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SECURITIES ALERT

Better Access to Capital for Listed Issuers? New Prospectus Exemption Proposed

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Staff of the Ontario Securities Commission (OSC) recently published a Notice and Request for Comment (the “Notice”) containing an update on the OSC’s Exempt Market Review and the proposed exemptions that might result from that review. One of the most interesting of these proposals is the proposed existing security holder prospectus exemption (the “Proposed Exemption”).

The Proposed Exemption recognizes that most small listed 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 short form offering exemptions) are rarely used. Further, after their initial public offering, small listed issuers rarely conduct prospectus offerings. This is largely because of the time and cost involved in preparing a prospectus.

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

The proposed new prospectus exemption has the following key conditions:

- the issuer must have a class of equity securities listed on the Toronto Stock Exchange (“TSX”), the TSX Venture Exchange (“TSXV”) or Canadian Stock Exchange (“CSE”);
- the issuer must have been a reporting issuer for not less than 12 months, or become a reporting issuer by filing and obtaining a receipt for a prospectus;
- the offering can consist 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 must allow all security holder of record to subscribe to the offering;
- existing security holders must be allocated a pro rata portion of the offering (subject to re-allocation where the offering is not taken up
- the offering cannot result in an increase of greater than 100% of the outstanding securities of the same class ;
- 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.

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 is subject to adjustment after the receipt of public comments, which are due by June 18, 2014; however, it seems likely to go ahead substantially in the form outlined above later this year. If so, it will provide new capital raising opportunities for all listed issuers.

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Contact us today and speak with a member of our Securities Law Group.

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