mcmillan Securities Bulletin

January 2015

Securities Law 2014: The Year in Review and its Legal Implications

2014 saw a number of significant developments in Canadian securities law, including the adoption of the new disclosure requirements addressing gender diversity on boards and senior management positions, adoption of new capital-raising prospectus exemption, proposed amendments to the take-over bid regime, and proposed amendments to the early warning regime. We also saw some progress towards a national securities regulator.

The year also delivered a series of noteworthy judicial decisions involving the right of a shareholder to tender to a bid, treatment of fairness opinions, corporate disclosure in face of a proxy fight, declaration of Aboriginal title by the Supreme Court of Canada, to name a few. The Canadian Securities Administrators (CSA), the Investment Industry Regulatory Organization of Canada (IIROC) and the TSX Venture Exchange (TSXV) issued a number of notices including notices that provide guidance for interpreting securities legislation. A number of legislative changes were adopted or proposed, including changes to the following:

- Early-warning system
- Prospectus exemptions
- Short-term debt and securitized products
- Rights offerings
- Disclosure requirements concerning oil and gas activities
- Model rules for derivatives
- Crowdfunding exemption
- Take-over bids
- OTC derivatives trade reporting
- Disclosure requirements concerning women on boards and senior management

This securities law review provides a brief overview of these key securities law developments. We encourage readers to access and read the full McMillan bulletins for a more in-depth look at the year's notable developments.

I. Progress Towards a National Securities Regulator

- In September 2013, the Ministers of Finance of Canada, Ontario and British Columbia agreed in principle to establish a cooperative capital markets regulatory system with one common regulator. The other provinces and territories have been invited to participate in the proposed cooperative system and on September 8, 2014, the federal government, Ontario, British Columbia, Saskatchewan and New Brunswick signed a Memorandum of Agreement setting out the terms and conditions of the proposed cooperative system.
- The Memorandum of Agreement sets out the principal components of the proposed cooperative system, which would include, among other things, the following elements:
    - Uniform provincial and territorial legislation: a uniform set of securities laws and regulations for each provincial or territorial participating jurisdiction addressing the regulation of capital markets;
    - Complementary federal legislation: federal legislation that addresses criminal matters and matters relating to systemic risk in national capital markets and data collection;
    - Regulator: a single operationally independent capital markets regulatory authority, with an expert board of directors, a regulatory division and an adjudicative tribunal that administers the *Provincial Capital Markets Act* (PCMA) and the *Federal Capital Markets Stability Act*;
    - Council of Ministers: a council of Ministers composed of the Minister of Finance of Canada and the Ministers responsible for capital markets regulation in each participating jurisdiction; and
    - Fees: a single, simplified fee structure allowing for the self-funding of the common regulator without imposing unnecessary or disproportionate costs on market participants.
- On December 5, 2014, the Canadian regulators participating in the Cooperative System provided an update on the progress towards preparing draft initial regulations to be

proposed for adoption under the proposed PCMA. The draft initial regulations were expected to be ready for publication on December 19, 2014, but this deadline has been delayed to early spring of 2015.

- The draft initial regulations under the PCMA will be based on the existing rules of the participating provinces, including the existing national and multilateral instruments. They will propose changes to the existing rules only as needed to eliminate differences in requirements and fit them under the PCMA.

See the McMillan bulletin on this topic here.

II. Corporate Governance Developments

Gender Diversity on Boards and Senior Management Positions in Ontario

- On October 15, 2014, the CSA released amendments to National Instrument 58-101 *Disclosure of Corporate Governance Practices* and Form 58-101F1 *Corporate Governance Disclosure* which will require non-venture reporting issuers (essentially Toronto Stock Exchange (TSX) listed companies) to disclose certain information relating to the representation of women on boards of directors and in executive officer positions and on mechanisms of board renewal.
- The new disclosure requirements are the culmination of a process initiated by the Ontario Securities Commission (OSC) in July 2013. Proposed amendments to Form 58-101F1 were published by the OSC in January 2014. Other participating CSA jurisdictions followed suit in July. The British Columbia and Alberta Securities Commissions did not adopt the new disclosure rules. However, because the OSC adopted the new rules and all TSX-listed companies are reporting issuers in Ontario, the new rules will apply to British Columbia and Alberta companies listed on the TSX.
- Generally, the rules will apply to all proxy circulars sent in connection with an annual meeting filed following an issuer's financial year ending on or after December 31, 2014. If the issuer does not send a management information circular to investors, the disclosure must be contained in the issuer's annual information form.
- The disclosure requirements relate to the following five areas:

    1. Actual Representation: the number and proportion of directors and executive officers (including executive officers of major subsidiaries) who are women.

2. Targets: whether the issuer has adopted a target for the number of women on its board or in executive positions, and the progress the issuer has made in achieving its target. If the issuer has not adopted a target, it must explain why it has not done so.

3. Policies and Objectives: a summary of the objectives of any written policy relating to the identification of women directors, along with a description of the measures taken to ensure the implementation of the policy, the annual and cumulative progress of the objectives, and whether, and if so how, the board or its nominating committee measures the effectiveness of the policy. If the issuer has not adopted such a policy, it must explain why it has not done so.

4. Hiring Process: whether, and if so how, the issuer considers the level of representation of women on the board or in executive officer positions when considering identifying new candidates or making appointments, respectively. If the issuer does not make such considerations, it must explain why it does not.

5. Board Renewal: a description of any term limits for directors or other mechanisms for board renewal, or an explanation why the issuer does not employ such measures.

- The rules follow a "comply or explain" model. If an issuer has not adopted the specified measures or made the specified considerations, the issuer must explain why it has not done so.

For a summary of the new disclosure requirements see the McMillan bulletin on these new requirements here and a memorandum summarizing them here.

Canada Launches Enhanced Corporate Social Responsibility Strategy for Extractive Sector Companies Operating Aboard

- On November 14, 2014, Canada's Minister of International Trade announced an enhanced corporate social responsibility (CSR) strategy, "Doing Business the Canadian Way: A Strategy to Advance CSR in Canada's Extractive Sector Aboard" (the CSR Strategy).

- Under the CSR Strategy, companies are expected to participate in the dispute resolution mechanisms of the CSR Counsellor's Office or Canada's National Contact Point for the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises and to align with widely recognized CSR-related guidelines. Participating companies will be recognized by the CSR Counsellor's Office as eligible for enhance economic diplomacy by the Government of Canada. Companies found not to be

embodying CSR best practices, and those that refuse to participate in the dispute resolution mechanisms, will no longer have access to the Trade Commissioner services and other Government of Canada services. These services include the issuances of letters of support, advocacy efforts in foreign markets and participation in Government of Canada trade missions.

For a summary of the new enhanced CSR Strategy, see the McMillan bulletin here.

III. Notable Judicial Decisions

The Right of a Shareholder to Tender to a Bid Remains Paramount – Hudbay Minerals Inc v Augusta Resource Corporation, British Columbia Securities Commission

- In *Hudbay*, the British Columbia Securities Commission (BCSC) allowed the shareholder rights plan of Augusta Resource Corporation (Augusta), which had been overwhelmingly approved by the shareholders of Augusta, to remain in place until at least July 15, 2014 – 156 days from the announcement of the hostile take-over bid for Augusta made by HudBay Minerals Inc. (the Bid).
- The interpretation and application of National Policy 62-202 *Take-Over Bids – Defensive Tactics*, the policy under which securities regulators consider unsolicited take-over bids and the defensive tactics employed by target boards, has produced inconsistent results across the country and had introduced a level of uncertainty to market participants as to the likely outcome of shareholders rights plan hearings.
- The BCSC noted that the key issue before it was the balancing of interests between the right of each shareholder to accept a take-over bid and the right of the shareholders as a group to determine that a rights plan should stay in place for the benefit of the issuer. The BCSC appears to have confirmed that, at least in British Columbia, the right of individual shareholders to tender to a bid remains paramount.
- The BCSC viewed the following factors as the most relevant in making its decision:
    - length of time Augusta had to identify a superior transaction;
    - likelihood that, if given more time, a superior transaction would be unearthed by Augusta;
    - whether the Bid was coercive;
    - nature of the shareholder approval; and

- likelihood of extension of the Bid.

For the McMillan bulletin on this decision click here.

Treatment of Fairness Opinions in Ontario – Champion Iron Mines Limited (Re), Bear Lake Gold Ltd (Re), and Re Patents Royal Host Inc, Ontario Superior Court of Justice

- In *Champion*, Justice Brown considered an application for approval of a plan of arrangement under of which Mamba Minerals Limited and its wholly owned subsidiary will acquire all of the outstanding common shares of Champion Iron Mines Limited (Champion Iron). Although Justice Brown ultimately concluded that the arrangement was fair and reasonable, he noted that he placed no weight on the fairness opinion included in Champion Iron's management proxy circular. He pointed out that the fairness opinion was not admissible to assist the Court in determining whether the arrangement was "fair and reasonable" because it did not satisfy the civil procedure requirements for expert evidence.
- Justice Brown also further commented that courts are not "rubber stamps." He noted that a court is not a boardroom; its function is judicial and it is not merely a closing agenda item to check off in the course of a transaction. He took issue with plan of arrangement applications that impose tight schedules and require orders within 24 hours, and noted that judges require time to read, understand and assess the evidence put before them in order to discharge their judicial adjudicative function.
- This decision led some commentators to suggest that moving forward a fairness opinion may need to meet the court's formal standards in order to be admissible evidence. However, in two decisions following *Champion*, *Bear Lake Gold Ltd (Re)* and *Re Patents Royal Host Inc*, the Superior Court of Justice affirms that in certain circumstances a fairness opinion does not need to qualify as an expert evidence to assist courts in approving an arrangement.

For the McMillan bulletin on the Champion Iron decision click here.

- In *Bear Lake*, Justice Wilton-Siegel approved a plan of arrangement under which Kerr Lake Mines Inc. would acquire Bear Lake Gold Ltd. In making his decision, Justice Wilton-Siegel specifically addressed the issue of whether a fairness opinion is of relevance to a court in circumstances where the underlying financial analyses are not disclosed in a proxy circular. He noted that, in such circumstances, a fairness opinion was relevant for two reasons:

(a) the use of a fairness opinion by a special committee of board is evidence that the committee considered the fairness and reasonableness of a transaction on the basis of objective criteria to the extent possible; and

(b) the publication of a fairness opinion in a circular (even without the detailed analysis underlying the fairness opinion) allows the shareholders to assess for themselves the integrity of the directors' recommendations and the fairness of the transaction to them from a market perspective.

- We would caution, however, that Justice Wilton-Siegel noted that this current practice may not be appropriate for contested transactions. Accordingly, in plans of arrangement, which may be or are contested, issuers should consider including in proxy circulars summaries of the underlying financial analyses performed by the investment bankers and presented to boards.

For the McMillan bulletin on the Bear Lake decision click here.

- Similarly in *Re Patents*, Justice Newbould approved and issued an interim order authorizing the calling and holding of a special meeting of shareholders to consider and vote on the arrangement under which Holloway Lodging Corporation would acquire all the shares of Royal Host Inc. Justice Newbould noted that the purpose of a fairness option is a commercial one. It is an opinion to be considered by the board of directors and the shareholders in a commercial context, and is not an expert report in the litigation context.

- While Justice Newbould recognized that reliance on the fairness opinion would be a matter for the court hearing the final arrangement application, he referred to the *Bear Lake Gold* decision and agreed with its treatment of the *Champion* decision - a fairness option can be indicia of the fairness and reasonableness of a proposed transaction.

Ontario Court of Appeal Reaffirms that Reliance on Business Judgment Rule requires Compliance by Directors with Duty of Loyalty, Unique Broadband Systems, Inc (Re), Ontario Court of Appeal

- In *Unique Boardband*, the Ontario Court of Appeal reconfirmed that the court's deference to business decisions made by boards of directors, known as the "business judgement rule", will not apply where the directors have breached their statutory duty of loyalty. The Court also confirmed that contractual provisions that have the effect of contracting out of the statutory duties imposed on directors and officers by the Ontario *Business Corporations Act* (OBCA) will not be upheld. The Court agreed with the trial court that the former CEO of Unique Broadband Systems, Inc. (UBS), Gerald McGoey, who was

also a director, breached his fiduciary duty when the board of directors approved extraordinary compensation awards to him. The Court concluded that not only was he not entitled to the payments approved by the board, he was also not entitled to indemnification under contractual or other director and officer indemnities or the 'golden parachute' severance payment upon termination of his employment.

- The Court characterized the business judgment rule as a "*rebuttable presumption*" that in reaching the decision made, the directors had acted on an informed basis, in good faith and in the best interests of the corporation. However, this presumption will only apply where the preconditions of honesty, prudence, good faith and a reasonable belief that one's actions were in the best interests of the corporation, had been met. The Court concluded that the presumption had been rebutted, noting that: "Courts will defer to business decisions honestly made, but they will not sit idly by when it is clear that a board is engaged in conduct that has no legitimate business purpose and that is in breach of its fiduciary duties."

- The Court also found there was no credible evidence of the *bona fides* of the compensation payments. The compensation payments were made without the benefit of independent oversight or third party advice. The compensation payments were not determined by any objective means nor did the UBS board receive any expert advice on an appropriate bonus structure. While disclosure by a director or officer of his personal interest in a transaction was required as an initial step, it was not sufficient to relieve a director of his obligation to act honestly and in the best interests of the corporation.

- The Court also refused to allow the golden parachute payment to McGoey. The Court ruled that corporation and its officers and directors cannot contract out of the fiduciary and related duties set out in section 134(1) of the OBCA. A contractual provision that expressly or impliedly excludes a breach of fiduciary duty as a ground for termination for cause would effectively "eviscerate" the prohibition set out in section 134(3) of the Act. The Court refused to interpret a contractual provision so as to exclude a breach of fiduciary duty as a ground for termination, since this would "eviscerate" the prohibition set out in section 134(3) of the Act.

For the McMillan bulletin on this decision click here.

Corporate Disclosure in Face of Proxy Fight, Smoothwater Capital Partners LP I v Equity Financial Holdings Inc, Ontario Superior Court of Justice

- In *Smoothwater Capital*, the Ontario Superior Court of Justice considered the issue of whether a press release issued by Equity Financial Holdings Inc. (Equity) constituted an illegal solicitation of proxies.

- The Court held that the press release did not constitute a proxy solicitation and dismissed the application. In dismissing Smoothwater Capital Partners LP I's application, the Court noted that the term "solicitation" is to be defined broadly and that the determination of the existence of a solicitation is a question of fact depending on the nature of the communication and the circumstances of its transmission. While the Court agreed that the term "solicitation" is to be defined broadly, the Court did not view that the Equity press release and the circumstances of its transmission constitute solicitation.
- In the Court's view, the Equity press release defended its history, leadership and explained why Equity is combining the date of the Annual and Special Meeting of Shareholders. The Court distinguished prior cases on the basis that the press release stopped short of requesting proxies from shareholders and merely advised shareholders that a management information circular will be provided to shareholders in advance of the Annual and Special Meeting of shareholders. Furthermore, the Court also distinguished prior cases on the basis that the press release was issued by the company and not by shareholders. The company has a corporate position to defend, while shareholders do not.

Ontario Court sets new record date for shareholders' meeting to prevent manipulation of voting process and orders appointment of independent Chair, Concept Capital Management Ltd v Oremex Silver Inc, Ontario Superior Court of Justice

- In *Concept Capital*, the Court had to consider three principal issues:
    - whether a duly called shareholders' meeting was properly postponed or cancelled by the board of directors of Oremex Silver Inc. (Oremex);
    - whether the record date for the rescheduled meeting should be changed in order to prevent shares purportedly issued under a private placement from being voted; and
    - whether an independent Chair should be required for the rescheduled meeting.
- The Court upheld the postponement of the shareholders' meeting on the basis that it could not conclude, on a balance of probabilities, that the postponement was motivated by an improper purpose or bad faith. However, the Court did conclude that the motivation behind the directors changing the terms of a private placement was to dilute the shares of the existing shareholders in order to enhance the directors' prospects of being re-elected. This constituted improper conduct by the directors. Therefore, the Court appointed a new record date for the rescheduled meeting in order to protect

Oremex shareholders from the directors' improper conduct, and also agreed to the appointment of an independent Chair.

- Over the past few years, there has been a significant increase in litigation in the context of proxy fights or contested director elections. The jurisprudence has reflected a judicial approach of providing directors with significant latitude in making decisions in the context of proxy fights. However, courts will generally prevent boards from taking steps that are undertaken for the primary purpose and with the effect of manipulating the voting process for their benefit. Nevertheless, clear evidence of actions undertaken for an improper purpose or in bad faith will be required in order for a court to intervene.

For the McMillan bulletin on this decision click here.

Supreme Court declares Aboriginal title in Tsilhqot'in Nation v British Columbia

- On June 26, 2014, the Supreme Court of Canada, for the first time in history, formally declared that Aboriginal title exists in a specified area of British Columbia historically occupied by the Tsilhoqot'in people.
- The key findings in this case are:
    - The Court has confirmed that Aboriginal title can exist over relatively broad areas of land that were subject to occupation at the time sovereignty was asserted. The term "occupation" means regular and exclusive use of land and is not necessarily limited to village sites.
    - With the exception of clarifying what is required to establish occupation, the decision does not make significant changes to the law of Aboriginal title as it has come to exist over the last several decades.
    - The decision makes clear that provincial laws apply on lands for which Aboriginal title is claimed or proven.
    - In keeping with well-established law, federal and provincial governments continue to have a duty to consult and potentially accommodate in cases where Aboriginal title is asserted but not yet proven.
    - Governments can infringe proven Aboriginal title, provided they meet the established tests for "justification".

- An inevitable question is whether this decision will result in a significant number of other Aboriginal title claims coming forward through litigation. Only time will tell, but it is certainly not inevitable that this will be the case. There are a few passing comments from the Court that will surely be the subject of further discussion in future litigation. For example, the Court makes a brief statement at paragraph 92 to say that projects might need to be cancelled if they begin without Aboriginal consent, title is later proven and continuing the project would be "unjustifiably infringing". Similarly, the Court states at paragraph 86 that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land."
- The decision has raised the expectations of aboriginal groups across Canada. For industry, the key issue will be how the decision will affect treaty negotiations, government-to-government agreements, public policy, and resource allocation.

For the McMillan bulletin on this decision click here.

VI. Legislation – Adoption of Amendments

Amendments to the TSX Company Manual

- On February 13, 2014, the TSX approved amendments to the TSX Company Manual that require each director of a TSX listed issuer to be elected by a majority of the votes cast with respect to his or her election other than at contested meetings where the number of directors nominated for election is greater than the number of seats available on the board.
- The amendments took effect on June 30, 2014, and issuers with fiscal years ending on or after June 30, 2014 must comply with the amendments at their first annual meeting following such date.

See the McMillan bulletin on the adoption of amendments here.

New Prospectus Exemption for Canadian Listed Issuers for Placements to Existing Security Holders

On March 13, 2014, the new capital-raising prospectus exemption for issuers listed on the TSX, the TSXV and the Canadian Securities Exchange (CSE) took effect in all jurisdictions except Ontario and Newfoundland and Labrador. These reporting issuers may raise capital by distributing securities directly to their existing security holders without a prospectus, subject to the following conditions:

- the issuer has a class of equity securities listed on the TSX, TSXV or CSE;
- the issuer has filed all required timely and periodic disclosure documents;
- the offering consists only of the class of equity securities listed on the TSX, TSXV or CSE, or units consisting of the listed security and a warrant to acquire the listed security;
- the issuer makes the offering available to all existing security holders who hold the same type of listed security;
- the issuer issues a news release disclosing the proposed offering, including details of the use of the proceeds; and
- each investor confirms in writing to the issuer that, as at the record date, the investor held the type of listed security that the investor is acquiring under the exemption.

- Later in the year, on November 27, the OSC followed suit and announced certain rule amendments that will give effect to a prospectus exemption for existing securities holders. A summary of these proposed amendments are discussed further below in Section V.

See the McMillan bulletin on the new prospectus exemption here.

Amendments to Regulatory Framework for Registrants

- On October 16, 2014, the CSA published final changes to the regulatory framework for registrants. The amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, National Instrument 33-309 *Registration Information*, National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*, and related companion policies and forms (the Amendments) reflect substantive and housekeeping changes to these instruments.
- The Amendments concern:

(i) exemptions from sub-advisors from certain registration obligations;
(ii) certain exemptions from registration requirements for trading in short-term debt;
(iii) limitations on exempt market dealer activities and clarification of their ability to underwrite offerings; and
(iv) additional experience requirement for Chief Compliance Officers.

- The Amendments came into effect on January 11, 2015. Sections 7.1(5) concerning trading of a security by exempt market dealers, and section 8.22.1 concerning trading of short-term debt, come into force July 11, 2015 to allow for a six-month transition period.

For the McMillan bulletin discussing these amendments click here.

Amendments to National Instrument 51-101: Standards of Disclosure for Oil and Gas Activities

- On December 4, 2014, the CSA released amendments to National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities* intended to promote better disclosure of resources other than reserves and other numerical measure of oil and gas activities of public oil and gas companies. The amendments would promote better disclosure of unconventional resources, provide for increased flexibility for oil and gas reporting issuers worldwide, and harmonize with changes to the Canadian Oil and Gas Evaluation (COGE) Handbook.
- Subject to Ministerial approvals, the amendments will come into force on July 1, 2015. Reporting issuers are nonetheless expected to immediately adhere to the latest requirements of the COGE Handbook pursuant to National Instrument 51-101, including guidelines for the estimation and classification of resources (other than reserves).

V. Proposed Legislative Changes in 2014

Proposed Amendments to National Instrument 45-106: Prospectus and Registration Exemptions Relating to Short-term Debt and Securitized Products

- On January 23, 2014, the CSA published for a 90-day comment period proposed amendments that would modify the credit ratings required to distribute short-term debt, primarily commercial paper (CP). The proposed short-term debt prospectus exemptions would remove the split rating condition that currently requires CP's to have a rating at or above the designated ratings thresholds, and if a second rating is obtained, it could not be below any of the same designated rating threshold (the Short-term Debt Prospectus Exemptions). Instead, a "modified split rating" would require that CPs not have any ratings below a different set of designated rating threshold.
- The Short-term Debt Prospectus Exemptions are intended to:
    - remove the regulatory disincentive for some CP issuers to obtain an additional credit rating;

- provide consistent treatment of CP issuers with similar credit risk; and
- maintain the current credit quality of CP distributed under the Short-term Debt Prospectus Exemption.

- The CSA also proposed to modify its 2011 proposals regarding eligible securitized products investors exemptions. The CSA proposed to amend National Instrument 45-106 as follows:
  - The following prospectus exemptions would be unavailable for the distribution of short-term securitized products:
    - the Short-term Debt Prospectus Exemptions;
    - the private issuer prospectus exemption;
    - the family, close friends and close business associates exemptions;
    - the founder, control person and family exemption; and
    - the offering memorandum exemption.
  - A new "Short-term Securitized Products Prospectus Exemption" would be introduced.
  - Issuers who distribute securities under the Short-term Securitized Products Exemption would be subject to additional initial offering and ongoing disclosure obligations.
  - The CSA also proposed to make certain consequential amendments to National Instrument 25-101 *Designated Rating Organizations* and to Companion Policy 45-106 *Prospectus and Registration Exemptions.*

See the McMillan bulletin on these proposed amendments here.

Proposed Amendments to National Instrument 45-106: Accredited Investor and Minimum Amount Investment Prospectus Exemptions

- On February 27, 2014, the CSA published the proposed amendments to National Instrument 45-106 *Prospectus and Registration Exemptions*. The proposed amendments primarily address the accredited investor prospectus exemption and the minimum

amount investment prospectus exemption, alongside a number of housekeeping and information-gathering changes.

- Currently section 2.3 of National Instrument 45-106 allows accredited investors, purchasing securities as principals, to be exempt from the prospectus requirement. The proposed amendments would require all individual accredited investors, falling under the certain criteria, to complete and sign Form 45-106F9 *Risk Acknowledgment Form for Individual Accredited Investors* prior to, or concurrent to, the purchase of securities.
- Furthermore, the CSA's proposed amendments would broaden the definition of accredited investor to "include family trusts established by an accredited investor" to "include family trusts established by an accredited investor for his or her family, provided the majority of trustees of the family trust are accredited investors."

For the McMillan bulletin on these proposed amendments click here.

The First Concrete Step in the OSC's Exempt Market Reform Initiative: Existing Security Holder Prospectus Exemption

- On November 27, 2014, the OSC announced certain rule amendments that will give effect to the new capital raising prospectus exemption for reporting issuers listed on the TSE, the TSXV, the CSE, and the Aequitas Neo Exchange (the Existing Security Holder Prospectus Exemption). This new exemption is scheduled to come into effect on February 11, 2015.
- The Existing Security Holder Prospectus Exemption is a prospectus exemption for distributions to existing security holders by a reporting issuer (other than an investment fund) of its own securities. It provides investors who have acquired securities of a listed issuer with the opportunity to participate in primary offerings of that issuer. Offerings are limited to the class of equity securities listed on one of the Exchanges, or units consisting of the listed security and a warrant to acquire the same. Securities distributed under the Existing Security Holder Prospectus Exemption will be subject to a four month hold period, subject to certain other conditions being met. All distributions under the exemption will require the filing of a report of exempt distribution.
- In implementing the Existing Security Holder Prospectus Exemption, the OSC is harmonizing itself with the other Canadian jurisdictions, other than Newfoundland and Labrador, all of which have already adopted a similar exemption (the CSA Exemption). However, while the Existing Security Holder Prospectus Exemption is substantially similar to the CSA Exemption, the two are not identical. Notably, the CSA Exemption does not have a carve-out for investment funds, while in Ontario investment funds are excluded in keeping with the policy rationale of facilitating capital raising for small and

medium-sized enterprises. Also, unlike the CSA Exemption, the Existing Security Holder Prospectus Exemption requires that a distribution of listed securities or units by an issuer must not result in an increase of more than 100% of outstanding listed securities of the same class and series.

For the McMillan bulletin on the proposed exemption click here.

Ontario Securities Commission Introduced Four Proposed Prospectus Exemptions in Ontario

- In connection with its Exempt Market Review in August 2013, the OSC published for a 90-day comment period proposals for four new prospectus exemptions in Ontario:
  - an offering memorandum prospectus exemption;
  - a family, friends and business associates prospectus exemption;
  - a prospectus exemption for distributions by a reporting issuer to its existing security holders; and
  - a crowdfunding prospectus exemption.
- The comment period closed on May 28, 2014.

For the McMillan bulletin on the substance and purpose of each of the proposed prospectus exemption click here.

Canadian Securities Regulators Proposed Crowdfunding Exemption

- On March 20, 2014, securities regulators in Quebec, Saskatchewan, New Brunswick, Manitoba, and Nova Scotia published for comment proposed crowdfunding prospectus exemptions, which consist of an integrated crowdfunding prospectus exemption and a start-up crowdfunding prospectus and registration exemption. The four proposed exemptions published by the OSC, as discussed above, have a proposed exemption similar in substance to the integrated crowdfunding prospectus exemption.
- Crowdfunding generally refers to raising small amounts of funds from a potentially large number of people through an internet portal acting as intermediary. While crowdfunding has become an important method for raising project financing, to date it has largely only been used to raise money for specific ventures and has not generally involved the issuance of securities. The proposed exemptions will be welcomed by start-ups and

early-stage businesses that have increasingly been pushing to make a crowdfunding prospectus exemption available in Canada.

For the McMillan bulletin on these proposed amendments click here.

New Report of Exempt Distribution Form Proposed for Domestic and Foreign Investment Funds

- On March 20, 2014, the CSA introduced a proposed new Form 45-106F10 – *Report of Exempt Distribution for Investment Fund Issuers*. When adopted, domestic and international investment funds (or underwriters who distribute securities of such investment funds) will be required to use the Investment Fund Exempt Trade Report in the provinces of Alberta, New Brunswick, Ontario, and Saskatchewan (the Subject Provinces).
- The proposed form significantly expands the disclosure required to be provided by investment funds to securities regulatory authorities in relation to distributions of securities of the investment fund made to investors resident in the Subject Provinces. If adopted, investment funds may be required to use up to three different forms of reports of exempt distributions in Canada:

  (i) the Form 45-106F10 in the Subject Provinces;

  (ii) a Form 45-106F6 in British Columbia; and

  (iii) the traditional Form 45-106F1 in the remaining provinces and territories of Canada.

For the McMillan bulletin on the proposed new Form 45-106F10 click here.

Canadian Securities Regulators Proposed Significant Harmonized Changes to the Take-Over Bid Rules

- On September 11, 2014, the CSA announced a harmonized approach to certain significant amendments to the take-over bid regime aimed at rebalancing the current dynamics between hostile bidders and target boards. The provisions reflecting the actual amendments are expected to be published for comment in early 2015.
- The proposed amendments would require all non-exempt take-over bids to contain the following mandatory features:

  - a mandatory minimum tender condition of more than 50% of the outstanding securities (not including the securities owned by the bidder and its joint actors);

- a 10 day bid extension after the bidder achieves the mandatory minimum tender condition of more than 50% and the bidder announces its intention to take up and pay; and

- a minimum bid period of 120 days (instead of the current minimum bid period of 35 days), subject to the ability of the target board to waive, in a non-discriminatory manner when there are multiple bids, the minimum period to a period of no less than 35 days.

For the McMillan bulletin on the proposed amendments click here.

Canadian Regulators Proposed Amendments to OTC Derivatives Trade Reporting Rules

- On November 14, 2013, the OSC published OSC Rule 51-507 Trade Repositories and Derivatives Data Reporting (the TR Rule) along with OSC Companion Policy 91-507CP Trade Repositories and Derivatives Date Reporting (the Companion Policy), which came into effect on December 31, 2013. Simultaneously, the Manitoba Securities Commission (MSC) and the Autorité des Marchés Financiers (AMF) published local versions of the TR Rule and Companion Policy which were substantially identical to the Ontario version of the TR Rule and Companion Policy.

- Subsequently, on April 17, 2014, the OSC and the MSC published amendments to the TR Rule and Companion Policy, which delayed the effective date of reporting obligations and lessened the burden of reporting obligations on local end-user counterparties by repealing the local counterparty fall-back rule that imposed report monitoring obligations when dealing with foreign dealer reporting counterparties. The AMF adopted some of these changes by way of blank exemption decision 2014-PDG-0051, which delayed the effective date for reporting but did not remove the local counterparty fallback provisions.

- In June 2014, the OSC published another set of amendments to the TR Rule to relieve the reporting burden of certain counterparties to transactions and to make a number of other changes to the rule to clarify its application. Simultaneously, the MSC published a substantially similar set of amendments to the Manitoba version of the TR Rule.

- In July 2014, the AMF published a set of amendments to the Quebec version of the TR Rule. The AMF's amendments create a different process and to determine the reporting counterparty than is used in Ontario and Manitoba. It is expected that prior to the effective date for reporting, the AMF will likely adopt a blanket exemption decision which will harmonize the Quebec version of the TR Rule with the Ontario and Manitoba versions of the TR Rule. However, this is not certain and the difference in proposals across the Canadian jurisdictions may raise issues for market participants trying to

comply with the reporting requirements of the TR Rule in more than one Canadian jurisdiction.

- The Ontario and Manitoba version of the amendments to the TR Rule came into force on September 9, 2014. The Quebec version of the amendments to the TR Rule was opened for comments until August 2, 2014.

See the McMillan bulletin for further details of the amendments here.

Canada Securities Regulators Abandoned Certain Key Amendments to the Early Warning System

- In March 2013, in response to increased shareholder activism and the need (and demand by many public companies) for more transparency, the CSA proposed amendments to Multilateral Instrument 62-104 *Take-over Bids and Issuer Bids*, National Policy 62-203 *Take-Over Bids and Issuer Bids* and National Policy 62-103 *Early Warning System and Related Take-Over Bid and Insider Reporting Issues*, the so-called "early warning system".
- These proposals would have, among other things, lowered the early warning threshold and required the inclusion of certain derivatives in the reporting calculation.
- On October 10, 2014, the CSA announced that they are abandoning the following two key amendments:
  - reducing the reporting threshold from 10% to 5%; and
  - including "equity equivalent derivatives" for the purposes of determining the threshold for early warning reporting disclosure.
- The CSA intend to publish their final amendments in the second quarter of 2015.

See the McMillan bulletin on this topic here.

CSA Proposed Changes to Make Rights Offerings More Attractive to Reporting Issuers

- Rights offerings allow issuers to raise capital while providing existing security holders with the opportunity to avoid dilution of their holdings. Unless an exemption is available, a rights offering must be made pursuant to a prospectus prepared in accordance with applicable Canadian securities laws.

- On November 27, 2014, the CSA published for a 90-day comment period proposed amendments to the current prospectus-exempt rights offering regime, designed to make these offerings more attractive to issuers.
- The key changes under the proposed exemption affect the following areas:
    - disclosure requirements;
    - dilution limit;
    - protections of security holders;
    - subscription pricing;
    - no exemption for non-reporting issuers; and
    - stand-by exemption.

See the McMillan bulletin on this topic here for a detailed summary of the proposed amendments.

VI. Notices and Guidance

CSA Staff Notice 51-341 *Continuous Disclosure Review Program Activities for the fiscal year ended March 31, 2014*

- On July 17, 2014, the CSA released Staff Notice 51-341 *Continuous Disclosure Review Program Activities for the fiscal year ended March 31, 2014* (Staff Notice), which summarizes the results of the reviews the CSA conducted under their Continuous Disclosure (CD) Review Program. The program was established to review the compliance of the CD documents of reporting issuers to ensure such documents are reliable and accurate.
- The CSA completed a total of 991 reviews, 221 full reviews and 770 issue oriented reviews (IORs), in fiscal 2014. An IOR focuses on a specific accounting, legal or regulatory issue, while a full review is broad in scope and covers many types of disclosure.
- The Staff Notice identified certain areas where common deficiencies were found during the CSA's review of the CD documents. Deficiencies were found in the following areas:
    - financial statements specifically deficiencies relating to disclosure of interests in other entities, revenue recognition, and impairment of assets;

- management's discussion and analysis specifically deficiencies relating to non-GAAP measures, forward looking information, and additional disclosure for venture issuers without significant revenue; and
- other regulatory disclosure specifically deficiencies relating to mineral projects, executive compensation, and filing of news releases and material change reports.

- The Staff Notice includes detailed examples to help reporting issuers address these deficiencies and provides practical guidance and suggestions for improving disclosure.

IIROC Issued Guidance on Underwriting Due Diligence

- On December 18, 2014, the IIROC issued a guidance regarding due diligence conducted by underwriters on public offerings of securities in Canada. The guidance is meant to foster consistency and enhanced standards amongst IIROC Dealer Members.
- While due diligence is a fluid process, and underwriters are expected to tailor to the due diligence they conduct to the particular issuer and industry, there are key principles that IIROC expects underwriters to follow and which the guidance builds on. Overall, underwriters are expected to not put "form over substance" and are expected to exercise their professional judgment in respect of the due diligence they conduct on an issuer.
- The guidance sets a number of key principles respecting underwriting due diligence including
  - policies and procedures for underwriting due diligence;
  - due diligence plans;
  - due diligence Q&A sessions;
  - business due diligence;
  - legal due diligence;
  - reliance on experts and other third parties;
  - reliance on lead underwriter;
  - due diligence record-keeping; and

- the role of supervision and compliance.

TSXV Issued Guidance on Discretionary Waivers of Minimum Pricing Requirements

- The TSXV issued a bulletin providing guidance to issuers on the circumstances in which it will consider waiving its $0.05 minimum pricing requirements for a financing involving the issuance of share of a company listed on the TSXV. While the TSXV maintains that it is not generally amenable to waiving the $0.05 minimum pricing requirements, it recognizes that in certain circumstances this minimum requirement may complicate an issuer's ability to conduct a financing.
- The TSXV has confirmed that it will consider waiver requests on a case-by-case basis, with the following circumstances being treated more favourably:

  (i) rights offerings;

  (ii) pending share consolidations; and

  (iii) other discretionary waivers satisfying certain criteria.

Proxy Advisory Firm Regulation – CSA Proposed Guidance, not Rules

- The CSA have released for comment proposed National Policy 25-201 *Guidance for Proxy Advisory Firms* (the Proposed Policy). The Proposed Policy provides guidance and recommendations to proxy advisory firms, including the expectations of the CSA, with respect to four areas:

  (iv) Conflict of interest

  (v) Transparency and accuracy of vote recommendations

  (vi) Development of proxy voting guidelines

  (vii) Communications with clients, market participants, the media and the public.

See the McMillan bulletin on this topic here.

CSA Publishes Model Rule on Mandatory Central Counterparty Clearing of OTC Derivatives

- On January 16, 2014, the CSA Over-the-Counter Derivatives Committee (CSA Committee) published CSA Staff Notice 91-304, which includes the Model Provincial Rule on Customer Clearing and Protection of Customer Collateral and Positions together with its explanatory guidance (the Model Rule). The Model Rule sets out requirements for the treatment of customer collateral by intermediaries, including requirements relating to the segregation and use of customer collateral in over-the-counter (OTC) derivatives transactions. The Model Rule is aimed at ensuring that customer clearing is done in a manner that protects customer collateral and positions and improves derivatives clearing agencies' resilience to clearing member defaults.
- On December 19, 2013, the CSA Committee published CSA Staff Notice 91-303 *Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives* (the Staff Notice 91-303). This draft rule sets out the requirements for central counterparty clearing of OTC derivatives transactions and aims at increasing transparency and the overall mitigation of risk in the OTC derivatives market. In conjunction with this publication, certain members of the CSA published draft Rule 24-503 *Clearing Agency Requirements* (the Draft Rule 24-503). Draft Rule 24-503 sets out application process requirements for recognition as a clearing agency or exemption from the recognition as a clearing agency or exemption from the recognition requirement. The Model Rule, Staff Notice 91-303, and Draft Rule 24-503 all relate to central counterparty clearing. The CSA is, therefore, urging market participants to consider them comprehensively.

See the McMillan bulletin on this topic here and here.

by Amandeep Sandhu and Marina Tran, Student-at-Law

For more information on this topic, please contact:

Vancouver Amandeep Sandhu 604.691.7448 amandeep.sandhu@mcmillan.ca