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mcmillan Securities Bulletin

Securities Law 2013: The Year In Review And What's Ahead For 2014

2013 saw a number of significant developments in securities law, including a strong push for a national securities regulator, notable developments for insider trading, a new proposed regulatory regime for shareholder rights plans, and a proposal to address gender diversity on boards and senior management. The year also delivered a series of noteworthy judicial decisions involving proxy battles, defensive tactics, and disclosure issues involving assessments of materiality, to name a few. The Canadian Securities Administrators issued a number of notices providing guidance for interpreting securities legislation, and multiple legislative changes were adopted or proposed, including changes to the following:

- Early-warning system
- Shareholder rights plans
- Trade-based exemption for finders
- Model rules for derivatives
- Security-based compensation arrangements
- Requirements for dealers, advisers and investment fund managers
- Proxy voting infrastructure
- Proxy advisory firms
- Auditor oversight
- Prospectus exemptions
- Reverse takeovers
- Underwriting conflicts

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. A First Step Towards a National Securities Regulator

- On September 19, 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.
- The announcement of the cooperative system follows the 2011 Supreme Court of Canada ruling that the Government of Canada's attempt to impose a common securities regulator on the provinces and territories was unconstitutional.

- The proposed cooperative system would include, among other things, the following elements:
  - a common regulator with a head office in Toronto and regulatory offices located in each participating province, directed by an expert board of directors appointed by the council of Ministers that will be independent, have relevant capital markets-related expertise, and be broadly representative of the regions of Canada;
  - a council of Ministers composed of the Minister of Finance of Canada and the Ministers responsible for capital markets regulation in each participating jurisdiction;
  - a uniform set of securities laws and regulations for each provincial or territorial participating jurisdiction addressing the regulation of capital markets;
  - federal legislation that addresses criminal matters and matters relating to systemic risk in national capital markets and data collection; and
  - a single, simplified fee structure allowing for the self-funding of the common regulator without imposing unnecessary or disproportionate costs on market participants.
- Under the agreement in principle, the federal government has agreed to provide transitional funding to those provinces and territories that will lose net revenue as a result of transitioning to the cooperative system.
- Based on the timeline set out in the agreement in principle, the parties expect the common regulator to be operational by July 1, 2015, following, among other things, the execution of an agreement by each of the participating jurisdictions on or before May 30, 2014 setting out the terms and conditions for the integration of their securities regulatory body into the common regulator.
- It remains to be seen how many of the other provinces and territories will join the cooperative system. Based on media reports relating to the announcement of the proposed cooperative system, Quebec and Alberta continue to oppose a national regulator.

See the McMillan bulletin on this topic here.

II. Corporate Governance Developments

Gender Diversity on Boards and Senior Management Positions in Ontario

- In July 2013, the Ontario Securities Commission (OSC) initiated a public consultation seeking input on OSC Staff Consultation Paper 58-401 *Disclosure Requirements Regarding Women on Boards and in Senior Management*. The consultation paper was published following a request received in June 2013 from the Minister of Finance, Charles Sousa, and the then Minister Responsible for Women's Issues.
- On January 16, 2014, the OSC published for a 90-day comment period a number of proposed amendments to Form 58-101F1 of National Instrument 58-101 *Disclosure of Corporate Governance Practices* which would require TSX-listed issuers (and other non-venture issuers) that are reporting issuers in Ontario to provide disclosure regarding the following matters on an annual basis:
    - director term limits;
    - policies regarding the representation of women on the board;
    - the board's or nominating committee's consideration of the representation of women in the director identification and selection process;
    - the issuer's consideration of the representation of women in executive officer positions when making executive officer appointments;
    - targets regarding the representation of women on the board and in executive officer positions; and
    - the number of women on the board and in executive officer positions.
- These proposed amendments reflect the recommendations contained in a report delivered to the Minister of Finance and Minister Responsible for Women's Issues on December 18, 2013.

For McMillan bulletins on the requirements of the corporate governance guideline click here and here.

Revised OSFI Corporate Governance Guidelines

- In January 2013, the Office of the Superintendent of Financial Institutions (OSFI), the regulator for federally regulated financial institutions such as banks, trust companies,

insurers and other similar financial institutions (FRFIs), released its final version of the revised Corporate Governance Guideline (Guideline). The final version reflects OSFI's response to commentary received on the first version published in August 2012. FRFIs have until January 31, 2014 to fully implement the guideline.

- The Guideline deals with various corporate governance matters, including board duties and composition, oversight functions and internal controls, risk appetite frameworks and risk committees, audit committees, and OSFI's assessment of governance effectiveness.
- Notable changes from the initial draft guideline include:
    - Emphasis that the Guideline is not expected to apply to all institutions equally and recognition that FRFIs may have different corporate governance practices depending on their size; ownership structure; nature, scope and complexity of operations; corporate strategy; and risk profile.
    - Relaxation of some requirements:
        - periodic independent third party reviews of board and committee effectiveness and oversight functions (changed to regular self-assessments *occasionally* with the assistance of independent external advisors);
        - a designated Chief Risk Officer (changed to a senior officer who has responsibility for the oversight of all relevant risks across the FRFI, recognizing this officer may have a dual role);
        - a separate risk committee (the guideline clarifies that the boards of smaller, less complex FRFIs may perform the function of the risk committee, but should have the requisite collective skills, time, and information); and
        - hard reporting lines from the Chief Risk Officer role to the board and risk committee, as opposed to the CEO (changed to "unfettered access" but a direct reporting line "for functional purposes").

For the McMillan bulletin on the OSFI Guideline click here.

III. The End of the Canadian Wrapper Requirement for Private Placements in Canada

- Foreign issuers seeking to offer securities by way of private placement in Canada have long faced many disclosure rules which necessitate the preparation of a "Canadian wrapper" to supplement their offering documentation.
- On April 23, 2013, the OSC, on behalf of other Canadian securities regulators, issued an order granting exemptive relief to a group of applicant U.S. and Canadian broker-dealers from having to prepare supplemental Canadian disclosure in the context of a global offering.
- Two days later, the OSC published proposed amendments to OSC Rule 45-501 – *Ontario Prospectus and Registration Exemptions* and Form 45-106F1. The proposed amendments would apply to offerings of "designated foreign securities" to "permitted clients" only, and have the effect of codifying much of the relief granted in the order.
- The trend towards liberalizing the Canadian disclosure requirements and eliminating the need for a Canadian wrapper will be welcomed by foreign issuers and sophisticated Canadian investors who may otherwise have been excluded from investment opportunities because of the cost disincentive and regulatory burden posed with respect to foreign offerings.

For the McMillan bulletin on the end of the Canadian wrapper requirement click here.

IV. Notable Developments in Insider Trading

The following summarizes some of 2013's principal legislative changes and decisions in the area of insider trading.

Amendments to Insider Trading Provisions of Ontario Securities Act expands definition of "special relationship" in the take-over context

- In June 2013, the Ontario Government made amendments to the Ontario Securities Act which 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" a take-over bid.

Unsolicited Expressions of Interest May Trigger Insider Trading Restrictions – Re Lambert, Alberta Securities Commission

- In *Re Lambert*, the Alberta Securities Commission (ASC) took issue with trades made by a CEO after his company received a non-binding expression of interest from a third party.
- The CEO had previously indicated to an investment banker that he would be receptive to considering a proposal. The expression of interest was unsolicited and contained no reference to any terms, price, or the nature of a possible transaction; and no agreement on a transaction was reached until two months after the expression of interest. Those facts led the company to conclude that the expression of interest did not amount to material information. However, after the transaction closed, securities regulators brought proceedings against the CEO, who admitted, in settling the case, that his trading was inappropriate and contrary to the public interest because the facts suggested the company could in the near future be in play.
- The CEO reached a settlement agreement with the ASC by agreeing to pay the ASC $229,000, to refrain from becoming a director or officer of a reporting issuer for two years, and to refrain from trading securities except through a registered representative for two years.
- The ASC stressed in a press release that "it is important that senior company officials - insiders - understand that insiders cannot trade while in possession of undisclosed material information; whether or not that material information must yet be disclosed under our continuous disclosure regime."

V. Notable Judicial Decisions

Reliance On Counsel May Be A Mitigating Factor But Not an Excuse - Photo Violation Technologies Corp (Re), British Columbia Securities Commission

- In *Photo Violation*, the British Columbia Securities Commission (BCSC) made it clear that reliance on legal counsel doesn't allow directors to avoid liability under securities laws when a company issues shares without appropriate exemptions from the registration and prospectus requirements.
- The BCSC sanctioned a director and the president and CEO of a parking technology company for illegally distributing securities (the purchasers did not qualify for the exemptions relied on).
- Noting the considerable steps the respondents took to ensure compliance with the *Securities Act*, including obtaining legal advice and meeting with commission staff with a

view to addressing compliance issues of the company, the panel held that engaging a law firm or advisor to assist in compliance with regulatory compliance were major mitigating factors but did not relieve the respondents from liability.

- Ultimately, in connection with a private placement, the company and its directors are responsible for making sure that purchasers of securities can rely on the prospectus exemptions that they say they are relying on.

Disclosure of "Spectacular" Drill Results - Canaco Resources Inc., Re, British Columbia Securities Commission

- In *Canaco*, the BCSC dismissed allegations that Canaco and four of its directors failed to immediately disclose positive drill results and acted contrary to the best interests of Canaco by issuing themselves stock options with knowledge of the undisclosed drill results.
- On December 3, 2010, the Board of Canaco issued options to directors and management when the company had undisclosed drill results from eight drill holes which the directors described as "spectacular", "fantastic news", and "just beautiful" in internal emails. These drill results were later " disclosed in three separate news releases published after the grant, and two of the three releases described the results as "spectacular".
- Based on evidence from geologist experts, the BCSC panel found that the drill results for the eight holes were not material. The results were consistent with the information that Canaco disclosed in previous news releases and would not affect a mineral resource estimate.
- The BCSC panel also concluded that the language in the news releases and the opinion of the directors was not relevant to an assessment of materiality. The test for materiality is objective, and what an issuer might say in a news release or the opinion of directors is not determinative.

Early Warning Required - Disclosure Requirements in Proxy Contests - Genesis Land Development Corp. v Smoothwater Capital Corporation, Alberta Court of Queen's Bench

- In *Genesis Land*, the Alberta Court of Queen's Bench provided some guidance on the early warning requirements in proxy contests for persons acting "jointly or in concert."
- An activist shareholder, along with the other respondent shareholders, had a voting agreement to replace the applicant's existing board with a slate of directors of their own choosing but did not abide by the early warning requirements.

- The court found the respondents to be acting 'jointly or in concert' and the disclosure in the early warning reports and the dissident proxy circular to be inadequate. As a result, the annual general meeting was postponed for one month and the result of the hearing was made public for the benefit of shareholders.
- The respondents had submitted to the Court that, based on their interpretation of the instrument, the issue of acting "jointly or in concert" was only relevant in a take-over bid context or in connection with another agreement to acquire shares.
- The Court disagreed, stating that early warning disclosure is required where any person acquires beneficial ownership of, or control or direction over, more than 10% of a class of securities of an issuer. This includes disclosure of any persons acting jointly or in concert with the acquiror if there is any "agreement, commitment or understanding" to "exercise voting rights" in respect of the issuer. The subject matter of the agreement, commitment or understanding does not need to involve a take-over bid or other acquisition of shares.
- The Court also provided guidance on when parties will be considered to be acting jointly or in concert, noting that it is a question of fact, and that the agreement, commitment or understanding need not be formal or written. Circumstantial evidence, such as family relationships, communications between the parties and attendance at meetings together can be taken into account in determining whether the parties were making a concerted effort to bring about a specified objective.

Ontario court provides clarification on requisitioned shareholders' meetings - Wells v Bioniche Life Sciences Inc., Ontario Superior Court of Justice

- In *Wells*, the Ontario Superior Court of Justice provided some clarity and guidance on how a Court will interpret the relevant provisions of the *Canada Business Corporations Act* (CBCA) in determining whether a dissident shareholder has the right to requisition and call a shareholders' meeting.
- The decision confirms that although a board may opt to accept a meeting requisitioned by a beneficial holder, it is not obligated to do so as only registered shareholders are entitled to requisition shareholders' meetings under the CBCA.
- The decision also confirms that a valid requisition regarding a meeting to elect directors should contain the names and some biographical details of the proposed nominees, and suggests that a requisitioning shareholder may call a meeting pursuant to section 143(4) of the CBCA even if the directors validly relied on a section 143(3) exception to decline to call the requisitioned meeting.

For the McMillan bulletin on this decision click here.

Break fees and takeover bid defensive tactics - Alamos Gold Inc. v Aurizon Mines Ltd., British Columbia Securities Commission

- *Alamos* is a BCSC decision regarding an application by Alamos Gold Inc. (Alamos) to have the shareholder rights plan of Aurizon Mines Ltd. (Aurizon) cease traded along with the competing white knight bid by Hecla Mining Corporation (Hecla) in the face of Alamos' hostile bid for Aurizon. At issue was the $27.2 million break fee that Aurizon would have to pay to Hecla should Alamos have acquired a certain amount of Aurizon shares.
- Alamos asked the BCSC to consider this break fee an unusual defensive tactic in the face of a takeover bid which was included in the Hecla transaction solely to defeat the Alamos bid.
- Aurizon argued that the inclusion of a break fee was necessary in order to obtain a deal with Hecla and the terms of the Hecla deal were negotiated vigorously. Evidence was presented that the board of Aurizon reviewed the value of the Hecla transaction as a whole and concluded that the transaction was in the best interests of Aurizon.
- The BCSC agreed and concluded that the break fee was a "necessary element of an alternative transaction the Aurizon board negotiated for its shareholders to consider, rather than an attempt to frustrate the Alamos offer." The BCSC allowed the break fee to remain and the Hecla transaction to continue. The BCSC also stated the break fee was within market range for these types of transactions and the 33 1/3% trigger was not unreasonable.

For the McMillan bulletin on this decision click here.

Statutory Cause of Action Restricted to Primary Market Purchasers – Tucci v Smart Technologies, Ontario Superior Court of Justice

- In *Tucci*, the Ontario court confirmed that the statutory cause of action for misrepresentation in a prospectus pursuant to section 130(1) of the *Ontario Securities Act* does not apply to secondary market purchasers, even when those purchasers buy securities during an ongoing IPO.
- This case involved a class action certification suit, where the defendants consented to certification of the action but contested the proposed plaintiffs' attempt to include secondary market purchasers within the defined class. The proposed plaintiffs had purchased shares of the defendant through the secondary market during the IPO.

- In reaching this decision, Justice Perell held that a secondary market purchaser purchases securities offered by a secondary market vendor, and not through a prospectus offering, likely at a different price, and on different terms of sale than primary market purchasers.

VI. Legislation –Amendments

Amendments to NI 54-101: Communication with Beneficial Owners of Securities of a Reporting Issuer (Notice and Access)

- In February 2013, the CSA adopted amendments focused on modernizing and improving communications between reporting issuers and their shareholders by allowing a greater use of the internet to deliver proxy-related materials.
- Issuers may now use notice-and-access to send meeting materials to shareholders by (i) posting relevant materials on SEDAR and a non-SEDAR website, and (ii) sending shareholders a notice package, containing (i) a notice that contains certain required information, (ii) in the case of registered holders, a form of proxy, and (iii) if applicable, permitted financial statements and MD&A. The notice package can be sent by mail or, if prior consent has been obtained, electronically.
- The changes will permit issuers to reduce the volume of meeting materials that are required to be printed and mailed, which will reduce printing and posting costs and simplify the delivery process for meeting materials.

See the McMillan bulletin on notice and access here.

Amendments to NI 51-103: Ongoing Governance and Disclosure Requirements for Venture Issuers

- In July 2013, the CSA provided an update that it would not be proceeding with proposed National Instrument 51-103 Ongoing Governance and Disclosure Requirements for Venture Issuers. The proposed instrument addressed continuous disclosure and governance obligations, disclosure for prospectus offerings, and certain exempt offerings that require prescribed disclosure.

Amendments to NI 41-101: General Prospectus Requirements (Marketing Public Offerings)

- In August 2013, the CSA adopted amendments to increase the range of permissible pre-marketing and marketing activities in connection with prospectus offerings. The new rules will provide additional flexibility and certainty for issuers and investment dealers.
- The key amendments will:

- allow non-reporting issuers, through an investment dealer, to "test the waters" in potential initial public offerings by communicating with accredited investors;
- permit and set out the conditions under which investment dealers can use marketing materials and conduct road shows after the announcement of a bought deal and following the filing of a preliminary prospectus; and
- clarify the circumstances in which bought deals and bought deal syndicates can be enlarged.

See the McMillan bulletin on this amendment here.

VII. Legislation – Proposed Amendments

BC Notice 2013/01: BCSC proposes to revoke trade-based exemption

- In January 2013, the BCSC gave notice that it is considering revoking a trade-based exemption which permits finders to place prospectus-exempt (private placement) securities without the requirement for registration under the *Securities Act (British Columbia)*.
- the BCSC proposes to revoke the exemption because:

  (a) the impact on capital raising will be negligible;

  (b) those relying on the exemption are not complying with its investor protection conditions; and

  (c) private placement market investors will be better protected if they purchase securities through registrants.

- The proposed revocation of the exemption is noteworthy to persons receiving a finder's fee in a private placement. If the exemption is revoked any finder who is considered to be in the business of trading securities who places a British Columbia resident in a private placement will be required to register as a dealer or an exempt market dealer, as the case may be.

See the McMillan bulletin on this topic here.

Amendments to Early Warning System and Related Take-Over Bid and Insider Reporting Issues

- 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."
- The proposals would, among other things:
    - lower the threshold for public disclosure of ownership of voting or equity securities of public companies from 10% to 5%;
    - require that, in calculating such holdings, voting or equity securities in respect of which a person has an economic interest be included regardless of whether such person beneficially owns the securities;
    - prevent eligible institutions from using the alternative monthly reporting system if they solicit or intend to solicit proxies on matters relating to the election of directors or major corporate transactions; and
    - require more detailed disclosure on the purpose of reported acquisitions.

See the McMillan bulletin on this topic here.

Proposed National Instrument 62-105: Security Holder Rights Plans

- In March 2013, the CSA published for comment a proposed instrument to security holder rights plans as part of a broader and ongoing CSA initiative to review defensive tactics issues, including, for example, the role of private placements during take-over bids. The proposed amendments will establish a regulatory framework for security holder rights plans in all CSA jurisdictions.
- In general, the proposed regime will allow rights plans adopted by boards of directors of issuers to remain in place, provided majority security holder approval of the rights plan is obtained within specified times. The proposed regime is intended to address concerns about the limited ability of an issuer to respond to an unsolicited or hostile take-over bid when adopting a rights plan, while ensuring that a majority of shareholders of the issuer are supportive of the rights plan measure proposed by the issuer's management.

- On March 14, 2013, the Autorité des marchés financiers (AMF) published a consultation paper regarding its "*Alternative Approach to Securities Regulators' Intervention in Defensive Tactics.*" The AMF approach is more general and far reaching in that it applies not just to rights plans but to all defensive measures adopted by a board to fend off a hostile bid. This approach would bring the Canadian regime with respect to defensive measures more in line with the US (Delaware) regime, where boards have generally been able to "just say no" to a hostile bid by implementing a rights plan or other effective defensive measure.

- In February 2014, the Quebec government released the *Report of the Task Force on the Protection of Québec Businesses*. The report sets out a series of recommendations regarding hostile takeover bids that would apply to public companies governed by the *Business Corporations Act* (Quebec) (QBCA), including amending the QBCA to allow for voting rights that increase the longer that shares are held and the prohibition of certain post-bid transactions by targets subject to a hostile takeover bid (undertaken for the benefit of the bidders), unless bidders had obtained prior target board consent. The Minister of Finance indicated that he intends to move quickly to propose legislative amendments to the QBCA.

See the McMillan bulletins on defensive tactics here and here.

Multilateral CSA Staff Notice 91-302 Updated Model Rules

- On December 6, 2012, the OTC Derivatives Committee of the CSA published for comment CSA Staff Consultation Paper 91-301, which set out two model provincial rules and accompanying model explanatory guidance (Draft Model Rules) on trade repositories and derivatives data reporting (TR Rule) and the determination of products which will be treated as derivatives for purposes of the TR Rule (Scope Rule) aimed at increasing transparency in the OTC derivatives market..

    - The TR Rule - The purpose of the TR Rule is to improve transparency in the derivatives market and to ensure that designated trade repositories operate in a manner that promotes the public interest.

    - The Scope Rule - The Scope Rule provides guidance as to which types of contracts or instruments will be treated as derivatives or securities, or are excluded in whole or in part from regulation.

- On June 6, 2013, as a response to the public comment with respect to the Draft Model Rules, the staff from the CSA in Alberta, British Columbia, New Brunswick, Nova Scotia, and Saskatchewan published Multilateral CSA Staff Notice 91-302 *Updated Model Rules*

– *Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting* (Updated Model Rules)

- These jurisdictions have not yet published province-specific rules as they must first implement the necessary legislative amendments with the intent that the final multilateral instrument be harmonized with rules implemented in Manitoba, Ontario, and Quebec, each of which has published a final version of a province-specific rule based on the Updated Model Rules.

See the McMillan bulletins on this topic here and here.

CSA Consultation Paper 54-401: Review of Proxy Voting Infrastructure

- In August 2013, the CSA published for comment Consultation Paper 54-401 *Review of the Proxy Voting Infrastructure* to seek input from stakeholders on Canadian proxy voting infrastructure.
- In particular, the CSA identified two issues for further examination:

  (1) whether accurate vote reconciliation is occurring within the proxy voting infrastructure, and

  (2) determining the type of end-to-end vote confirmation system that should be added to the proxy voting infrastructure.

- The comment period closed on November 13, 2013. In October 2013, the CSA issued Staff Notice 54-302 stating that the CSA intends to engage in further consultations with market participants targeted at specific topics and that certain jurisdictions intend to hold further consultations in early 2014.

See the McMillan bulletin on this topic here.

Amendments to NI 25-301: Proxy Advisory Firms

- In September 2013, the Canadian Securities Administrators (CSA) provided an update on review of proxy voting infrastructure. In June 2012, the CSA sought comments from market participants on Consultation Paper 25-401 *Potential Regulation of Proxy Advisory Firms*. Based on the comments received, the CSA had concluded that a policy-based approach is the appropriate response and is in the process of developing this approach. In connection with this, in August 2013 the CSA published for comment Consultation Paper 54-401 *Review of the Proxy Voting Infrastructure*, discussed in more detail under "Proposed Legislative Changes for 2014" below.

Amendments to NI 52-108: Auditor Oversight

- In October 2013, the CSA published for comment proposed amendments to replace the current National Instrument 52-108 *Auditor Oversight* ("NI 51-108") in its entirety. The main focus of the amendments is the change of the triggers for when a public accounting firm is to deliver to the regulator a notice relating to remedial action imposed by the Canadian Public Accountability Board (CPAB).
- The CSA is also proposing to amend "change in auditor" rules so that reporting issuers provide more timely and complete information to the market.
- The new rules will:
    - require a public accounting firm to deliver a notice to the regulator if CPAB imposes certain types of remedial actions regardless of the labels CPAB attaches to them;
    - require a public accounting firm to notify its reporting issuer clients if it is not in compliance with certain requirements in NI 52-108;
    - require disclosure in a prospectus, if the financial statements of the issuer included in the prospectus were audited by an auditor that, as at the date of the most recent auditor's report included in the prospectus, was not required to be subject to, and was not subject to the oversight program of CPAB;
    - reduce the filing period from 30 days to 14 days for a change of auditor notice required by National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102") following the termination, resignation, or appointment of an auditor by a reporting issuer;
    - require a predecessor auditor or a successor auditor to notify the regulator on a timely basis if a reporting issuer does not file a change of auditor notice required by NI 51-102; and
    - add a condition to the current exemptions in National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* relating to audited financial statements of SEC foreign issuers and designated foreign issuers to require compliance with NI 52-108.
- In addition, a new prospectus requirement is being considered that would require issuers to disclose that an auditor is not subject to the CPAB oversight program. CSA is also

proposing an amendment to disclosure requirements for foreign issuers requiring them to comply with NI 52-108, which aligns their auditor and auditor oversight obligations.

See the McMillan bulletin on this proposed amendment here.

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

- In October 2013, the CSA published for comment proposed amendments that would promote better disclosure of unconventional resources, provide for increased flexibility for oil and gas reporting issuers worldwide, and harmonize with proposed changes to the Canadian Oil and Gas Handbook. The proposed amendments are intended to promote better disclosure of resources other than reserves and other numerical measures of oil and gas activities of public oil and gas companies.

Multilateral CSA Notice 45-312: Proposed Prospectus Exemption for Placements to Existing Security Holders

- In November 2013, Canadian securities regulators in all jurisdictions except Ontario. Newfoundland, and Labrador published for comment a draft prospectus exemption for existing security holders.
- Currently, issuers offering securities to retail investors (those not considered "accredited investors") are limited to using a prospectus or an exemption requiring a disclosure document. As TSX-V issuers are also held to continuous disclosure obligations, regulators recognize that duplicative disclosure under current exemptions may cause issuers to incur unnecessary and prohibitive costs. Retail investors are in turn limited to purchasing additional securities on the secondary market, where market prices and brokerage fees may reduce their incentive to invest.
- The proposed prospectus exemption would allow TSX-V issuers to raise capital through direct issues to existing security holders, subject to a number of conditions, and would thus provide for a more efficient avenue to offer securities to existing security holders.

See the McMillan bulletin on this topic here.

Amendments to the TSX Company Manual

- In November 2013, the TSX published for comment two proposed amendments relating to Security-Based Compensation and Reverse Takeovers in Part VI – *Changes in Capital Structure of Listed Issuers*, specifically in relation to:

- exemptions from security holder approval for newly implemented security-based compensation arrangements in the context of acquisitions under Section 611 of the Manual; and

- circumstances in which the TSX will consider a transaction to constitute a backdoor listing (also known as a reverse takeover) under Section 626 of the Manual.

- The amendments to Section 611 of the Manual are designed to formalize an exemption that the TSX currently provides on a discretionary basis to allow listed issuers, in the context of an acquisition, the flexibility to adopt new security-based incentive compensation arrangements for employees of a target issuer.
- The amendments to Section 626 of the Manual are designed to better define backdoor listings by closing a perceived gap that may allow unlisted entities to use TSX-listed issuers to "go public" without having to meet original listing requirements.

See the McMillan bulletin on this proposed amendment here.

Amendments to NI 33-105: Underwriting Conflicts

- In November 2013, the CSA published for comment proposed amendments that provide limited relief from the requirements to include connected and related issuer disclosure in certain offering documents for private placements of foreign securities to sophisticated investors in Canada.

See the McMillan bulletin on this proposed amendment here.

Amendments to NI 31-103: Registration Requirements, Exemptions and Ongoing Registrant Obligations

- In December 2013, the CSA published for comment proposed changes to the regulatory framework for dealers, advisers, and investment fund managers. The changes range from technical adjustments to more substantive changes that limit the extent of activities of certain registrants.

See the McMillan bulletin on this proposed amendment here.

VIII. Canadian Securities Administrators Comments

In 2013, the CSA issued multiple notices to provide the public with guidance and support when interpreting securities legislation. The following summarizes two such notices.

Staff Notice 11-326 Cyber Security

- CSA Staff Notice 11-326 highlights the importance of strong and individually-tailored cyber security measures for issuers, registrants, and regulated entities; as such controls promote the reliability of their operations and the security of their confidential information.
- The Staff Notice identifies two major types of cyber threats in particular that have increased in sophistication and frequency: Denial of Service attacks (attempts to make a machine or network resource unavailable to its intended users) and Advanced Persistent Threats (a group with the capability and intent to persistently and effectively target a specific entity).
- The CSA notes that issuers and other regulated entities that have not yet addressed the matter should consider how to best address the risks of cyber crime, and that issuers that already have cyber security risk control measures in place should review them on a regular basis.
- The Staff Notice further notes that issuers should consider whether any issues with respect to cyber crime are such that they need to be disclosed in a prospectus or continuous disclosure filing, and that the CSA will consider these issues in its reviews of issuer disclosure and in its oversight of registrants and regulated entities going forward.

See the McMillan bulletin on this staff notice here.

Results of Continuous Disclosure Review Program for Fiscal 2013

- In July 2013, the CSA published the results of their most recent annual review of continuous disclosure documents filed by Canadian public companies.
- In 47% of the review outcomes, companies were required to take action to improve their disclosure, including:
    - 26% of the reviews resulted in 'prospective changes', requiring companies to make enhancements to their disclosure in future filings;
    - 14% of the reviews resulted in companies being required to amend or re-file certain continuous disclosure documents;
    - 5% of the companies were either ceased-traded, placed on a default list, or referred to enforcement; and

  - 2% of the reviews resulted in companies receiving a letter alerting them to certain disclosure enhancements that should be considered in their next filings.

- In 53% of the reviews, companies were not required to make any changes or additional filings.

See the McMillan bulletin on this topic here.

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a cautionary note