DuMOULIN BLACK LLP
BARRISTERS & SOLICITORS

10th Floor 595 Howe Street
Vancouver BC Canada V6C 2T5
www.dumoulinblack.com

Telephone No. (604) 687-1224
Facsimile No. (604) 687-8772
Direct Line (604) 602 6820
Email dmcelroy@dumoulinblack.com

VIA E-MAIL

February 25, 2015

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority (Saskatchewan)
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

Dear Sirs/Mesdames:

**Re: Canadian Securities Administrators Notice and Request for Comment (the "Notice")
Proposed Amendments to National Instrument 45-106 *Prospectus and Registration Exemptions,* National Instrument 41-101 *General Prospectus Requirements,* National Instrument 44-101 *Short Form Prospectus Distributions,* and National Instrument 45-102 *Resale Restrictions* and Proposed Repeal of National Instrument 45-101 *Rights Offerings***

We write in response to the request for comments on the proposed amendments set forth in the Notice (collectively, the "**Proposed Amendments**").

Comments

We support the Proposed Amendments as a method of facilitating rights offerings in Canada. We believe that they would increase the likelihood of reporting issuers raising capital via rights offerings.

Specific comments are as follows:

i. In Annex A2 to the Notice, the Proposed Changes to Companion Policy CP 45-106, in section (4) it appears that the reference to paragraph 2.1.1(16)(b) should in fact be to paragraph 2.1.1(17)(a).

ii. In Part 4 of the proposed Form 45-106F15, it should be made clear that the obligation to provide information on insiders and 10% security holders is "if known to the issuer after reasonable enquiry", which would be consistent with Item 12 of the existing Form 45-101F1.

iii. In Annex A1 to the Notice, the proposed amendment to National Instrument 45-106, in 2.1.1(3)(f) we note that an issuer that wishes to use the Proposed Exemption will need to translate the Notice and Circular if it has any security holders in Quebec. In our view the cost and timing of such translation would be a disincentive to conducting rights offerings for smaller to mid-sized issuers that have security holders in Quebec. Further, in light of the fact that the Circular does not disclose the issuer's business, but rather relies on the continuous disclosure record (which most issuers do not translate), we do not see a strong policy rationale for requiring that the Notice and Circular be translated. In other words, those Quebec resident security holders that do not read English will likely not have a full grasp of the issuer's business, and requiring that the Notice and Circular be translated would not remedy that fact.

We think that, in order to increase the frequency and success of rights offerings, there should not be any translation requirement. In the alternative, we think that any requirement to translate should be limited to issuers that have a significant security holder base in Quebec. For example, if less than 10% of the outstanding securities are held by Quebec residents and less than 10% of the security holders are Quebec residents, then there should be no requirement to translate.

iv. Also in Annex A1 to the Notice, in 2.1.1(6)(b)(ii), at the end of the definition of "x", we think it would add clarity to include the words "after giving effect to the basic subscription privilege". We acknowledge that the wording of this proposed section is the same as the applicable wording in the Current Exemption.

v. We are unclear as to why the proposed Circular contains a certificate that is required to be signed by directors and officers. We understand that this requirement makes sense for an offering memorandum and other offering documents such as take-over bid circulars, because the statutory liability provisions applicable to those documents (see sections 132.1 and 132 of the *Securities Act* (British Columbia), respectively) impose liability specifically on persons who signed the certificate. In this context, however, the proposed standard of liability (being secondary market liability) does not contemplate a certificate signed by particular directors and officers, and accordingly does not impose any specific liability on the signatories.

The questions set forth in the Notice are reproduced and addressed as follows:

Questions relating to the Proposed Exemption

1. We propose that the exercise period for a rights offering under the Proposed Exemption must be a minimum of 21 days and a maximum of 90 days. These time periods are substantially consistent with those under the Current Exemption. Some market participants have told us that an exercise period of 21 days is too long. Others thought a longer exercise period is beneficial. Reasons cited for a longer exercise period are that at least 21 days may be necessary to reach beneficial security holders and foreign security holders and that institutional investors often need a longer period to receive approvals.

   (a) Do you agree that the exercise period should be a minimum of 21 days and a maximum of 90 days?

   We do not consider 21 days to be an appropriate minimum exercise period. We consider 90 days to be an appropriate maximum exercise period.

   (b) If not, what are the most appropriate minimum and maximum exercise periods? Why?

   We agree with the concerns in respect of contacting beneficial security holders and allowing them sufficient time to consider participating in the rights offering. We note that the regime for contacting beneficial security holders in National Instrument 54-101 requires issuers to send meeting materials at least three business days before the 21st day

before the meeting. We think the minimum exercise period should be not less than this period, meaning that if the exercise period commenced on the date that the Notice is sent, the exercise period would be a minimum of 24 days. Another way to achieve the same end is if the exercise period is at least 21 days and commences at least three business days after the date of mailing of the Notice.

2. We propose that the Notice must be filed and sent before the exercise period begins and that the Circular must be filed concurrently with the Notice. Do you foresee any challenges with this timing requirement?

We do not foresee challenges unless, per our comment in 1(b) above, the exercise period were to commence three business days (or some other period of time) after the date of mailing of the Notice. In that case the Circular could be filed not later than the first day of the exercise period.

3. Some market participants have suggested we consider requiring the issuer to only file and not send the Notice and the Circular. While we do not think that the issuer should have to send the Circular itself, it is our view that the issuer should send the Notice to ensure that each security holder is aware of the offering. We also understand that the issuer would have to send rights certificates to security holders in any event.

   (a) Do you foresee any challenges with requiring the issuer to send a paper copy of the Notice?

   We do not foresee any significant challenges.

   A requirement to send the Notice to all security holders and make the Circular available on SEDAR is analogous to the use of "notice-and-access" in respect of security holders' meeting materials. We think applying the same principles to rights offerings makes sense, up to a point.

   In respect of the argument that the issuer would be sending rights certificates in any event and therefore should also send the Notice, we note that rights certificates would only be sent to registered holders. As such, we consider this argument to be only a partial justification for a requirement to send the Notice to beneficial holders as well.

   Given the importance of a notification of a rights offering, however, our view is that the requirement to send the Notice to all security holders is justified.

   (b) Do you foresee any challenges with the Circular only being available electronically?

   We expect that a small minority of security holders may not have access to the internet, so there is the potential for prejudice to those persons. We think it is outweighed by the benefit to issuers of being able to avoid the cost of printing and mailing hard copies of the Circular.

4. The required disclosure in the proposed Circular focuses on information about the offering, the use of funds available and the financial condition of the issuer. We do not propose to require information about the business in the Circular.

   (a) Have we included the right information for issuers to address in their disclosure?

   Yes. In our view the level of disclosure is appropriate.

(b) Is there any other information that would be important to investors making an investment decision in the rights offering?

Question 35 in the Circular asks "Will we issue fractional rights?" We think the issue will more frequently be whether fractional underlying securities will be issued on the exercise of rights. We suggest the question be amended accordingly.

5. Under the Proposed Exemption, we would require the issuer to include certain information in their closing news release including the amount of securities distributed under each of the basic subscription privilege and the additional subscription privilege to insiders as a group and to all other persons as a group. Other required disclosure includes the aggregate gross proceeds of the distribution, the amount of securities distributed under any stand-by commitment, the amount of securities issued and outstanding as at the closing date and the amount of any fee or commission paid in connection with the distribution. This information will give investors a more complete understanding of who acquired securities under the rights offering.

   Do you think that this disclosure will be unduly burdensome? If so, what disclosure would be more appropriate?

   In our view the level of disclosure is not unduly burdensome.

6. The Current Exemption permits the trading of rights and we propose to allow for the trading of rights under the Proposed Exemption. We have received mixed feedback from market participants on the costs and benefits of allowing rights to trade freely. On the one hand, the trading of rights adds complexity to a rights offering and could potentially add a few days to the timeline for an average rights offering. The trading of rights also allows the issuance of free-trading securities to new investors. On the other hand, the trading of rights may benefit issuers as it often puts the rights into the hands of holders who are more likely to exercise the rights. It allows for monetization, which means that security holders who are unable to exercise rights could receive compensation for the rights. It also benefits foreign security holders as the issuer's transfer agent will typically attempt to sell the rights of ineligible security holders on the market.

   (a) Should we continue to allow rights to be traded? If so, why?

   Yes. We agree that it can add complexity to the rights offering, but we think the ability to make rights saleable is important. We agree with the arguments noted in the question with respect to monetization and the increased likelihood that saleable rights will be exercised. To expand on the argument in respect of foreign security holders, even if the sale generates little or no return for the foreign holders, it is still better than excluding them altogether and issuers should continue to be entitled to make that election.

   (b) What are the benefits of not allowing rights to be traded?

   As noted above, if the rights are not allowed to be traded the rights offering is less complex and only existing security holders are entitled to participate.

   (c) Should issuers have the option of not listing rights for trading?

   Yes. If, for example, an issuer has a very small foreign security holder base and the benefit to those persons would not justify the cost to the issuer of listing the rights, the issuer should have the option of not listing rights for trading.

7. When we looked at historic use of rights offerings by reporting issuers, we found that the time between the filing of the draft circular and the notice of acceptance was quite lengthy (an average of 40 days). As a result, we considered options to reduce the review period. One of the options was to conduct a more focused initial review in three days rather than 10 days prior to the regulators' acceptance of the offering. The review would focus on sufficiency of proceeds, stand-by commitments, use of proceeds, insiders, and other issues that raise significant investor protection or public interest concerns. We decided not to proceed with this option but instead to remove regulatory review prior to use. This is similar to other prospectus exemptions and it would significantly improve issuers' time to market. Certain jurisdictions are also proposing reviewing rights offerings on a post-distribution basis for a period of two years to assess the use of and compliance with the Proposed Exemption.

   (a) Do you agree with our proposal to remove pre-offering review?

   Yes. In our experience the regulatory review process is a disincentive to completing a rights offering and the benefits conferred by such process do not justify the cost to issuers and security holders of the inability to conduct rights offerings on a reasonable and predictable time frame.

   (b) Do the benefits of providing issuers with faster access to capital outweigh the costs of eliminating our review?

   Yes, per the response above. Also, we expect that the inclusion of civil liability for secondary market disclosure in the Proposed Amendments will induce issuers to exercise vigilance in preparing their continuous disclosure, including the Circular. This will partially offset the loss of the protection conferred by the regulatory review process.

   (c) Post-distribution review would focus on sufficiency of proceeds, stand-by commitments, use of proceeds, insiders and other issues that raise significant investor protection concerns. Are there other areas that we should focus on?

   No. We believe the areas noted are sufficient.

8. Currently, an investor in a rights offering has no statutory recourse if there is a misrepresentation in an issuer's rights offering circular or continuous disclosure record. We propose that civil liability for secondary market disclosure provisions would apply to the acquisition of securities in a rights offering under the Proposed Exemption.

   (a) Is this the appropriate standard of liability to protect investors given that there will be no review by CSA staff of an issuer's rights offering circular?

   Yes. We think civil liability for secondary market disclosure is the right standard. In our view the alternative standards of statutory liability are not the right approach. Liability for disclosure in, for example, a take-over bid circular, is not appropriate in that the proposed Circular disclosure is less substantive and relies on an issuer's existing disclosure record.

   As noted in our comment (iii) above, in light of the fact that secondary market liability is proposed, we do not understand why the Circular must include a certificate signed by directors and officers.

   (b) Would requiring a contractual right of action for a misrepresentation in the circular be preferable? If so, what impact would this standard of liability have on the length and complexity of an issuer's offering circular, given that in order for the contractual liability to cover additional continuous disclosure record documents, the issuer may have to incorporate by reference those documents into the issuer's circular.

In our view a requirement to incorporate an issuer's disclosure record by reference would impede rights offerings if there was a corresponding requirement to obtain the consent of experts referenced therein. As such, if a contractual right of action would necessitate incorporation by reference, we would not support this standard of liability.

In addition, a requirement to incorporate documents into the Circular by reference combined with a requirement to translate the Circular would mean that the continuous disclosure documents would have to be translated. This would be a major impediment to conducting rights offerings pursuant to the Proposed Amendments for any issuer that does not translate its continuous disclosure documents in the ordinary course.

9. Given the potential size of rights offerings, there may be circumstances where it is desirable to mitigate the effect of the offering on control of an issuer. In this regard, CSA staff question whether security holders would benefit from separating the timing of the basic subscription and additional subscription privilege such that an issuer would announce the results of the basic subscription before commencing the additional subscription privilege period. An issuer's announcement of the results of the basic subscription may help security holders make more informed decisions about their participation under the additional subscription privilege.

   (a) Would security holders benefit from knowing the results of the basic subscription before making an investment decision through the additional subscription privilege?

   Potentially yes.

   (b) Would security holders make a different investment decision through the additional subscription if the results of the basic subscription were announced?

   Our expectation is that some security holders may make a different investment decision with respect to the additional subscription privilege, but we are not in a position to say how they would differ.

   If so,

   - Should the additional subscription privilege be inside or outside of 21 days?

     We think it would have to be outside of 21 days, unless significant security holders were given a shorter time period for exercising the basic subscription privilege. However, per the above and below, we are not in favour of a requirement for split timing.

   - Should the split timing for basic subscriptions and additional subscriptions always be required or only required in circumstances where there may be an impact on control?

     We think it should not be required, but that issuers should have the option to elect split timing.

   (c) What are the costs and benefits of having a two-tranche system for security holders?

   The benefits are outlined in the text of this question 9. The costs are additional complexity, financial cost and time required to complete a rights offering, which would likely result in fewer rights offerings being undertaken.

Questions relating to the repeal of the Current Exemption for use by non-reporting issuers

10. We propose repealing the Current Exemption for use by non-reporting issuers. There is very little use of the Current Exemption by non-reporting issuers. We also have concerns that existing security holders of non-reporting issuers do not have access to continuous disclosure about the issuer and the rights offering circular contains very limited disclosure about the issuer and its business. Accordingly, there may not be sufficient disclosure upon which an investor can make an informed investment decision.

    (a) If we repeal the rights offering prospectus exemption for non-reporting issuers,

        - Would this create an obstacle to capital formation for non-reporting issuers?

          No. We agree that rights offerings are not ideally suited for non-reporting issuers, and that they have the ability to use other exemptions that are well suited, such as the offering memorandum or "private company" exemptions.

        - Do you foresee any other problems?

          No. We acknowledge that the use of the Current Exemption by non-reporting issuers is very rare.

        - Would repealing the Current Exemption cause problems for foreign issuers that do not meet the Minimal Connection Exemption? If so, should we consider changes to the Minimal Connection Exemption? Please explain what changes would be appropriate and the basis for those changes.

          We think the applicable figures in the Minimal Connection Exemption could be increased to 20% (in respect of the aggregate number of Canadian securityholders) and 10% (in respect of securityholders in any province or territory). We think this would have limited or no impact on investor protection, and would increase the number of foreign rights offerings in which Canadians could participate.

    (b) Do you think we should consider changes to the Current Exemption instead of repealing it? If so, what changes should we consider?

    Any changes we would suggest would be similar to the changes incorporated into the Proposed Exemption.

        - If you think we should change the disclosure requirements, please explain what disclosure would be more appropriate.

          Not applicable.

        - Should non-reporting issuers be required to provide audited financial statements to their security holders with the rights offering circular if they use the exemption?

          Per our response in 10(a) above, our view is that non-reporting issuers should not be permitted to use the Proposed Exemption.

    (c) If the Current Exemption is repealed, non-reporting issuers could continue to offer securities to existing security holders under other prospectus exemptions such as the offering memorandum exemption, the accredited investor exemption, and the family, friends and

business associates exemption. Are there other circumstances in which non-reporting issuers need to rely on the Current Exemption? If so, please describe.

No.

Questions relating to the Stand-by Exemption

11. We propose that the securities distributed under the Stand-by Exemption to a stand-by guarantor who is not a current security holder or who is a registered dealer will be subject to a four-month hold period. We understand that stand-by guarantors are often either insiders of the issuer or registered dealers.

    (a) Should stand-by guarantors be subject to different resale restrictions depending on whether or not they are security holders of the issuer on the date of the notice?

    No. We think that stand-by guarantors should be permitted to receive free-trading securities irrespective of whether they are security holders on the date of the notice. We think that imposing a hold period on securities purchased by a stand-by guarantor would impose unnecessary complexity and cause possible confusion and would be a potential cost to any would-be guarantor, without any corresponding benefit. We therefore think that such a rule would make issuers less inclined to undertake a rights offering.

    (b) What challenges would there be for issuers trying to find a stand-by guarantor that is not already a security holder?

    We are unable to comment on this. Further to our answer in 9(a), we think that the restrictions on acting as a stand-by guarantor should be as few as possible, in order to encourage issuers to undertake rights offerings.

12. We are considering whether securities distributed under the Stand-by Exemption to a stand-by guarantor that *is* an existing security holder should also be subject to a four-month hold.

    (a) If the stand-by guarantor is an existing security holder, should we require a four month hold? Why or why not?

    See our response in 11(a) above.

    (b) We understand that in many cases, a stand-by guarantor receives a fee for providing a stand-by commitment. Should a stand-by guarantor that receives a fee and is a current security holder be subject to a restricted period on resale when other security holders are not subject to the restricted period?

    See our response in 11(a) above. In our view the payment of a fee should not impact the hold period requirement.

    (c) What challenges do you foresee if we require a four-month hold?

    We think it would be an impediment to attracting a stand-by guarantor, and that it would not have any corresponding benefit to issuers or existing security holders.

Question relating to the Minimal Connection Exemption

13. We are considering whether we should require the filing of materials with the regulator through SEDAR as part of the Minimal Connection Exemption. Most issuers using the Minimal Connection Exemption would be foreign issuers. We understand that some, but not all, of these issuers use local counsel to file the materials. Do you anticipate challenges if we require that materials for the Minimal Connection Exemption be filed on SEDAR?

    We do not anticipate any significant challenges in such circumstances.

Thank you for the opportunity to provide these comments and for your consideration of the same.

Yours truly,

DuMOULIN BLACK LLP

Per: "*Daniel McElroy"*

Daniel G. McElroy

DGM/eph