DAVIES

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September 27, 2017

BY E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of 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

c/o

The Secretary
Ontario Securities Commission
Email: comments@osc.gov.on.ca

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
Email: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment- *Proposed Amendments to National Instrument 45-102 Resale of Securities* and consequential amendments

We are writing in response to CSA Notice and Request for Comment- *Proposed Amendments to National Instrument 45-102 Resale of Securities* and consequential amendments (the "Notice").

We support the initiative to reform the resale exemption (the "section 2.14 exemption") found in section 2.14 of National Instrument 45-102 *Resale of Securities* ("NI 45-102") and we welcome the opportunity to comment on the new resale exemption described in proposed section 2.14.1 of NI 45-102 (the "section 2.14.1 exemption").

General Comments

We understand that the policy rationale behind the section 2.14.1 exemption is the view that it is unnecessary to restrict the resale of securities issued on a private placement basis, where that resale takes place over a foreign market or to a person or company outside of Canada and there is little or no likelihood that a market for the securities will develop in Canada. While we appreciate the objective that the CSA is trying to achieve, we submit that each of section 2.14 (as it exists today) and section 2.14.1 (as proposed in the Notice) establish arbitrary thresholds that fail to identify circumstances where the prospectus requirement should not be applied to an offshore resale of securities. Namely, circumstances where the risk is low that the trade is, in fact, an indirect distribution into Canada because there is not a meaningful Canadian market into which the traded securities are likely to flow back without first coming to rest outside of Canada. In our view, Canadian connections that do not bear on this flow back risk should be irrelevant in assessing the availability of an offshore resale exemption.

In the case of a listed security, we think listing (in the case of an initial public offering) and/or published trading volume is a much better proxy for flow back risk than the Canadian ownership thresholds employed in the existing section 2.14 exemption or the "foreign issuer" concept proposed to be employed in the new section 2.14.1 exemption. The mere fact that an issuer is incorporated or has a head office in a jurisdiction of Canada, or that a majority of its executive officers or directors ordinarily reside in Canada, does not provide a meaningful indication that a significant market for the securities of such issuer has developed, or is likely to develop, in Canada. Furthermore, published trading volume information is a preferable indicator as a practical matter as it is accessible to all investors. In contrast, it could be difficult for investors to determine whether the majority of the directors or officers of an issuer "ordinarily reside" in Canada or a majority of the consolidated assets of an issuer are located in Canada.

Even in circumstances where some market for the securities is likely to develop in Canada, if the issuer is (or will concurrently become) subject to the continuous disclosure and other requirements of securities legislation in one or more well-established foreign jurisdictions and more than a majority of the published trading of a class of securities of the issuer over a pre-determined period of time has been in or through exchanges or markets outside of Canada, we are of the view that the CSA should not impose Canadian securities law requirements on resales of those securities in or through such offshore exchanges or markets. Notably, Canadian investors are generally free to buy and sell securities on an offshore exchange without restriction, even if the issuer of the traded securities would not satisfy the definition of "foreign issuer". It is unclear why these secondary trades should be distinguished from a first trade of securities acquired by a Canadian investor from the issuer (or a control person) in an exempt distribution, where each is made over an offshore exchange, particularly where the majority of trading in that class of security takes place outside of Canada.

Specific Comments

Below are specific comments on proposed section 2.14.1.

1. Proposed elements of "foreign issuer" definition

As noted above, we do not think that the domestic or foreign status of an issuer is the correct proxy for identifying whether offshore resales should be subject to the prospectus requirement. The relevant considerations should be those that bear on flow back risk. See our response under #6 below for further detail as to the alternative measure we propose for an offshore resale exemption.

However, should the CSA determine to proceed with a foreign issuer concept as the basis for the section 2.14.1 exemption, we are of the view that the failure to satisfy (or, as applicable, the satisfaction of) only one of the proposed elements of the definition of "foreign issuer" is not sufficient to establish a connection with Canada that merits treating the resale as a "distribution". All of the proposed elements of the definition of foreign issuer (to the extent they remain part of the definition) should have to be established in order for an issuer to lose the benefit of the section 2.14.1 exemption. In particular, having a head office or being incorporated or organized in a Canadian jurisdiction alone, should not be sufficient for an issuer to lose its status as a "foreign issuer" entitled to the exemption. An issuer may elect to incorporate or establish a head office in Canada for a number of reasons, such as tax or other regulatory reasons, that has no bearing on its ability or intent to attract Canadian investors. Similarly, an issuer having a majority of its assets located in Canada may establish that there is a Canadian market for its products; however, it is not a meaningful indicator of a market for its securities.

Further, consideration should be given to practical issues that will arise in assessing an issuer's satisfaction of the proposed elements of the definition of "foreign issuer". It is unlikely that an investor will be able to ascertain if a majority of an issuer's executive officers and directors are ordinarily resident in Canada or an issuer has a majority of its consolidated assets located in Canada, other than by obtaining a representation from the issuer to this effect on the distribution date.

To the extent they remain elements of the definition, we also recommend that the CSA provide guidance on the meaning of "ordinarily resident" and what is meant by "more than 50% of the consolidated assets being located in Canada". Is the 50% threshold determined by reference to the value of the assets recorded on the balance sheet or some other metric? Does it include all assets or are certain assets excluded?

2. Timing for "foreign issuer" determination

Although a representation from the issuer is likely the only way for an investor to get comfort on the availability of the exemption and such representation is likely only to be available on the initial distribution date, we would recommend that an investor can rely on the exemption if the

issuer satisfies the foreign issuer test as at the trade date, even if the issuer did not satisfy the test as at the initial distribution date. Given the intent of the foreign issuer concept is to assess the extent of any Canadian market for the resale of the securities, the policy of the exemption will still be served if the determination of foreign issuer status is made as at the trade date.

3. Determination of non-reporting issuer status

We agree that an investor should be entitled to rely on the section 2.14.1 exemption, if the issuer of the securities was a non-reporting issuer on the date of the initial distribution or the date of the trade (but is not required to be a non-reporting issuer on both dates). However, it will be more challenging for the investor to determine if the issuer satisfies the "foreign issuer" definition on the date of the first trade.

4. No unusual efforts to prepare the market

We recommend removing this condition to the exemption. Importing a requirement of "insider", a Canadian only concept, could be confusing for investors in particular where concepts contained in the offshore securities legislation governing the foreign issuer are not identical. In addition, it seems to be an unnecessary condition. It is unlikely that a selling securityholder will take steps to prepare the market in Canada for a distribution of securities through an offshore market. The inclusion of anti-avoidance language (similar to what has been proposed in Proposed Ontario Securities Commission Rule 72-503 *Distributions Outside of Canada*) would achieve the same objective.

5. Retaining section 2.14

We recommend retaining the section 2.14 exemption for those issuers and Canadian investors who have relied on the availability of this existing exemption for the resale of securities previously placed into Canada. In addition, an ownership threshold may be an appropriate, alternative measure in the context of unlisted securities that are not widely held. However, as noted below, the existing section 2.14 exemption could be modified to more closely align with the policy underlying the exemption.

6. Similar exemption for Canadian issuers

The proposed section 2.14.1 exemption fails to accommodate the resale of securities of Canadian non-reporting issuers in offshore markets. In our view, this is problematic. We are aware of situations where an issuer organized in Canada has been required to file a non-offering prospectus, in the context of a southbound only IPO with a US-only listing, solely for the purpose of permitting the future resale of securities held by Canadian shareholders of the pre-IPO private company. This is a costly exercise for issuers, in particular given the different disclosure requirements for "emerging growth companies" subject to U.S. securities laws and issuers filing prospectuses under Canadian securities laws.

As noted earlier, in the case of a listed security, we are of the view that the CSA should apply a listing or trading volume test for the section 2.14.1 exemption (in lieu of the proposed "foreign issuer" test) as trading volume is a better proxy for the existence of a significant Canadian market for a class of securities. This would result in one exemption which could be applied equally with respect to the resale of securities of both foreign and Canadian issuers. Specifically, this exemption would provide that the first trade of securities of any non-reporting issuer (whether foreign or domestic), initially acquired by an investor in an exempt distribution, is not a distribution if the trade is to a person outside of Canada or on or through an exchange, or market, outside of Canada.

We also recommend that the CSA consider amending the existing section 2.14 exemption to (a) eliminate the number of holders test (which is very difficult to determine), and (b) increase the ownership threshold from 10% to "more than 50%" of the number of outstanding securities of the class or series owned by residents of Canada. The higher threshold should provide a better indicator of whether a significant Canadian market exists (or may arise) for the securities of an issuer with unlisted classes of securities. While less tailored (from both a policy or practical perspective) than the trading volume test that we have proposed for the 2.14.1 exemption, this alternative exemption would at least allow for the resale of unlisted securities in a manner that remains consistent with the policy rationale of the exemption. However, this alternative is not ideal given the difficulties with assessing Canadian ownership for publicly listed companies; accordingly, it is recommended only as a supplement (and not as a replacement) our formulation of 2.14.1 suggested above.

If you have any questions regarding the foregoing, please do not hesitate to contact the undersigned at 416.367.6907 (Mindy Gilbert) or 416.863.5517 (David Wilson).

Yours very truly,

(signed) *Mindy Gilbert & David Wilson*