

February 2017

SECURITIES ALERT

Regulators Review Rights Offerings

Some concerns are raised

On December 8, 2015, securities regulators, including the Ontario Securities Commission (the “OSC”) adopted an amendment to National Instrument 45-106 *Prospectus Exemptions* designed to create a streamlined prospectus exemption for rights offerings conducted by reporting issuers (the “New Rights Offering Exemption”). Rights offerings are one of the fairer ways for reporting issuers to raise capital as they provide security holders with an opportunity to protect themselves from dilution and regulators wished to encourage the use of rights offerings by making the rights offering process somewhat less complex for reporting issuers. This new regime is designed to allow existing security holders to make a decision regarding the exercise of their rights on a fully informed basis, free from any features of the offering designed to discourage participation or any other unfair influence.

Under the New Rights Offering Exemption, reporting issuers are required to file and send a notice prior to the start of the exercise period and to file a rights offering circular concurrently with the notice. The notice provides basic disclosure about the offering and tells security holders how to access the rights offering circular. Under the New Rights Offering Exemption, the OSC does not review either the notice or rights offering circular prior to filing. Although the new rights offering regime does not require prior regulatory review, the OSC has conducted a review of rights offering structures and disclosure over the two years since implementation of the New Rights Offering Exemption.

This review has raised OSC concerns regarding the use of the New Rights Offering Exemption, particularly where there may be a potential abuse of security holders. For example, the OSC is concerned that in certain instances a rights offering may be structured in such a way as to provide incentives for existing security holders not to participate, whether as a means to increase the proportionate interests of insiders, to transfer control to an unrelated third party or for other purposes.

Similarly, the OSC believes caution should be exercised with respect to the terms and conditions of stand-by commitments. Stand-by commitments are included in the rights offering regime because they provide certainty to reporting issuers and security holders that the issuer will be able to raise a minimum amount of proceeds. Although stand-by commitments are subject to reasonable commercial terms and conditions, the take-up of securities by the stand-by guarantor should be reasonably assured. Conditions that decrease certainty or discourage security holder participation may frustrate the ability of security holders to make a free and informed decision regarding the rights offering. For example, a stand-by commitment that is conditional on limited security holder participation could create uncertainty for security holders and may also discourage participation.



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

The OSC cautions that, where a rights offering, including a stand-by commitment, does not appear to be consistent with the objective of the rights offering regime, the OSC may raise comments with a reporting issuer regarding the structure of the rights offering and the disclosure provided to security holders. In certain instances, if the OSC believes a rights offering is being conducted in a manner that is contrary to the public interest, it may take steps to remedy or even cease trade the rights offering. Reporting issuers should note that, although the New Rights Offering Exemption has less regulatory oversight, it is still not completely oversight free. Improper structuring of a rights offering under the new regime could lead to undesirable results.

For more than 40 years, Perley-Robertson, Hill and McDougall has provided financing solutions to a wide variety of clients, including privately held companies, public companies, reporting issuers and companies listed on NASDAQ, the Toronto Stock Exchange, the TSX Venture Exchange and various OTC and private markets. In addition to providing advice on securities registration and compliance, we have completed venture capital funding transactions, debt and/or equity private placements, initial public offerings, prospectus offerings, capital pool company listings and qualifying transactions, reverse takeovers and limited partnership fundings. Whatever your financing requirements, we are confident we can find a cost efficient solution tailored to your needs.

Contact us today and speak with a member of our securities law team.

Mike Gerrior Head, Securities Law Group mgerrior@perlaw.ca +1.613.566.2813	Rob Kinghan Partner rkinghan@perlaw.ca +1.613.566.2848
Tim McCunn Partner tmccunn@perlaw.ca +1.613.566.2831	Dirk Bouwer Partner dbouwer@perlaw.ca +1.613.566.2850
Dave Lowdon Lawyer djlowdon@perlaw.ca +1.613.566.2809	Conor Cronin Lawyer ccronin@perlaw.ca +1.613.566.2155
Phil Aubry Lawyer paubry@perlaw.ca +1.613.566.2746	Sue Kavanagh Manager, Corporate Services skavanagh@perlaw.ca +1.613.566.2824