

Canadian Securities Law News

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Number 253

Canadian Securities Administrators

Administrators 4

TSX 5

Montreal Exchange 5

Provincial Updates

Ontario 5

Recent Cases

Unregistered Trading and Advising 6

Market Manipulation 7

No Prosecutorial Misconduct 8

PRODUCT SPOTLIGHT

The commentary on continuous disclosure, starting at ¶13100-001, has recently been updated to assist reporting issuers in understanding and meeting their continuous disclosure obligations.

TSX PROPOSES NEW LISTING REQUIREMENTS FOR EXCHANGE TRADED PRODUCTS, CLOSED-END FUNDS AND STRUCTURED PRODUCTS

— Jason A. Chertin, Money Khoromi, and Ke-jia Chong, Student-at-law, McMillan LLP. © McMillan LLP. Reprinted with permission.

On January 15, 2015, the Toronto Stock Exchange ("TSX") published for comment proposed amendments (the "Amendments") to the TSX Company Manual (the "Manual"). The Amendments create listing requirements for non-corporate issuers in a new Part XI to the Manual. These entities include exchange traded products ("ETPs"), closed-end funds and structured products. ETPs include exchange traded funds ("ETFs") and exchange-traded notes.

Background

The Manual provides detailed requirements for all applicants seeking to be listed on the TSX. The existing rules set out in the Manual are primarily designed for corporate entities. In response to the growth of ETFs, closed-end funds and structured products, the Amendments propose new listing rules for non-corporate entities.

In the past six years, the TSX has added six more ETF providers and 251 new products, including 56 new ETF listings in 2014. Over the last five years, the TSX has had an average of 35 new closed-end fund listings per year. While there are currently only six structured products publicly listed on Canadian exchanges, the TSX believes that there could be benefits to having more structured products publicly traded. The rules proposed in the Amendments are specifically designed to facilitate the listing of ETPs, closed-end funds and structure products. The Amendments correspond with the amendments to National Instrument 81-102 — *Mutual Funds* ("NI 81-102") recently adopted

by the Canadian Securities Administrators (the "CSA") related to the regulation of closed-end funds.

CSA Amendments to NI 81-102

As part of the recent amendments to NI 81-102, the CSA has restricted closed-end funds from distributing rights or warrants to current security holders. As a result, the Amendments do not contain rules regarding warrant and rights offerings for closed-end funds. Additionally, as a result of the CSA's amendments to the requirements for closed-end funds proposing to merge with another closed-end fund or convert into an open-ended mutual fund, the TSX rules relating to these matters will be removed concurrently with the implementation of the Amendments.

Proposed Amendments

A. Minimum requirements for original listings

The Amendments create minimum listing requirements for non-corporate issuers.

The TSX proposes \$1 million as the minimum market capitalization for ETP listings. Less than the current unpublished practice of a \$2 million minimum, this is intended to accommodate designated brokers who want to limit the seed capital for an ETP. The Net Asset Value ("NAV") must be calculated daily and be available on a publicly accessible website. An ETP not issued by a financial institution would also be required to have a CEO, CFO, Secretary and Independent Review Committee ("IRC"). An ETP issued by a financial institution would need to identify the individuals who are responsible for the management and operations of the ETP.

Closed-end funds would be subject to a minimum market capitalization of \$20 million, which reflects current TSX practice. At least 1 million freely-tradable securities would need to be held by at least 300 public holders, each with one board lot or more. The Amendments would also require that the NAV be calculated weekly and be available on a publicly accessible website. There must also be a CEO, CFO, Secretary and IRC for the closed-end fund or its manager.

Structured products would be subject to a minimum market capitalization of \$1 million, which is lower than the current TSX practice of a \$2-million minimum, in order to accommodate structured products' short product lives and low trading volumes. The TSX also proposes the NAV to be calculated weekly and be available on a public website. A non-financial institution issuer or its manager would be required to have two independent directors, a CEO, CFO and Secretary. For structured products issued by a financial institution, the individuals responsible for the management and operations would need to be identified. The TSX encourages entities other than financial institutions to have preliminary discussions with the TSX prior to submitting their listing application.

B. Capital structure changes

The Amendments propose further rules for transactions involving capital structure changes subsequent to the original listing. In general, listed ETPs must notify the TSX of any issuance or potential issuance of a new class of securities that is convertible into a listed class of securities. No prior notification is necessary if the securities are offered on a continuous basis. For closed-end funds and structured products, they must notify the TSX of any issuance or potential issuance of securities other than unlisted, non-voting and non-participating securities and receive pre-approval from TSX.

a. Additional listings

Under the proposed Amendments, the creation of any securities of an ETP must accord with its constating documents and NI 81-102. ETPs must provide a Form 1 and a legal opinion that securities from the previous quarter have been fully paid. Closed-end funds and structured products require TSX acceptance before proceeding with the issuance of any securities other than unlisted, non-voting and non-participating securities. Any public announcements of the transaction must indicate this.

b. Supplemental listings

The Amendments propose that ETPs or closed-end funds must apply to the TSX in order to list any securities of a class

that is not already listed. The TSX will give a preliminary opinion on the eligibility to list the supplemental securities.

There are also specific rules if the new class of securities is convertible into a currently listed class of securities. For ETPs, the number of securities of the new class must not be less than the minimum prescribed number as set out in the constating documents. For closed-end funds, the market value of the securities of the new class must not be less than \$2 million and there must be at least 100,000 freely-tradable securities held by at least 100 public board lot holders.

If the new class of securities to be listed by ETPs or closed-end funds is not convertible into a currently listed class of securities, such a listing needs to comply with the minimum original listing requirements for the respective products.

c. Security holder approval

In addition to the requirements under section 5.1 under NI 81-102, the Amendments propose that security holder approval be required for any amendments to the constating documents that are not otherwise covered by their general amendment provisions. Any extensions of an ETP or closed-end fund beyond the original termination date must also have security holder approval unless the security holders are given an opportunity to redeem securities at NAV on the original termination date.

d. Termination

Unless there is a fixed termination date, security holders of non-corporate issuers must be given at least 30 days' notice before termination.

e. Notification to TSX

Non-corporate issuers must pre-clear with the TSX any materials sent to security holders unless they are continuous disclosure documents like financial statements or management reports on fund performance.

f. Continued listing requirements and delisting

Under the Amendments, securities of a closed-end fund may be suspended or delisted if the fund is less than \$3 million in the value for over 30 consecutive days, has less than 500,000 freely-tradable publicly held securities, or has less than 150 public security holders. For ETPs and structured products, the requirements are more general. They may be delisted if continued listing does not preserve the quality of the market.

Specific Questions

The TSX has posed the following specific questions with respect to the Amendments:

1. Are the proposed original listing requirements for ETPs, Closed-end Funds and Structured Products appropriate? In particular, are the proposed minimum initial public offering conditions appropriate?
2. For Closed-end Funds that do not calculate NAV on a daily basis, what is a reasonable time period within which they should be required to price an offering of additional listed securities?
3. For Closed-end Funds, is it appropriate to require new funds to publish a daily NAV on their website? Should exemptions be made for certain fixed-income funds or alternative asset funds?
4. Does Independent Review Committee approval for fund mergers provide any value to the TSX? Is there any other way to provide comfort to TSX, when security holder approval is not sought, that the merger of two funds is fair and reasonable for current security holders of both funds?
5. Should TSX require security holder approval for any other matters for ETPs, Closed-end Funds and Structured Products?
6. Are the proposed continued listing requirements appropriate?
7. Are there any other rules or requirements contained in the Manual that should be adapted to better suit ETPs,

Closed-end Funds and Structured Products?

The deadline for submitting comments to the TSX is March 16, 2015. Please contact a member of our Investment Funds & Asset Management Group listed below if you have any questions or seek assistance with the preparation of a comment letter.

For more information on this topic please contact:

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CANADIAN SECURITIES ADMINISTRATORS

2015 Update Regarding Structured Notes

The CSA has issued CSA Staff Notice 44-305, which sets out CSA Staff's views regarding issues in connection with offerings of structured notes (specified derivatives for which the amount payable is determined by reference to the price, value, or level of an underlying interest that is unrelated to the operations or securities of the structured note issuer) under the shelf prospectus system. The notice has been reproduced in Volume 1 at ¶4435 of the *Canadian Securities Law Reporter*.

Documents Published for Comment

Staff of the Alberta, British Columbia, and Nova Scotia Securities Commissions, and of the Financial and Consumer Affairs Authority of Saskatchewan and the New Brunswick Financial and Consumer Services Commission recently published the following documents for comment:

- proposed Multilateral Instrument 91-101 *Derivatives: Product Determination*;
- proposed Companion Policy 91-101CP *Derivatives: Product Determination*;
- proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*; and
- proposed Companion Policy 96-101CP *Trade Repositories and Derivatives Data Reporting*.

The comment period ends on March 24, 2015.

CSA Revises Numbering System Notice

The CSA has revised a notice that explains its National Numbering System. For further information, please refer to revised CSA Staff Notice 11-312, which will be reproduced in a future report in Volume 1 at ¶1142 of the *Canadian Securities Law Reporter*.

CSA Issues Progress Report on its Review of the Proxy Voting Infrastructure

On August 15, 2013, the CSA published for comment CSA Consultation Paper 54-401 *Review of the Proxy Voting Infrastructure*, which outlined, and sought feedback from market participants on, a proposed approach to address concerns regarding the integrity and reliability of the proxy voting infrastructure. The CSA recently issued a notice to report on the progress the CSA has made in its review of the proxy voting infrastructure and outline its next steps in this initiative. For further information, please refer to CSA Staff Notice 54-303, which will be reproduced in a future