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REQUEST FOR COMMENTS: Amendments Respecting Trading During Certain Securities Transactions

References: RS Inc: Amendments Respecting Restrictions on Trading by a Participant During a Distribution and Restrictions on Trading During a Securities Exchange Take-Over Bid
And OSC Proposed Rule 48-501—Trading During Distributions, Formal Bids and Share Exchange Transactions

BMO Nesbitt Burns welcomes the opportunity to provide additional input on Market Regulation Services Inc.'s (RS) proposed amendments to the Universal Market Integrity Rules (UMIR) with respect to market stabilization and market balancing activities, proposed exemptions, and harmonization with the Ontario Securities Commission (OSC) proposed rule 48-501 governing the same activities.

BMO Nesbitt Burns supports the efforts to provide amended UMIR and OSC rules that will more clearly delineate activities and provide exemptions within a robust regulatory framework. We note that many of the suggestions that we made during the first comment period have been adopted as well as many of the suggestions of our peers. As a result, our areas of concern have been reduced to the following:

- **Commencement of the restricted period—Soliciting Dealer Manager**

  BMO Nesbitt Burns recommends that the restricted period vary as a function of the role of the dealer in the transaction. As a result of OSC 33-601, Advisors are subject to greater restrictions with respect to proprietary trading. We recommend, however, that when a dealer is acting in the role of Soliciting Dealer Manager, the period of restriction should only be the last 10 days. Soliciting Dealer Managers have no pecuniary interest in the outcome of the vote, since compensation is not related to the success of the vote. During the last 10 days, a Soliciting Dealer Manager will be privy to information about the potential outcome of the vote, so imposing a restriction is appropriate.

- **Termination of the restricted period—requirement for delivery of final prospectus to each subscriber**

  The proposed UMIR rule 1.2(6)(a) (i)) still makes reference to the end of the selling process requiring not only a final receipt to be issued, but also a final prospectus delivered to each subscriber. BMO Nesbitt Burns respectfully reiterates our objection to this requirement. Final prospectuses can only be delivered after a final receipt has been obtained and tickets have been contracted. Traditionally, final prospectuses are only deemed to have been received after two business days have passed. This results in an artificial extension of the termination of the restricted period

- **Termination of the restricted period—release of the information circular**

  The proposed rule states that the restricted period should commence "in connection with an amalgamation, arrangement…on the date of the information circular…and ending on the approval of the transaction." We believe that the restriction should **end** on the date of mailing the information circular as this marks the point at which all material information is in the public domain.

  To elaborate:

  - Imposing proprietary trading and research restrictions until the deal is closed creates a disservice to investors who must look to dealers for trading execution and research services.

  - The period of time between the release of the information circular and the closing can be considerable. If regulatory approvals are required (i.e. securities commissions, stock exchanges, Investment Canada, Competition Bureau, CRTC, Energy Board, Bank Act), and/or there are extensive or unusual conditions to the offer (i.e. due diligence, retention of management, divestiture of assets, requirement to obtain creditor/shareholder/secured party consent, requirement to obtain court approvals, etc), the process can take months.

  - Other market practices, standards, and censures are in place for analysts and traders that militate against market manipulation, insider trading and potential conflict of interest. For example, market participants acting as advisors and carrying on sales and trading businesses are required to have in place information barrier policies and procedures to prevent misuse by the sales and trading businesses of material confidential information that a participant may have in its possession as the result of its advisor business. Regulators of markets and market participants are able to monitor sales and trading by a participant for possible market manipulation in connection with an amalgamation or arrangement.

  - The appropriate trigger point for the practical conclusion of an advisory role is the publication of the circular. This event provides full, true, and plain disclosure of the details of the transaction and of all material confidential information in the advisor's possession. In addition, participants may have internal monitoring processes to mitigate the possibility of its sales and trading personnel engaging in any prohibited manipulative trading practice in

connection with an amalgamation or arrangement where a participant is acting in an advisory role between publication of the circular and the closing of the transaction.

- **Exemptions—hedged transactions**

  We request clarity (in the form of specific exemptions) with respect to the following types of transactions:

  - An existing hedge position has been established in a proprietary account other than a designated market maker trading account or a derivatives market maker account (long derivative and short common stock) and the security becomes subject to a Trading Restriction under this Proposed Rule. An exemption should be established that permits the position to be unwound or rebalanced to maintain market neutrality (delta hedge).

  - An unsolicited client order to enter into a swap transaction involves a security subject to a trading restriction. An exemption should be established that permits the dealer to satisfy the unsolicited order and enter into the associated hedge as long as the trade position is not directional, hence market neutral.

- **Research activities**

  While the Revised Proposal, which allows ratings to be raised or lowered on restricted securities under the prescribed conditions, may be positive on its own, we believe that the remaining proposals still leave ratings effectively "constrained". Therefore we do not believe the proposed rules would be a practical or positive step forward.

  Specifically, the rules which disallow Single Issuer Reports and which require that a restricted security be given no materially greater space or prominence in a publication than that given to other securities or issuers practically limits the ability to change ratings of such restricted issuers. Research dissemination procedures require that added prominence be given to opinion changes to ensure that such opinion changes are communicated broadly and concurrently to all clients and client groups.

  If a restricted security may continue to be rated but that rating, for all practical purposes, may not change, then the rating could be rendered of limited use to investors and may be misleading.

If you require any further information about our comments, please do not hesitate to contact us.

Regards,

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