

March 27, 2014

## Better Access to Capital for TSXV Issuers? New Prospectus Exemption Proposed

By David J. Lowdon

The securities regulatory authorities in all jurisdictions except Ontario and Newfoundland and Labrador (the participating jurisdictions) have recently published a proposal for a substantially harmonized prospectus exemption (the “proposed exemption”) that would, subject to certain conditions, allow issuers listed on the TSX Venture Exchange (TSXV) to raise money by distributing securities to their existing security holders without a prospectus. While Ontario is not included in the participating jurisdictions, the Ontario Securities Commission recently announced its support for the proposed exemption and will seek substantial harmonization in the exemptions being considered under its separate exempt market review.

The proposed exemption recognizes that most TSXV issuers today rely almost exclusively on the accredited investor exemption when issuing shares without a prospectus. Other exemptions available (such as offering memorandum, rights offering and TSXV short form offering exemptions) are rarely used. Further, after their initial public offering, TSXV issuers rarely conduct prospectus offerings. This is largely because of the time and cost involved in preparing a prospectus.

The proposed new prospectus exemption has the following key conditions:

- the issuer must have a class of equity securities listed on the TSXV;
- the issuer must have filed all timely and periodic disclosure documents as required under applicable securities laws;
- the offering can consist only of the class of equity securities listed on the TSXV or units consisting of the listed security and a warrant to acquire the listed security;
- the issuer must issue a news release disclosing the proposed offering, including details of the use of proceeds;
- each investor must confirm 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 proposed exemption;
- unless the investor has obtained advice regarding the suitability of the investment from a registered investment dealer, the aggregate amount invested by the investor in the last 12 months under the proposed exemption is not more than \$15,000;
- the investor must be provided with certain rights of action in the event of a misrepresentation in the issuer’s continuous disclosure record; and
- although an offering document is not required, if an issuer voluntarily provides one, the investor will have certain rights of action in the event of a misrepresentation in it.



PERLEY-ROBERTSON,  
HILL & MCDUGALL LLP/s.r.l.

In addition, the proposed exemption will require the issuer to represent to prospective purchasers in the subscription agreement that there are no material facts or material changes relating to the issuer that have not been generally disclosed.

The first trade of securities issued under the proposed exemption will be subject to resale restrictions under section 2.5 of National Instrument 45-102 *Resale of Securities*, like most other capital raising prospectus exemptions. In addition, issuers will have to file a report of exempt distribution within 10 days after each distribution under the proposed exemption.

The proposed exemption would provide TSXV issuers with increased access to capital and provide retail investors with access to the often “sweetened” private placements of TSXV issuers that are now usually only available to the small pool of investors able to take advantage of the accredited investor exemption.

The proposed exemption is subject to adjustment after the receipt of public comments; however, it seems likely to go ahead substantially in the form outlined above. If so, it will provide new opportunities for both TSXV issuers and retail investors. If you have any questions, please feel free to contact me at the coordinates below.

*Dave Lowdon is a lawyer in our Business Law Group. Dave can be reached at 613.566.2809 or [djlowdon@perlaw.ca](mailto:djlowdon@perlaw.ca). To view his bio, please [click here](#).*