Canada: Capital Markets and Securities Law Overview

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Securities Legislation

Regulatory standards imposed by Canadian securities regulators and stock exchanges are generally comparable to U.S. standards. The most important thing to understand about Canadian securities law, however, is that it is largely the responsibility of the provincial and territorial governments. As a result, Canada has no national securities law and no national securities regulator. Rather, many substantive aspects of securities regulation, such as registration and prospectus requirements and exemptions and continuous disclosure requirements are harmonized through the use of "national instruments" or "national policies", which are adopted by each of the provincial and territorial regulators. Moreover, initiatives such as the national electronic filing system (SEDAR) and the Passport System encourage regulators to delegate responsibilities to one another, thus creating a system of "one stop shopping" for issuers and registrants.

Being the jurisdiction of the Toronto Stock Exchange (TSX) and the principal regulator for a majority of Canadian reporting issuers, the Ontario Securities Commission (OSC) has generally taken a more active role in the development of Ontario securities law through the introduction of various regulatory instruments, policies and rules. As such, the OSC tends to exercise a very broad regulatory and disciplinary jurisdiction and is arguably the nearest equivalent in Canada to the American SEC.

In recent years, the possibility of replacing the provincial and territorial securities regulators with a single national regulator has gained momentum. While the Supreme Court recently found draft legislation to establish such a regulator to be outside federal jurisdiction, the federal government has stated that it will continue to work towards the goal of a national regulator within the applicable constitutional parameters.

Registration Requirements

Dealer, adviser and investment fund manager registration requirements, exemptions from these requirements, and registrants' activities are primarily set out and regulated by National Instrument 31-103 *Registration Requirements and Exemptions* (NI 31-103), which applies in all Canadian provinces and territories (jurisdictions). While NI 31-103 regulates registration requirements and registrants' activities, the actual requirement to register with Canadian securities regulators generally comes from the local securities act in each Canadian jurisdiction (referred to as the "securities legislation").

NI 31-103 regulates the registration of firms and individuals and consolidates firm registrations into three categories: (i) dealers, which includes investment dealers,

mutual fund dealers and exempt market dealers; (ii) advisers, which includes portfolio managers and restricted portfolio managers; and (iii) investment fund managers. The requirement to register as a dealer or adviser is triggered where a person or company conducts trading or advising activity for a "business purpose". This is referred to as the "business trigger" for registration. Merely holding oneself out, directly or indirectly, as being willing to engage in the business of trading in securities may trigger the requirement to register as a dealer; however, a number of factors must be considered when determining whether registration is required. Guidance as to the factors that the Canadian securities regulators consider relevant in determining whether a person or company is in the "business" of trading or advising is set out in the companion policy to NI 31-103. If a person or company carries on business in more than one registrable activity, then unless otherwise exempt, the person or company must register in all applicable categories.

NI 31-103 also consolidates registration requirements with respect to proficiency, solvency and insurance requirements, as well as ongoing compliance requirements and exemptions from registration. These include requirements with respect to financial reporting, know your client, suitability, client disclosure, safekeeping of assets, recordkeeping, account activity reporting, complaint handling and other compliance procedures. In order to create flexible regulation, NI 31-103 combines principles, supported by guidance in its companion policy, with prescriptive elements where considered appropriate.

Notably, Non-Canadian dealers and advisors may also rely on international dealer and advisor exemptions for their conduct in Canada provided that applicable conditions are met and activities are limited.

The Investment Industry Regulatory Organization of Canada (IIROC), which is the self-regulatory organization recognized by securities regulators, also oversees its member investment dealers and advisers, as well as trading activity on Canadian marketplaces.

Prospectus Requirement

Securities laws generally require the filing of a prospectus to qualify any "distribution" of securities. In the absence of an exemption (see "Exemption from the Prospectus Requirement" below), no person or company may "trade" in a security where such trade constitutes a "distribution" unless a prospectus has been filed. Securities originally distributed under a prospectus exemption are generally subject to resale restrictions that require that the issuer have been a reporting issuer for a specified period of time and, in some cases, that the securities be held for a specified period of time. All treasury offerings of securities not previously issued are distributions.

The objective of the prospectus requirement is to provide investors with complete and accurate information about the affairs of an issuer, thereby enabling them to make informed investment decisions about the securities being offered. Thus, the contents of

a prospectus will vary depending on the nature of the security to be issued, the businesses in which the issuer and its subsidiaries are engaged and the particular requirements of the jurisdictions in which the offering will be made. The prospectus must be comprehensible to readers and presented in an "easy-to-read" format.

Securities laws contain a number of specific requirements with respect to the required or permitted contents of a prospectus, which have generally been harmonized under National Instrument 41-101 *General Prospectus Requirements*. Form 41-101F1 *Information required in a Prospectus,* requires an issuer to disclose extensive information about numerous matters concerning the company in the prospectus, including:

- its corporate structure;
- its use of proceeds;
- its financial statements;
- risk factors relating to an investment in securities of the issuer;
- significant acquisitions (including recently completed acquisitions as well as proposed/probable acquisitions);
- legal proceedings affecting the issuer;
- its directors and officers and the compensation of its executives;
- outstanding options to purchase securities;
- the principal holders of its securities;
- prior issuances of securities;
- relationships between the issuer and an underwriter;
- its auditors; and
- any other material facts relating to the securities proposed to be issued and not otherwise disclosed.

Prospectus Disclosure

The prospectus must contain "full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed". The significance of this standard is reinforced by the certificates, which the issuer, the underwriters and others, as applicable, must sign at the end of the prospectus. In the event that the prospectus contains a misrepresentation, the issuer, its directors and each underwriter that signs it (among others) may be found liable. An issuer is not liable if it can prove that the purchaser purchased the securities with knowledge of the misrepresentation. Directors, underwriters and others can similarly rely on a due diligence defence if they can establish that after conducting a reasonable investigation, they reasonably believed there was no misrepresentation in the prospectus.

Upon filing the final prospectus, the issuer will (if it has not previously filed a prospectus) become a “reporting issuer” in each jurisdiction in which a receipt is issued (or is deemed to be issued under the Passport System). As such, the issuer will be subject to continuous disclosure rules and ongoing reporting requirements. These rules and requirements concern such things as the timely disclosure of material changes, the preparation and filing of quarterly and annual financial information, the solicitation of proxies and the preparation of annual information forms and information circulars.

Exemption from the Prospectus Requirement

There are a number of options available for distributing securities on a prospectus exempt basis, generally referred to as exempt distributions or private placements. Private placements have, for the most part, been harmonized across the country in the form of National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106). The instrument provides a wide range of prospectus exemptions for both private and public issuers of securities.

Although it has generally achieved its purpose and allowed market participants to view the landscape of exemptions, it is important to remember that some jurisdictions, including Ontario, continue to retain certain additional local exemptions.

The prospectus exemptions available under NI 45-106 are generally divided into the following categories: capital raising; transaction specific; exemptions for investment funds; employee, executive officer, director and consultant exemptions; and miscellaneous.

The most frequently used among the capital raising exemptions are the “accredited investor” exemption and the “minimum amount investment” exemption. The “accredited investor” exemption provides a prospectus exemption for trades of securities to a qualified list of entities and individuals known as “accredited investors”. Included among the qualified entities are certain types of banks and other financial institutions, trust companies, pension funds, registered charities, investment funds, domestic and international governmental bodies and entities other than individuals or investment funds with net assets of C$5 million. An individual may also qualify as an “accredited investor” if he or she, alone or with a spouse, owns financial assets having an aggregate net realizable value over C$1 million; beneficially owns financial assets having an aggregate net realizable value over C$5 million; has, alone or with a spouse, net assets of at least C$5 million; or has net income before taxes in excess of C$200,000 alone, or C$300,000 together with his or her spouse. Certain individual accredited investors are required to complete and sign a risk acknowledgement form at or before signing any purchase agreement and the form must be retained by the distributing person for a period of eight years after the distribution.

The “minimum amount investment” exemption is available to any person or entity, other than an individual, that purchases as principal securities of a single issuer that have an acquisition cost of a minimum of C$150,000 at the time of the trade.

In addition to these two most frequently used exemptions, an exemption is also available to private issuers. If an entity is not a reporting issuer or an investment fund, it may rely on the private issuer exemption provided: it has not distributed securities other than to a prescribed list of investors and its securities are subject to restrictions on transfer and beneficially owned by no more than 50 persons. Other capital raising exemptions include exemptions for trades to family, friends and business associates of the issuer), trades to affiliates, trades to existing securityholders, and trades made under rights offerings or pursuant to dividend or distribution reinvestment plans.

Transaction exemptions include exemptions for business combinations and reorganizations, assets acquisitions, takeover bids and issuer bids and securities issued for debt. NI 45-106 also makes available specific exemptions for investment funds as well as for issuances to employees, executive officers, directors and consultants. These may apply to issuances of equity securities themselves or to grants and exercises of securities issued as equity compensation, such as stock options.

Documentation used in connection with a private placement may vary depending upon the size and nature of the issuer, the exemption relied upon and the identity and relationship of the purchaser to the issuer. Generally, however, the documentation consists of a subscription agreement, and where applicable, an agency or underwriting agreement. The documentation may also include an offering memorandum but one is not mandatory unless relying on certain specified exemptions. The subscription agreement, or similar document, typically contains contractual representations, warranties and covenants between the issuer and the purchaser. It also generally includes or is accompanied by some form certificate whereby the purchaser provides confirmation of the necessary elements of any prospectus exemption being relied upon, if applicable. For example, if the exemption relied upon is the “accredited investor” exemption, the purchaser will usually be asked to complete a certificate that indicates which category of accredited investor applies to the purchaser. As indicated above, where certain individual categories of “accredited investor” are relied upon, the issuer or seller is also required to complete and obtain from the purchaser or purchasers a certificate of “Risk Acknowledgement”, which must be retained by or on behalf of the issuer for up to eight years. While an offering memorandum is not required to be prepared when relying on the accredited investor and other exemptions, if one is delivered, some provinces and territories also provide a statutory right of action for damages or rescission to purchasers where an offering memorandum contains a misrepresentation.

Resales of Securities

As discussed above, every trade that is a “distribution” requires the filing of a prospectus or reliance on a prospectus exemption. The resale of securities distributed pursuant to a prospectus exemption requires reliance on a further exemption or, if this is not available, on a prospectus—unless a set of resale conditions is met. Those conditions generally require that the issuer of securities has been a “reporting issuer” for at least four months, that no unusual effort has been made to prepare the market for the securities being sold and, in some cases, that the person proposing to sell the securities has held them for a minimum hold period of four months and the securities in question carry a prescribed legend to that effect. The system is referred to being “closed” because a security never becomes freely tradable unless a prospectus is filed, or—if distributed under a prospectus exemption—until enough time lapses to allow information about the issuer and the security to be disseminated in the marketplace.

In addition to issuances from treasury, sales of securities by a “control person” are by definition a distribution, and therefore must be made pursuant to a prospectus or a prospectus exemption (or pursuant to a prescribed procedure where notice is given prior to the trade). A control person is defined under securities law as a holder of sufficient securities of an issuer to materially affect control of the issuer. In the absence of evidence to the contrary, a holder of more than 20% of its outstanding voting securities is generally deemed a control person.

Continuous Disclosure Requirements

The Ontario Securities Commission has stated that, as a general principle, the purpose of disclosure is to promote equality of opportunity for all investors in the market. Disclosure achieves this by helping investors learn, quickly, all of the material facts that might reasonably affect an investment decision. The filing of a prospectus is the first link in the chain of disclosure, but it must be followed up with the continuous reporting of information and developments that might affect investment decisions.

Two kinds of reporting are required under Canada’s continuous disclosure regime: “periodic” and “timely”. Periodic reporting requires the reporting issuer to prepare and file continuous disclosure documents such as financial statements, management’s discussion and analysis (MD&A), proxy circulars and annual information forms (AIFs). Timely reporting provisions require the reporting issuer to disclose material changes as they occur, through press releases and material change reports. Reporting issuers are also required to file business acquisition reports (BARs) and material contracts in a timely fashion. “Reporting insiders”, a category that includes members of senior management or the board, key personnel and significant shareholders, must also report trades in the reporting issuer’s securities as well as interests in related financial instruments and changes in economic exposure to the reporting issuer, generally within five days. Canadian

securities laws also require that shareholders file an early warning report upon acquiring control or direction of 10% of a reporting issuer and in connection with certain other acquisitions and dispositions further discussed below under "Take-over Bids".

Continuous Disclosure Obligations

National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102) is designed to provide a nationally harmonized set of continuous disclosure requirements for reporting issuers other than investment funds. Broadly speaking, the instrument sets out the obligations of reporting issuers relating to financial statements, AIFs, MD&A, BARs, material change reporting, information circulars, proxies and proxy solicitation and other disclosure matters.

For example, the board of each reporting issuer is required to approve both annual financial statements and interim reports and interim and annual MD&A prior to their release. The MD&A must include discussions of off-balance-sheet transactions, more detailed disclosure of critical accounting estimates and additional guidance for resource issuers. Meanwhile, an AIF must include such things as disclosure regarding social and environmental policies of the reporting issuer if they are fundamental to its operations and a reporting issuer must file on SEDAR a copy of any material contract entered into except those entered into "in the ordinary course of business", subject to certain limited exceptions. NI 51-102 also requires issuers to publicly disclose copies of constating documents and other documents or agreements that affect the rights of securityholders as well as results of voting for securityholder meetings. National Instrument 81-106 *Investment Fund Continuous Disclosure* imposes a similar disclosure regime for investment funds.

NI 51-102 also contains requirements regarding disclosure of forward-looking information.

Material Change Reporting

NI 51-102 requires reporting issuers to issue and file with the relevant securities authority: (i) a press release directed to the investing public (to be issued "forthwith") and (ii) a Material Change Report (to be filed within ten days of the date on which the change occurs). In general, a "material change" is defined to mean, in relation to a reporting issuer, a change in the business, operations, or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the reporting issuer or a decision made by the board (or by senior management who believe that confirmation of the board is probable) to implement such a change.

National Policy 51-201 *Disclosure Standards* (NP 51-201) supplements the material change disclosure requirement and provides the marketplace with the view of the CSA on a number of disclosure matters. In particular, NP 51-201 provides that any announcement of material information should be factual and balanced; neither

over-emphasizing favourable news nor under-emphasizing unfavourable news. In short, announcements must be clear, accurate and objective. As well, it suggests a number of best practices to assist reporting issuers in complying with continuous disclosure rules, and preventing insider trading and selective disclosure, including that reporting issuers establish a corporate disclosure policy.

National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*, meanwhile, provides relief from many requirements of NI 51-102 for SEC foreign issuers and issuers of certain designated foreign jurisdictions that comply with the continuous disclosure requirements of the SEC or relevant foreign jurisdiction.

Material Information and Press Releases

Reporting issuers whose securities are listed on the TSX will also be subject to additional obligations set out in the TSX Company Manual. Notably, the TSX Company Manual and the TSX's *Policy Statement on Timely Disclosure* require that a listed company promptly disclose "material information" concerning its business and affairs upon the information becoming known to management. The TSX considers "material information" to be a broader term than a "material change" discussed above. As such, issuers listed on the TSX may be required to press release information that would not otherwise warrant a Material Change Report.

Statutory Liability for Secondary Market Disclosure

Securities laws also impose civil liability for secondary market disclosure.

Causes of action for secondary market disclosure pertain to misrepresentations made by, or on behalf of, a responsible issuer in its disclosure documents or in public oral statements, and failures to make timely disclosure of a material change. In addition to the issuer itself, its directors and officers and major shareholders, among others, could be subject to such a cause of action. In contrast to the common law cause of action for negligent misrepresentation, which requires each plaintiff to prove that it relied to its detriment on the alleged misrepresentation, a plaintiff has a statutory right of action without regard to whether the purchaser or seller of securities relied on the alleged misrepresentation. However, a prospective plaintiff will be able to commence a proceeding only with leave of the court, and a number of defences that may preclude liability or limit damages in certain situations are available.

Corporate Governance and Audit Committees

Canada's response to Sarbanes-Oxley legislation in the U.S. can be found in National Instrument 52-110 *Audit Committees*, National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* and National Instrument 52-108 *Auditor Oversight*. These instruments are comprehensive in scope, but in brief require CEO and CFO certification of disclosure in public companies' annual and

interim filings, regulate the role and composition of audit committees, prescribe disclosure in respect of audit committees and support the work of the Canadian Public Accountability Board in its oversight of auditors of public companies.

NI 52-110 *Audit Committees* governs the function, powers and composition of the audit committee, and requires issuers to provide certain prescribed disclosure regarding its composition and functions. The audit committee rule requires all issuers to which it applies to have an audit committee composed of a minimum of three directors. Generally, all three directors are required to be independent (NI 52-110 sets out a definition for independence) and financially literate. The audit committee rule clarifies the role of the external auditor vis-à-vis the audit committee, board and securityholders of an issuer by requiring that the external auditor report directly to the audit committee. The responsibilities that the audit committee must fulfill are also prescribed, and include responsibility to establish procedures for receiving and addressing complaints about auditing and accounting matters (whistleblowing).

Corporate Governance Practices

Governance disclosure is prescribed by National Instrument 58-101 *Disclosure of Corporate Governance Practices*, whereas governance "best practices" are prescribed by the associated National Policy 58-201 *Corporate Governance Guidelines*. The instrument and policy generally apply to all reporting issuers other than investment funds.

Broadly speaking, NI 58-101 requires issuers to disclose their corporate governance practices in their information circulars or AIFs, and to file on SEDAR a copy of any code of ethics adopted, as well as any amendments to it. Failure by an issuer to provide adequate disclosure constitutes a breach of securities laws and exposes the issuer and others to enforcement proceedings and sanctions. By mandating corporate governance related disclosure, the goal of NI 58-101 is to provide greater transparency on how issuers apply various corporate governance principles.

Recognizing that many corporate governance matters cannot be prescribed in a "one size fits all" manner, neither NI 58-101 nor NP 58-201 are intended to prescribe what an issuer must do. NP 58-201 is designed to reflect "best practices", which have been formulated with desirable corporate governance principles in mind. The guidelines are not intended to be prescriptive and include, among other things, recommendations relating to board independence, the role of the board and management, selection of board members and compensation. In particular, NP 58-201 recommends that the board of an issuer be comprised of a majority of independent directors and that the issuer have a compensation committee and a nomination committee, each comprised entirely of independent directors. Issuers are encouraged to consider the guidelines in developing their own corporate governance practices, and are required to disclose deviations therefrom together with a description of what the board does to ensure that the objective of the guidelines are met.

Meanwhile, National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (NI 52-109) requires reporting issuers to file interim and annual certificates, certified by the CEO and CFO (or equivalent) of the issuer. The certificates include certifications regarding fair presentation of financial condition, financial performance and cash flow and confirmation that the interim and annual filings do not contain any misrepresentations. The certificates must also include certifications regarding the establishment, maintenance and effectiveness of disclosure controls and procedures (DCP) and internal control over financial reporting (ICFR). In addition, certified corresponding disclosure is required in the issuer's MD&A regarding the effectiveness of DCP and ICFR and any changes in ICFR during the relevant period that have materially affected, or are reasonably likely to materially affect, the issuer's ICFR.

Take-over Bids

The CSA has harmonized and streamlined the requirements for take-over bids and issuer bids across Canada in National Instrument 62-104 *Take-Over Bids and Issuer Bids* (NI 62-104) which governs most substantive and procedural bid requirements. A take-over bid in Canada is defined as an offer to acquire outstanding voting or equity securities that would bring the "offeror's securities" to 20% or more of the securities of the class. The term "offeror's securities" for such purposes includes securities beneficially owned, or over which the offeror has the power to exercise control or direction, alone or acting jointly or in concert with other persons.

An early warning notification mechanism is imposed once an offeror acquires beneficial ownership or the power to exercise control or direction of 10% of a reporting issuer. Every person reaching this 10% threshold is required to immediately issue a press release containing certain prescribed information and, within two business days, file an "early warning report" in prescribed form. A further press release and early warning report is required whenever 2% of the class of securities is acquired or disposed of, where there is a change in a material fact contained in a previously filed report or where the person's holdings decreases to less than 10%. Exemptions are provided for specified lending arrangements and certain institutional investors with a passive investment intent can, however, comply with these early warning requirements under an alternative system that generally only requires reporting after month-end.

A take-over bid must be made in compliance with the substantive and procedural requirements of the jurisdiction, in the absence of an exemption from the take-over bid requirements. Compliance with the substantive and procedural requirements generally requires making an offer to all security holders of a given class on identical terms. A formal offer requires preparation of a take-over bid circular satisfying certain statutory line item disclosure requirements that must be sent to shareholders of the target issuer. The procedural requirements are included in NI 62-104 and all Canadian securities regulators have also adopted National Policy 62-

203 *Take-Over Bids and Issuer Bids*, which provides guidance on take-over bids and take-over bid exemptions across the country.

There are various exemptions from the formal take-over bid requirements. These exemptions include:

- Acquiring at market price within any period of 12 months not more than 5% of the outstanding securities of a class measured at the commencement of the 12 month period; or
- Purchases in private agreements from not more than five persons where the consideration paid does not exceed 115% of the market price (as defined) of the securities at the date of purchase.

Insider Trading Issues/Insider Reports

Securities legislation prohibits any person in a "special relationship" with a reporting issuer or an issuer whose securities are publicly traded from purchasing or selling securities of the reporting issuer with knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed. Persons in a special relationship include, among others, any person or company that is an insider, affiliate or associate of the reporting issuer, a person or company that engages or proposes to engage in any business or professional activity with, or on behalf of the reporting issuer, a person who is a director, officer or employee of the reporting issuer or a person who learns of a material fact or material change with respect to the issuer from a person in a special relationship and knew or ought reasonably to have known such person to be in such a relationship. There are also prohibitions and civil liability with respect to tipping, which consists of informing, other than in the necessary course of business, another person or company of a material fact or material change with respect to the reporting issuer before it has been generally disclosed, and "recommending", meaning recommending or encouraging another person or company to purchase or sell securities of an issuer with knowledge of a material fact or material change that has not been disclosed. Many of these terms have specific definitions in Canadian securities law that should be understood by anyone in such a "special relationship" because insider trading and tipping are offences that carry criminal penalties. Civil remedies are also available to a purchaser and seller of securities, and to the issuer, in connection with this kind of activity. For these purposes, the *Securities Act* (Ontario) provides that a "security" includes (a) a put, call, option or other right or obligation to purchase or sell securities of the reporting issuer; (b) a security, the market price of which varies materially with the market price of the securities of the issuer; or (c) a related derivative.

Under National Instrument 55-104 *Insider Reporting Requirements and Exemptions*, every "reporting insider" of a reporting issuer must file an insider report within five days of a change in the reporting insider's (a) beneficial ownership of, or control or direction over, whether direct or indirect, securities of the reporting issuer; or (b)

interest in, or right or obligation associated with, a related financial instrument involving a security of the reporting issuer.

Supplemental insider reporting requirements of NI 55-104 require the filing of insider reports with respect to certain agreements, arrangements or understandings that (i) have the effect of altering the reporting insider's economic exposure to the reporting issuer; (ii) involve, directly or indirectly, a security of the reporting issuer or a related financial instrument involving a security of the reporting issuer and (iii) do not otherwise trigger the obligation to file an insider report. Upon becoming a reporting insider, the reporting insider must file an insider report to disclose any such agreement or arrangement that was entered into prior to the date the person became a reporting insider and that is still in effect. The term “economic exposure” generally refers to the link between a person’s economic or financial interests and the economic or financial interests of the reporting issuer of which the person is an insider.

A reporting insider includes the reporting issuer itself, its major subsidiaries, significant shareholders (including those based on post-conversion beneficial ownership) and management companies and each of their directors and prescribed senior officers, as well as a person or company responsible for a principal business unit, division or function of the reporting issuer and insiders who receive or have access to information as to material facts or material changes concerning the reporting issuer in the ordinary course before the material facts or material changes are generally disclosed. Significant shareholders are those generally holding more than 10% of the voting securities including on a post-conversion basis of convertible or similar securities in some circumstances.

In addition to the insider reporting requirements, the TSX’s *Policy Statement on Timely Disclosure* sets out procedures with respect to disclosure, confidentiality and employee trading pursuant to which issuers are urged to establish confidentiality and trading policies to govern, among other things, the establishment of “blackout periods” and “open windows” for trading in the company’s securities by employees and others.

Multi-Jurisdictional Disclosure System

Canadian regulators and the U.S. Securities and Exchange Commission permit distributions and rights offerings in Canada to be made by certain U.S. issuers on the basis of disclosure documents prepared in accordance with *U.S. Securities Act of 1933* and the *Securities Exchange Act of 1934* rather than requiring compliance with Canadian provincial securities legislation. These rules, which are referred to as the Canada-U.S. Multi-Jurisdictional Disclosure System or MJDS, also apply to certain rights and exchange offers, take-over bids, issuer bids and business combinations and extend to recognition of certain home jurisdiction continuous reporting obligations.

Eligible Canadian issuers are also able to use MJDS forms to offer securities publicly in the United States by means of a Canadian prospectus, which is subject to review only by Canadian regulatory authorities.

Initial Public Offerings

General

An initial public offering of securities of an issuer is the conventional way of "going public" in each of the provinces and territories in Canada, and is made by means of a prospectus which must be filed with and receipted by the applicable provincial securities regulator. All prospectuses filed with the Authorité des marchés financiers (the Quebec financial services regulator, which oversees securities regulation in the province of Quebec) (AMF) must be translated into French.

Prospectus Clearance

Preliminary Prospectus

Once the decision to "go public" has been made, an issuer must file a preliminary prospectus, which will be reviewed and commented on by its principal regulator, and the OSC if the OSC is not the principal regulator. The clearing of the preliminary prospectus is often an urgent matter as generally the issuer is anxious to receive the proceeds of the offering and the underwriters (or agents) have determined that the markets are appropriately receptive to the offering, subject to adverse market changes occurring prior to closing, and are eager to commence the "road shows" with registered representatives (e.g. salespersons) and potential purchasers regarding the issuer and the proposed offering.

Subject to applicable conditions, IPO issuers have the limited ability, through investment dealers, to "test the waters" prior to filing a preliminary prospectus by seeking expressions of interest from accredited investors on a confidential basis, subject to a 15 day cooling off period prior to the filing of the preliminary long-form prospectus. In jurisdictions that have issued (or are deemed under the Passport System to have issued) receipts for the preliminary prospectus, "expressions of interest" may be solicited from institutions and other prospective purchasers (provided that a copy of the preliminary prospectus is forwarded to them if they indicate an interest in purchasing) or the preliminary prospectus may be distributed to them first.

Comment Letter and Response

Issuance of a receipt for the preliminary prospectus begins what is known as the "waiting period." During this time, the principal regulator will review the preliminary prospectus and will issue a comment letter identifying any deficiencies or concerns. If the principal regulator is not the OSC, the OSC will also review the materials and advise the principal regulator of any concerns. After the principal regulator has issued the comment letter, the issuer's counsel will then (with the help of the issuer, the underwriters, and the auditors) respond to the letter and attempt to negotiate the rectification of the deficiencies. Then, if all goes well, the principal regulator will clear the issuer for filing the final prospectus

(receipt for the final prospectus is issued upon filing). If the principal regulator is the OSC, the receipt of the OSC would result in a deemed receipt from each jurisdiction in which the prospectus was filed under the Passport System. If the principal regulator is not the OSC, the receipt of the principal regulator would result in a deemed receipt from all Passport System regulators and, if the OSC cleared the prospectus, of the OSC.

Conditional Listing

Generally, an original listing application is made to a stock exchange after a receipt is received for the preliminary prospectus upon which a conditional listing is granted to the issuer, subject to the fulfillment of certain standard conditions. These conditions include obtaining a receipt for the final prospectus, the closing of the offering, minimum distribution of securities and delivery of certain documentation to the exchange.

Under National Instrument 41-101 *General Prospectus Requirements and Related Amendments* (NI 41-101), prospectus requirements and policies are now generally harmonized across Canada.

Reverse Take-overs (Back-Door Listings)

A well-known means of reactivating dormant companies or "public shells" on stock exchanges in Canada is the process of reverse take-overs. A reverse take-over involves a transaction that results in the acquisition of a listed issuer by an unlisted issuer. In such a scenario, the shareholders of the listed company end up owning less than 50% of the shares of the resulting issuer and a change of control occurs. This is typically achieved by the issuance by the listed company of treasury shares in return for assets (including shares of another company) or through an amalgamation or merger. The TSX Company Manual sets out the approval procedures where the TSX determines that a proposed transaction would constitute a back door listing.

Canada's Stock Exchanges

Market Regulation

The Investment Industry Regulatory Organization of Canada (IIROC) is the national self-regulatory organization that oversees trading activity in debt and equity markets in Canada. IIROC also sets out and enforces rules regarding the proficiency, business and financial conduct of investment dealers in the country.

Toronto Stock Exchange

The TSX is Canada's stock exchange for large capitalization issuers. It has three well-established listing categories—Industrial, Mining, and Oil and Gas. Each listing

category has two or more levels of financial and technical requirements, in recognition of the considerable range of maturity among listed companies. The requirements for the general Industrial listing category are applicable to all domestic applicants (except those in the mining or oil and gas sectors), including technology companies and research and development companies. Generally, companies that are established and profitable are listed as senior issuers. Companies that do not meet the senior criteria are subject to closer regulation under Part V of the TSX Company Manual and must receive advance TSX approval of certain proposed material changes. Senior issuers are exempt from Part V.

In addition to the options described above (initial public offering and reverse takeover), issuers also have the option of listing directly on the TSX if the issuer is already listed on another stock exchange, graduating from the TSX-V or making use of the Special Purpose Acquisition Corporation (SPAC) program. A SPAC is initially a shell company with no previous operational history that goes public through an IPO raising at least $30 million, with the intention of using the proceeds raised to acquire a company/group of companies or assets. Once the SPAC's IPO distribution has closed and its shares or units are listed, the SPAC has 36 months to complete a qualifying acquisition.

The TSX Venture Exchange

TSX-V listed companies are active primarily in the mining, oil and gas, manufacturing, technology and financial services sectors. The TSX-V operates on a two-tier system, each with its own listing requirements based on the company's financial performance, resources and development stage. Within each tier, there are specific minimum listing requirements for particular industry segments. Tier 1 is for senior companies.

Issuers wanting to list on the TSX-V have similar options to those described above for the TSX. In place of the SPAC program, however, the TSX-V offers a Capital Pool Company Program (or CPC). Specifically, a CPC raises funds through an initial public offering on TSX-V for the purpose of acquiring a private company or an asset within 24 months of its listing on TSX-V. After a successful qualifying transaction, the capital pool company becomes a regular listed company on TSX-V.

The Montréal Exchange (Bourse de Montréal)

The MX or Bourse de Montréal traces its roots to 1832 and is Canada's oldest stock market. MX acts as the sole financial derivatives exchange in Canada and offers such products as equity, interest rate, currency, energy and index derivatives (i.e. options and futures contracts). As of 2008, the MX is part of the TMX Group. The MX is recognized as a self-regulatory organization (SRO) under applicable provincial securities and derivatives laws.

The Canadian Securities Exchange

The Canadian Securities Exchange (CSE), formerly the Canadian National Stock Exchange, is operated by CNSX Markets Inc. It began operations in 2003 and was officially recognized by the OSC as stock exchange in 2004. The CSE offers simplified reporting requirements and reduced barriers to listing as compared to the TSX or the TSX-V.

About the Firm

When Heward Stikeman and Fraser Elliott first opened the firm's doors in 1952, they were united in their pledge to do things differently to help clients meet their business objectives.

In fact, they made it their mission to deliver only the highest quality counsel as well as the most efficient and innovative services in order to steadily advance client goals.

Stikeman Elliott's leadership, prominence and recognition have continued to grow both in Canada and around the globe. However, we have remained true to our core values.

These values are what guide us every day and they include:

- Partnering with clients – mutual goals ensure mutual success.
- Finding original solutions where others can't – but they must also be grounded in business realities.
- Providing clients with a deep bench of legal expertise – for clear, proactive counsel.
- Remaining passionate about what we do – we relish the process and the performance that results from teamwork.

A commitment to the pursuit of excellence – today, tomorrow and in the decades to come – is what distinguishes Stikeman Elliott when it comes to forging a workable path through complex issues. Our duty and dedication never waver.

This is what makes Stikeman Elliott the firm the world comes to when it counts the most.

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