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WeirFoulds Securities Law Quarterly: Concise, Informative Updates on Securities Law Developments for the Canadian Marketplace – Q2 2016

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Our coverage is succinct and targeted to serve the needs of issuers and their advisors. For more detailed information on our service offerings, please visit us online at weirfoulds.com.

Recent developments include:

- Ontario Securities Commission proposed rule regarding distributions outside of Canada;
- New harmonized exempt distribution reports;
- New prohibition on insider recommending buying/selling securities in Ontario;
- Toronto Stock Exchange proposed amendments to website disclosure and security based compensation arrangement disclosure; and
- Listing of special purpose acquisition corporations ("SPACs") on the TSX.

ONTARIO SECURITIES COMMISSION PROPOSED RULE REGARDING DISTRIBUTIONS OUTSIDE OF CANADA

The Ontario Securities Commission (the "**OSC**") has published for comment OSC Rule 72-503 *Distributions Outside of Canada* (the "**Proposed Rule**"), along with its proposed companion policy, in order to provide certainty to participants in cross-border transactions by setting out specific exemptions that respond to the challenges faced by issuers and intermediaries in cross-border transactions. The comment period closes on September 28, 2016.

In 1983 the OSC published Interpretation Note 1 Distributions of Securities Outside of Ontario (the "**Interpretation Note**") which provides guidance that where "reasonable precautions" have been taken by issuers and intermediaries to ensure that securities distributed out of Ontario "come to rest" with investors outside of Ontario and no other circumstances exist that would question the integrity of the Ontario capital markets, the OSC would take the view that a prospectus was not required nor an exemption from the prospectus requirements.

The Interpretation Note has created uncertainty and confusion amongst issuers and intermediaries in determining whether sufficient steps have been taken to reasonably conclude that securities have "come to rest" outside of Canada and will not "flow back" into Canada. The application of Ontario prospectus requirements using the Interpretation Note's approach is substantially narrower than the approach taken to determining the parameters of a regulator's jurisdiction in recent case law. The OSC and courts have sometimes come to the conclusion that securities laws of a jurisdiction will apply to activities outside of the jurisdiction as long as there is a "real and substantial connection" (or "sufficient connecting factors") to the jurisdiction. The reputation of the jurisdiction's capital markets may be affected by these cases as they often involve serious misconduct.

The Commission's approach to distributions outside Canada has evolved over time, as has case law on provincial jurisdiction over activities outside the province. The Proposed Rule would replace the Interpretation Note, to bring it in line with the current OSC Staff practice.

The purpose of the Proposed Rule is to provide assurance to participants in cross-border transactions by providing explicit exemptions that address the challenges that issuers and intermediaries face in determining whether a prospectus is to be filed or an exemption from the prospectus requirement relied on and the effect of related dealer registration requirements in connection with a distribution outside of Canada.

Generally, the Proposed Rule provides exemptions from the prospectus requirement in respect of a distribution of securities outside of Canada in the following circumstances:

- if the distribution is under a public offering document in the United States or a designated foreign jurisdiction;
- if a concurrent distribution is qualified under a final prospectus in Ontario;
- if the issuer is and has been a reporting issuer in a jurisdiction of Canada for the four months immediately preceding the distribution; and
- all other distributions, but subject to restrictions on resale to a person or company in a jurisdiction of Canada.

The Proposed Rule also provides an exemption from the dealer and underwriter registration requirement for distributions of securities outside of Canada on the following conditions:

- the head office or principal place of business of the person or company is in the United States, a designated foreign jurisdiction or Canada;
- in the case of a distribution to a purchaser in the United States, the person or company is appropriately registered with the SEC and FINRA and complies with all applicable regulatory requirements;
- in the case of a distribution to a purchaser located in a designated foreign jurisdiction, the person or company is registered in a category similar to dealer in that jurisdiction and complies with all applicable regulatory requirements;
- subject to a limited exception, the person or company does not carry on business as a dealer or underwriter from an office or place of business in Ontario;
- other than the issuer or selling security holder, the person or company does not trade securities to, with or on behalf of anyone in Ontario; and
- the person or company relying on the exemption is not registered as a dealer in any jurisdiction of Canada.

Under the Proposed Rule issuers will be required to file a report of distributions outside of Canada through the OSC's portal on proposed Form 72-503F *Report of Distributions Outside of Canada*.

NEW HARMONIZED EXEMPT DISTRIBUTION REPORTS

The new Form 45-106F1 *Report of Exempt Distribution* ("**New Report**") came into effect on June 30, 2016 in all jurisdictions of Canada.

As of June 30, 2016, the New Report must be filed in all Canadian jurisdictions through SEDAR, with the exception of reports to be filed in British Columbia and Ontario, which are filed through the BCSC eServices and Ontario Securities Commission Electronic Filing Portal, respectively.

Issuers are reminded that the New Report is to be filed within 10 days of a distribution, and late fees will apply in certain jurisdictions should the New Report be filed outside of the required time.

For assistance or guidance in preparing the New Report, please contact any of the members of our Securities Practice Group.

NEW PROHIBITION ON INSIDER RECOMMENDING BUYING/SELLING SECURITIES IN ONTARIO

Section 76 of the *Securities Act* (Ontario) (the "**Act**") was amended effective July 1, 2016 to prohibit persons or companies in a "special relationship" with an issuer, that have knowledge of a generally undisclosed material fact or material change of the issuer, from recommending or encouraging another person or company to buy or sell securities of the issuer, other than in the necessary course of business.

The Act provides that a person or company in a "special relationship" with an issuer means:

(a) a person or company that is an insider, affiliate or associate of:

(i) the issuer;

(ii) a person or company that is considering or evaluating whether to make a take-over bid or proposes to make a takeover bid for the securities of the issuer; or

(iii) a person or company that is considering or evaluating whether to become a party, or that proposes to become a party, to a reorganization, amalgamation, merger or arrangement or similar business combination with the issuer or to acquire a substantial portion of its property;

(b) a person or company that is engaging in any business or professional activity, that is considering or evaluating whether to engage in any business or professional activity, or that proposes to engage in any business or professional activity if the business or professional activity is:

(i) with or on behalf of the issuer; or

(ii) with or on behalf of a person or company described in subclause (a) (ii) or (iii) above;

(c) a person who is a director, officer or employee of:

(i) the issuer;

(ii) a subsidiary of the issuer;

(iii) a person or company that controls, directly or indirectly, the issuer; or

(iv) a person or company described in subclause (a) (ii) or (iii) or clause (b) above;

(d) a person or company that learned of the material fact or material change with respect to the issuer while the person or company was a person or company described in clause (a), (b) or (c) above; or

(e) a person or company that learns of a material fact or material change with respect to the issuer from any other person or company described above, including where the first person or company knows or ought reasonably to have known that the other person or company was in such a special relationship.

Please contact us to discuss any questions you may have concerning the above amendment or if you would like us to review your Insider Trading Policy ("**Policy**") to ensure the above restrictions are clearly reflected in your Policy.

TORONTO STOCK EXCHANGE PROPOSED AMENDMENTS TO WEBSITE DISCLOSURE AND SECURITY BASED COMPENSATION ARRANGEMENT DISCLOSURE

The Toronto Stock Exchange (the "**TSX**") published for comment proposed amendments to the TSX Company Manual (the "**Manual**") to (i) introduce website disclosure requirements for TSX listed issuers (the "**Website Amendments**"); and (ii) amend the disclosure requirements regarding security based compensation arrangements (the "**SBC Amendment**"). The comment period ended on June 27, 2016 and the proposed amendment requires the approval of the Ontario Securities Commission following public notice and comment.

Website Amendments

The Website Amendments introduce a new Section 473 to the Manual and amend Section 461.3 as an ancillary matter.

Section 473 would introduce the requirement for listed issuers to maintain a publicly accessible website posting, as applicable, current copies of:

(a) constating documents including articles, trust indentures, partnership agreements, by-laws and other similar documents
(b) corporate policies that impact meetings of security holders and voting;
(c) security holder rights plans;
(d) security based compensation arrangements ("Compensation Arrangements"); and
(d) certain corporate governance documents including charters of board committees, code of ethical business conduct, position descriptions, board mandate, anti-corruption policies and other environmental and social policies and whistleblower policies.

The Website Amendments also simplify the disclosure requirement for issuers that adopt a majority voting policy under Section 461.3 of the Manual. Currently issuers are required to disclose such policies on an annual basis in materials sent to security holders; however, the Website Amendments would instead require issuers to post a copy of the policy on the issuer's website.

Rationale for Amendments

The TSX has proposed the Website Amendments in order to provide participants with ready access to key security holder documents. Even though reporting issuers are required to file certain material documents with Canadian securities regulators, which are publicly available on the System for Electronic Document Analysis and Retrieval ("**SEDAR**"), these documents may sometimes be difficult to find on SEDAR. Additionally, certain of the policies and corporate governance documents required in Section 473 may not be required to be filed on SEDAR; therefore, the TSX believes that Section 473 will be beneficial to security holders by making such documents more readily accessible to the investing public.

The TSX also maintains that the Website and SBC Amendments should reduce listed issuers' annual disclosure obligations regarding majority voting policies and Arrangements by instead requiring that these documents be made publicly available on listed issuers' websites.

The TSX considers that the proposed posting requirements will not be onerous or costly for listed issuers, as most TSX listed issuers currently have websites and disclosure will benefit security holders and the market in general by improving access to up-to-date documents. The TSX also believes that these requirements may reduce the printing and mailing costs of information circulars.

SBC Amendment

Section 613(b) of the Manual has been amended to reflect more current security based compensation arrangements filed with the TSX. The SBC Amendments are proposed by the TSX to simplify the disclosure required in meeting materials and introduce a new form, Form 15, with a user-friendly table for the simplified disclosure.

When seeking security holder approval for a Compensation Arrangement ("**Approval Meetings**"), the materials with the prescribed disclosure of the terms of the Compensation Arrangement must be pre-cleared by the TSX. Materials for meetings other than Approval Meetings, ("**Other Annual Meetings**") must contain all required disclosure, but do not need to be pre-cleared. Materials for Approval Meetings and other Annual Meetings are collectively referred to as "**Meeting Materials**".

The SBC Amendment would require issuers to disclose the items in Form 15 in Meeting Materials for Approval Meetings and Other Annual Meetings, with the exception of one item described below.

Disclosure required for Approval Meetings and Other Annual Meetings in respect of Arrangements:

- Maximum number of securities issuable
- Outstanding awards
- Burn rate
- Eligibility
- Vesting
- Amendments

Additional disclosure required for Approval Meetings:

- Other key terms in sufficient detail as may reasonably be required by a security holder to approve the Compensation Arrangement or amendments.

LISTING OF SPECIAL PURPOSE ACQUISITION CORPORATIONS ("SPACS") ON THE TSX

The TSX has adopted rules allowing the listing of special purpose acquisition corporations ("**SPACs**") on the TSX. The rules governing the listing of SPACs and the completion of a SPAC's qualifying acquisition are contained in Part X of the TSX Company Manual (the "Manual"), which is available at www.tsx.com.

The TSX staff have issued a notice which provides guidance on the following:

1. the contents of the initial public offering prospectus filed in connection with a SPAC's listing on the TSX;
2. documents to be filed with the TSX in connection with the original listing of the SPAC;
3. the contents of the information circular prepared in connection with a SPAC's qualifying acquisition; and
4. the fees payable upon listing of the SPAC and on completion of the qualifying acquisition.

Initial Public Offering Prospectus

The TSX expects that the prospectus in connection with a SPAC's listing on the TSX will include specific disclosure of the following items in addition to the content required under securities laws:

1. the terms of the founders' initial investment in the SPAC, which must include an agreement by the founders not to transfer any founding securities prior to completion of the qualifying acquisition and an agreement that, in the event of a liquidation and delisting, the founding securities will not participate in a liquidation distribution;

2. a statement that the SPAC will not secure debt financing prior to completion of a qualifying acquisition, other than in accordance with Section 1009 of the Manual;
3. the proposed nature of permitted investments for the SPAC's escrowed funds and any intended use of interest earned on the escrowed funds from the permitted investments;
4. the anticipated allocation of funds for administrative and working capital expenses; and
5. the limitation, if any, on the exercise of conversion rights for security holders who vote against a proposed qualifying acquisition.

Documents to be Filed in Connection with the Original Listing of the SPAC

When applying for a listing on the TSX, a SPAC should submit the following items to the TSX concurrently with the filing of the preliminary prospectus with the relevant securities commission:

1. TSX listing application in draft form together with the documents to be filed in support of the application;
2. cheque for the original listing application fee payable;
3. preliminary prospectus;
4. draft escrow agreement governing the initial public offering proceeds;
5. certified copies of all charter documents, including Articles of Incorporation and equivalent documents; and Personal Information Form and a Release and Discharge Relating to Consent to Disclosure of Criminal Record Information, to be completed by every individual who, at the time of listing, will:
   (a) be an officer or director of the SPAC; or
   (b) beneficially own or control, directly or indirectly, securities carrying greater than 10 per cent of the voting rights attached to all outstanding securities of the SPAC.

Information Circular Prepared in Connection with a Qualifying Acquisition

A qualifying acquisition must be approved by a majority of votes cast by security holders (other than founding security holders) of the SPAC at a meeting duly called for that purpose. Prospectus level disclosure of the resulting issuer is required to be included in the information circular, and the information circular must be submitted to the TSX for pre-clearance prior to distribution. If additional conditions on the approval of the qualifying acquisition are required by the SPAC, these conditions must be described in the information circular.

In addition, the SPAC must prepare and file a (non-offering) prospectus containing disclosure about the SPAC and the proposed qualifying acquisition with the applicable Canadian securities regulatory authorities. The prospectus should indicate if a valuation was completed for the qualifying acquisition and, if so, whether the valuation was independent and the method used. If a valuation was not completed, the prospectus should disclose how the consideration paid for the qualifying acquisition was determined.

The information circular may only be mailed once a receipt for the prospectus has been received. TSX staff expects that the prospectus will be included as part of the information circular, to simplify disclosure and to ensure consistent delivery of information.

Listing Fees

A cheque for the application fee as set out in the TSX Listing Fee Schedule is to accompany the application for each of the original listing of the SPAC and the subsequent qualifying acquisition.

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