of a preliminary prospectus, in order to determine interest in a potential initial public offering ("**IPO**"). This exemption is subject to certain requirements. Specifically, issuers must keep a written record of the investors that were solicited and obtain written confirmation from investors that they will keep information about the issuer and the proposed IPO confidential.

Bought Deals: The Amendments expand and clarify the rules for pre-marketing bought deals. Issuers and underwriters can agree to amend an agreement to increase the size of a bought deal offering by up to 100% provided that the other terms of the offering do not change. Bought deal agreements, however, cannot provide the underwriter with an upsizing option. The bought deal agreement may also allow underwriters to be added or removed from the syndicate, although bought deal agreements cannot be *conditional* on syndication. However, the agreement may also contain a "confirmation clause" making the agreement conditional on additional underwriters agreeing to participate, provided that the lead underwriter and issuer sign the bought deal agreement on the same day and the lead underwriter is required to confirm the terms of the agreement within one business day. The CSA believes the amendments will prevent abuse of the

bought deal exemption, but will still enable issuers to benefit from increased demand for the offering.

Prospectus Notices, Standard Term Sheets and Marketing Materials: The Amendments differentiate between standard term sheets and marketing materials. Standard term sheets must contain prescribed cautionary language advising investors to look to the preliminary prospectus for full disclosure of all material facts. Any information concerning an issuer, securities or an offering, aside from contact information, must be disclosed in or derived from the prospectus.

Issuers can also provide more detailed marketing materials. However, such materials will be subject to additional requirements, such as publicly filing the marketing materials on SEDAR. The content of the marketing materials must also be disclosed in or derived from the prospectus.

Road Shows: The amendments clarify the procedures for road shows conducted in conjunction with prospectus offerings. Investment dealers conducting a road show will be required to ask for investors' contact information, maintain records of the information, provide investors with a copy of the relevant prospectus and read a cautionary statement when applicable. There is also a limited exception for road shows for cross-border IPOs in the United States.

Canada Adopts G8 Initiative to Increase Corporate Transparency in Extractive Sector

On June 12, Prime Minister Stephen Harper announced that Canada is adopting a G8 initiative that requires Canadian companies in the extractive sectors, including mining and oil and gas, to disclose payments to foreign and domestic governments. The announcement follows the industry's growing international trend towards improving transparency. The United States and the European Union have adopted similar measures that require extractive companies to report payments to governments.

The federal government will begin by consulting with the provinces, territories, First Nations and aboriginal groups and industry and civil-society stakeholders. The mechanics of the reporting regime, specifically how it will be policed, the disclosure requirements and the penalties for non-compliance, will need to be determined. Issuers will have to consider how internal processes will have to be adapted in order to comply with this new initiative.

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