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By E-Mail

Ontario Securities Commission

Attention:

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto ON M5H 3S8
comments@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: OSC Staff Notice 11-784 – *Burden Reduction*

This is our firm's response to OSC Staff Notice 11-784 – *Burden Reduction* dated January 14, 2019. We strongly support the overriding objective of the Ontario Securities Commission (the "**OSC**") to eliminate unnecessary, inefficient and overly burdensome rules and procedures while protecting investors and the integrity of our capital markets.

We believe that the U.S. Securities and Exchange Commission (the "**SEC**") has been successful in introducing a number of burden-reducing regulatory changes over the past several years. Some of our comments below are aimed specifically at increasing alignment between Canadian and U.S. securities laws so as to reduce regulatory friction for issuers in their cross-border capital markets activities.

We note that several of our suggestions below would fail to succeed in furthering the objective of reducing regulatory burdens for market participants if they are adopted in Ontario only. Any disharmony in securities regulations across Canada is disruptive to the capital markets; the only potential justification for such disharmony would be to address significant investor protection concerns that are truly unique to a local market. As such, our comments in this letter are qualified insofar as cross-Canada harmonization is by far the most important matter for securities regulators to address to reduce inefficiencies and unnecessary regulatory burdens for market participants.

Our suggestions for possible ways to reduce unnecessary regulatory burdens are organized as follows:

I. Rule Changes

1. Prospectus Offerings
2. Exempt Distributions
3. Continuous Disclosure
4. Issuer Bids
5. Derivatives
6. Registration
7. General

II. Operational Changes and Changes to Enhance Investor Experiences

I. Rule Changes

We propose the following changes to help streamline/eliminate rules, regulations and policies that are outdated or overly burdensome:

1. Prospectus Offerings

- Permit base shelf prospectuses to remain effective for a period of 3 years, as opposed to the current 25 month period;
- Adopt an automatic shelf prospectus system for issuers that would meet an appropriate size and seasoning requirement, such as applies to well-known seasoned issuers (WKSI) under SEC rules. This would allow regulators to devote more resources to continuous disclosure reviews;
- Consistent with the SEC, adopt rules that would permit testing-the-waters communications in connection with any offering (not limited to IPOs);
- Permit prospectuses for Canadian-only IPOs to be filed on a confidential basis;
- Permit exclusively electronic delivery of prospectuses to investors, rather than hard copies, in all circumstances;
- Eliminate the requirement reflected in section 3.3 of CSA Staff Notice 44-305 for pre-clearance letters, blacklines and supporting materials in relation to subsequent offerings of pre-cleared structured notes; staff may always consult with an issuer or its advisors regarding the pre-clearance analysis in relation to any particular offering of such notes);
- Expand the permitted content for standard term sheets, taking into account dealers' views

of market practices, so that fewer standard term sheets need to be treated as marketing materials. At present, the accommodations for standard term sheets are not as helpful as we believe was originally intended when securities regulators adopted the new marketing regime;

- Relax the requirement that all information in standard term sheets and marketing materials be disclosed in or derived from the prospectus. Instead, adopt a more principled rule that focuses on the material information contained in these documents. This would reduce administrative burdens for issuers without compromising investor protection, because of the materiality threshold and the general requirement to provide full, true and plain disclosure in prospectuses;

- Publish guidance that articulates the regulatory position on when an entity will be considered a "promoter" and the circumstances under which promoter status will fall away after an issuer becomes a reporting issuer;

- Adopt the passport system in Ontario and remove any requirements for dual prospectus applications;

- Increase the threshold of significance for requiring financial statements in prospectuses for probable acquisitions; in the context of shelf takedowns, only require financial statements for a probable acquisition that represents a fundamental change for the issuer;

- Apply only the significance tests under the Business Acquisition Report rules to determine whether financial statements are required in an IPO prospectus for a recent acquisition. The current requirement to include three years of financial statements for a business acquired three years before the date of the prospectus if a reasonable investor would regard the primary business of the issuer as the business acquired is overly burdensome and inconsistent with both the prospectus significant acquisition rules and the continuous disclosure requirements following the IPO; and

- Consistent with SEC rules, permit emerging growth companies to present only two years of audited financial statements, instead of three years, in a prospectus prepared in connection with an IPO; and

- Reduce the information circular disclosure requirements for the acquisition of a business that is not a reporting issuer so as not to require full long-form prospectus disclosure (for example, the significant acquisition rules for prospectuses only require two years of historical financial statements, while Section 14.2 of Form 51-102F5 effectively requires three years of financial statements).

2. Exempt Distributions

- Facilitate the ability of Canadian investors to participate in corporate actions by foreign non-reporting issuers such as rights offerings, spin-offs, stock splits etc. through expanded cross-border prospectus exemptions, premised on compliance with home jurisdiction requirements, without incremental Canadian notice or filing obligations, so as to reduce the frequency of Canadian investors being excluded from these transactions;

- Harmonize National Instrument 45-106 – *Prospectus Exemptions* ("**NI 45-106**") and

Form 45-106F1 – *Report of Exempt Distribution* ("**Form 45-106F1**") across Canada and remove carve-outs for individual provincial and territorial jurisdictions in the instrument and associated forms. Further harmonization is important given that excessive regulatory burdens are being disproportionately borne by smaller issuers raising relatively modest sums of capital, and the disharmony is a disincentive for both Canadian and foreign issuers to raise capital here;

- Remove the requirement to file Form 45-106F1 on the OSC portal and allow it to be filed on SEDAR only;

- Eliminate the filing requirements for offering memorandums that are furnished voluntarily (i.e., other than those used in conjunction with the exemption in section 2.9 of NI 45-106); and

- Harmonize the Ontario requirements pertaining to non-resident investment fund managers with the majority of other Canadian jurisdictions, i.e., in place of Multilateral Instrument 32-102, Ontario should adopt Multilateral Policy 31-202.

3. Continuous Disclosure

- Re-word and re-organize the rules relating to delivering financial statements, MD&A and proxy circulars under notice-and-access and under conventional delivery methods, as the current rules are very difficult to read and understand;

- Implement half-year reporting if/when it is implemented by the SEC;

- Certain aspects of the proposed new rules on non-GAAP financial measures can be expected to increase regulatory burdens for issuers to an extent that we believe is disproportionate to the investor protection benefits. We refer you to Torys' comment letter dated December 5, 2018 for our detailed concerns and suggestions, but we highlight the following in respect of regulatory burdens:

    - the proposal to prohibit cross-referencing to non-GAAP measures disclosure in a different document;

    - the absence of a proposed exemption for financial measures, such as the Life Insurance Capital Adequacy Test, that are publicly disclosed pursuant to requirements or recommended best practices of a regulatory body other than securities regulators, such as OSFI;

    - the proposed introduction of segment measures and capital management measures to the regulatory scheme;

    - the absence of proposed exemptions for designated foreign issuers;

    - the absence of a proposed exemption for offering materials delivered to permitted clients in connection with distributions of eligible foreign securities; and

    - the proposed application of the non-GAAP measures disclosure requirements to transcripts of oral statements.

4. Issuer Bids

- Revise the requirements for reporting ownership and trading in securities in take-over bid and issuer bid circulars so that disclosure is not required for directors and officers of subsidiaries of the offeror and target who do not otherwise have insider reporting obligations. The current rules, which require reasonable enquiry of those individuals, means potentially divulging the existence of a proposed transaction that would otherwise not be known to the individual;

- Move the regime for normal course issuer bids into the CSA rules in lieu of the existing process, making it more closely aligned with the SEC's safe harbor in Rule 10b-18 under the U.S. Securities Exchange Act of 1934, and eliminate the need for annual renewals of NCIBs. The current NCIB rules do not account for the emergence of multiple trading markets. The rules should be agnostic as to the location of a trade;

- Expand the foreign issuer bid exemption to permit foreign non-reporting issuers to buy back shares from investors resident in Canada provided such issuers are complying with the issuer bid rules in their local jurisdiction (i.e., abolish the other requirements of the current foreign issuer bid exemption, including the requirement that Canadians hold less than 10% of the outstanding securities subject to the bid). We believe that foreign issuers often elect to exclude Canadian investors rather than comply with incidental notice and other requirements under the existing Canadian issuer bid exemptions; and

- Publish guidance to clarify the circumstances under which a repurchase of securities by a Canadian reporting issuer made offshore would not raise public interest jurisdiction concerns by analogy to the issuer bid rules.

5. Derivatives

- Harmonize the registration regime for over-the-counter derivatives with National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**") rather than creating a separate registration regime; and

- Align the Ontario exchange traded derivatives/commodity futures regime with that of the other provinces and territories.

6. Registration

- Abolish the obligation of registrants to disclose their outside business activities within 10 days and, instead, adopt an annual reporting regime;

- Narrow the definition of "specified affiliate" for purposes of regulatory submissions because the burdens for registered, or exempt, firms within large or complex corporate or bank groups to assemble, disclose and monitor information about specified affiliates that are not: (i) shareholders or subsidiaries of the firm; or (ii) registered, licensed, or otherwise authorized or permitted to provide financial services, is disproportionate to the investor protection benefits (if any) of requiring that information;

- Stop requiring notices of regulatory action to be submitted by exempt international investment fund managers and sub-advisers; these notices aren't required of exempt international advisers and dealers;

- Do not preclude a firm that operates under an exemption from dealer registration in its home jurisdiction relying upon the international dealer registration exemption in section 8.18 of NI 31-103;

- Harmonize the investment fund manager ("**IFM**") registration requirement so that the distribution of investment fund securities to residents in Ontario no longer triggers an IFM registration requirement;

- State in section 11.9 of NI 31-103 that the deeming rule in section 1(6) of the *Securities Act* (Ontario) does not apply to notices given under this section;

- Restore the language in section 11.9 of NI 31-103 so that it only applies to firms registered in Canada and not also to firms registered in a foreign jurisdiction;

- Eliminate the requirement for a registered firm to submit a Form 33-109F5 annually for the sole purpose of updating the expiry date of its insurance coverage;

- Clarify that section 4.2 of Form 33-109F6 does not require a registered firm to report to the OSC its receipt of new discretionary exemptive relief from the OSC;

- Note when discretionary exemptive relief from the registration requirements has been granted to a firm on the National Registration Database ("**NRD**") (e.g., the conditional exemptions from registration in OSC Rule 32-505);

- List permitted individuals on the NRD;

- Make available a cumulative Form 33-109F6 or Form 33-109F4 that consolidates the information provided by a registrant in separate Forms 33-109F5;

- Eliminate the requirement for international firms to identify their principal regulator annually on the basis of the number of clients that are resident in each local jurisdiction each year; and

- Provide more guidance on what "incidental advice" regarding Canadian securities means for the purposes of the international adviser registration exemption in section 8.26 of NI 31-103.

7. General

- Consolidate definitions in a single instrument, except for those that are unique to a specific rule; and capitalize all defined terms for easier identification;

- Revise the definition of "Officer" in the *Securities Act* (Ontario) to clarify that it does not include nominal vice presidents;

- Adopt a regime for issuing no-action letters similar to the U.S. regime, which would increase regulatory efficiency and certainty for capital market participants from the valuable guidance provided in such letters;

- Alternatively, adopt a streamlined process for obtaining exemptive relief when the facts and request are equivalent in all relevant, material respects as in a prior exemptive relief order granted to a different party; and

- Do not include sunset periods in exemptive relief decisions as they create additional work on renewals and create significant uncertainty and thus increase regulatory costs for issuers.

II. Operational Changes and Changes to Enhance Investor Experiences

We propose the following changes to help make market participants' day-to-day interactions with the OSC more efficient and cost-effective:

- Commit to providing set turnaround times for responding to questions from issuers or counsel (by either email or phone) or providing formal decisions. Specifically, we propose the following:

    - 24 hours to provide an initial response to questions from issuers or counsel, at a minimum letting them know that the question has been received and is being reviewed. (We note that at the SEC, a question can be sent via email and the issuer or counsel will receive a response within 24 hours);

    - 48 hours to provide decisions on non-complex matters;

    - publicly disclosed, expected turnaround times for decisions on complex matters;

- Consistent with Alberta rules, grant an exemption from the annual participation fees for subsidiary entities if the financial statements of the subsidiary are consolidated with those of the parent, the participation fees paid by the parent reflect the subsidiary's market capitalization and the subsidiary was entitled to rely on a continuous disclosure exemption;

- Reduce and simplify certain filing requirements. Specifically, we propose that you:

    - In all instances, e.g. SEDAR Form 6s, accept electronic (PDF) signature pages, rather than requiring original ("wet ink") signature pages;

    - Simplify Form 13-502F1 to permit a year-end calculation, not a quarterly calculation, for determination of annual fees;

    - Harmonize the personal information form filing requirements with the TSX;

- Add up-to-date, consolidated versions of all instruments and policies to the OSC's website so that market participants can access the law. Archiving outdated material would also be highly desirable. Additionally, the OSC website should have up-to-date versions of forms available, in both word format and fillable PDF format;

- Enhance the search feature on both SEDAR and SEDI to permit full-text searching and create a more user friendly interface;

- Remove the requirement to input a non-robot code verification in order to access SEDAR documents; and

- Increase functionality to permit multiple SEDAR documents to be opened at the same time.

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We would be happy to discuss any of our above comments with you by phone or e-mail.

Yours truly,

Torys LLP

Torys LLP

cc: Leslie McCallum, Glen Johnson, Karrin Powys-Lybbe, Rima Ramchandani, Anita Anand, Tom Yeo, David Seville, Christine Vogelesang, Jim Hong, Adrienne DiPaolo, Robbie Leibel, Laura Sigurdson, *Torys LLP*