

# 2010 BCSECCOM 703

December 14, 2010

## Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy NP 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – National Instrument 51-102, s. 13.1 Continuous Disclosure Obligations – BAR – An issuer requires relief from the requirement to include certain financial statements in a business acquisition report – The issuer made a significant acquisition of a private company; the necessary information to prepare the required financial statements is unavailable; the BAR will contain sufficient alternative information about the acquisition

## Applicable Legislative Provisions

National Instrument 51-102, s. 13.1

In the Matter of  
the Securities Legislation of  
British Columbia  
(the Jurisdiction)

and

In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of  
Eagle I Capital Corporation  
(the Filer)

## Decision

## Background

- ¶ 1 The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the Legislation) for an exemption from the requirement to include certain financial statements in a business acquisition report (BAR) to be filed in connection with the Transaction (as defined below), as required by section 8.4 of National Instrument 51-102 - *Continuous Disclosure Obligations* (NI 51-102) (the Exemption Sought).

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Under the Process for Exemptive Relief Application in Multiple Jurisdictions (for a passport application):

- (a) the British Columbia Securities Commission is the principal regulator for this application, and
- (b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 - *Passport System* (MI 11-102) is intended to be relied upon in Alberta.

### **Interpretation**

- ¶ 2 Terms defined in National Instrument 14-101 - *Definitions* have the same meaning if used in this decision, unless otherwise defined.

### **Representations**

- ¶ 3 This decision is based on the following facts represented by the Filer:
- 1. the Filer is incorporated under the *Business Corporations Act* (British Columbia) and its head office is located at 900 - 595 Howe Street, Vancouver, British Columbia, Canada, V6C 2T5;
  - 2. the Filer has been a reporting issuer in the Jurisdiction and Alberta since January 14, 2009;
  - 3. the Filer is authorized to issue an unlimited number of common shares of which 9,965,500 common shares are issued and outstanding;
  - 4. the Filer was a “capital pool company” under the policies of the TSX Venture Exchange (the TSXV), and from January 14, 2009 to the close of market on September 30, 2010, the Filer’s common shares (the Common Shares) were listed under the symbol “EIC.P”;
  - 5. effective at the opening of market on October 1, 2010, the Common Shares have been listed on the TSXV under the symbol “EIC”;
  - 6. the Filer is a “venture issuer” as defined in NI 51-102;
  - 7. the Filer’s financial year-end is May 31;
  - 8. the Filer filed its audited consolidated financial statements for the year ended May 31, 2010 and has filed unaudited consolidated financial statements for the interim period ending August 31, 2010 on the System for Electronic Document Analysis and Retrieval (SEDAR);

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9. Eagle Acquisitions, Inc. (Eagle Subco), a company incorporated under the laws of the State of Delaware, is a wholly-owned subsidiary of the Filer;
10. Miguel's Products LLC (Miguel's) is a limited liability company formed under the laws of the State of Delaware on December 15, 2004, and was a specialty manufacturer of all natural and organic tortilla chips, salsa and other snack products;
11. on April 21, 2009, the Filer and Eagle Subco entered into a merger agreement, as amended on September 24, 2009, (the Merger Agreement) with Miguel's under which Eagle Subco agreed to merge with Miguel's (the Merger Transaction);
12. the Filer terminated the Merger Agreement on October 23, 2009 after the Filer failed to obtain requisite shareholder approval for the Merger Transaction;
13. on March 26, 2010, the Filer and Eagle Subco entered into a non-recourse purchase and sale agreement (the Purchase and Sale Agreement) with WWS Holdings, LLC (WWS) and Dean J. Lynch (Lynch) to acquire certain Miguel's assets (the Purchase Assets) that WWS intended to first acquire from TZ Business Lenders, Inc. (the Secured Creditor), which held a first priority security interest in and lien on all of the assets of Miguel's and which intended to publicly auction the Purchase Assets on April 1, 2010; the Purchase and Sale Agreement was conditional on WWS being the successful bidder and purchaser of the Purchase Assets and the Filer receiving TSXV approval for the acquisition of the Purchase Assets; the Purchase Assets included substantially all of the assets comprising the snack food business previously operated by Miguel's which included existing inventory, accounts receivable and proprietary intellectual property and business relationships necessary to manufacture and sell all natural and organic tortilla chips, salsa and other snack products under the Miguel's Stowe Away brand name, but excluding any and all deposits, deposit accounts and cash proceeds of Miguel's generated after April 1, 2010; in consideration for the Purchase Assets, under the Purchase and Sale Agreement, the Filer agreed to issue 1,600,000 Common Shares and promissory notes of US\$600,000 in favour of WWS and Lynch;
14. on April 1, 2010, the Secured Creditor sold all of the Purchase Assets to WWS at a public sale conducted in accordance with the terms and conditions of the United States Uniform Commercial Code for a cash payment of

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US\$1,038,139.97 pursuant to which public notice was provided in the States of Vermont, New Jersey and Delaware;

15. WWS and Lynch have informed the Filer that after the sale of the Purchase Assets to WWS on April 1, 2010, the business of Miguel's continued uninterrupted;
16. on June 9, 2010, the principal regulator granted the Filer an exemption from the continuous disclosure obligation to include certain financial statements of Miguel's in the BAR as required by subsection 8.4(1) of NI 51-102 in connection with the acquisition by the Filer of the Purchase Assets pursuant to the Purchase and Sale Agreement, provided that, among other things, such acquisition be completed within 75 days of June 9, 2010;
17. on or about September 1, 2010, the Filer, Eagle Subco, WWS and Lynch restructured the transactions contemplated in the Purchase and Sale Agreement and entered into a trademark and intellectual property licence agreement (the Licence Agreement) which terminated the Purchase and Sale Agreement;
18. the acquisition under the Purchase and Sale Agreement was therefore not completed within 75 days of June 9, 2010 and the Filer cannot rely on the exemption previously granted;
19. under the Licence Agreement, WWS granted to Eagle Subco an exclusive, non-transferable licence to use certain trademarks, trade names, recipes and formula and related intellectual property (Miguel's Intellectual Property) solely in connection with the production, promotion, marketing and sale of tortilla chips and related food products in the United States, Canada and Mexico (the Licence); in consideration for the Licence granted by WWS, the Filer and Eagle Subco jointly issued a promissory note in the principal amount of US\$500,000 to WWS and a promissory note in the principal amount of US\$100,000 to Lynch; both of such promissory notes are secured by the assets of Eagle Subco and property or assets produced by the use of the Miguel's Intellectual Property;
20. under the Licence Agreement, WWS also granted to the Filer and Eagle Subco the option to purchase Miguel's Intellectual Property for an aggregate of 1,600,000 Common Shares (the Option);
21. the acquisition of the Miguel's Intellectual Property through the exercise of the Option by the Filer or Eagle Subco (the Transaction) constitutes the Filer's "qualifying transaction" pursuant to the policies of the TSXV;

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22. on September 30, 2010, Eagle Subco exercised the Option and acquired the Miguel's Intellectual Property and the TSXV accepted the Transaction for filing;
23. the Transaction constitutes a "significant acquisition" for the purposes of NI 51-102 and the Filer is required to file a BAR within 75 days of the closing of the Transaction; as such, the BAR of the Filer is due on or before December 14, 2010;
24. under section 8.4 of NI 51-102, the BAR must be accompanied by:
  - (a) annual financial statements for Miguel's for its two most recently completed financial years prior to the Transaction, being the financial years ending December 31, 2009 and December 31, 2008 and the financial statements for the most recently completed financial year prior to the completion of the Transaction, being December 31, 2009 must be audited;
  - (b) unaudited interim financial statements for Miguel's most recently completed interim period, being the nine-month period ended September 30, 2010; and
  - (c) *pro forma* financial statements of the Filer giving effect to the Transaction.
25. audited annual financial statements of Miguel's for the year ended December 31, 2008 exist and were filed by the Filer on SEDAR in connection with a management information circular of the Filer dated September 25, 2009 concerning shareholder approval for the Merger Transaction;
26. the Filer has made reasonable inquiries into obtaining the records of Miguel's for the year ended December 31, 2009, and the three-month period ended March 31, 2010, from:
  - (a) the former auditor of Miguel's (the Former Auditor), and has been informed that the Former Auditor does not have sufficient financial information on Miguel's for the year ended December 31, 2009, to prepare audited annual financial statements of Miguel's and does not have any records for the period ended March 31, 2010;
  - (b) the Secured Creditor, and has been informed that the Secured Creditor did not request or receive any historical documents or financial records of Miguel's;

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- (c) the former management of Miguel's, namely, Anthony Cusano, Robert Rosko and Bruce Duley (Miguel's Former Management), and has been informed that Miguel's Former Management:
    - (i) resigned from Miguel's in February 2010 and upon such resignation left all records of Miguel's at the office of Miguel's; and
    - (ii) were informed by the Secured Creditor that when the Purchase Assets were turned over to the Secured Creditor, the Miguel's office was closed and all of the contents were left to be discarded by the landlord who subsequently cleared out the space so that it could be leased and destroyed all of the records that were left at the Miguel's office;
  - (d) WWS, and has been informed that WWS has no records or documents of Miguel's; and
  - (e) Lynch (the only remaining officer of Miguel's after the resignation of Miguel's Former Management), and has been informed that Lynch has no records or documents of Miguel's;
27. Miguel's Former Management have informed the Filer that they did not know at the time they left Miguel's that the Filer would reach an agreement to acquire the Purchase Assets or Miguel's Intellectual Property;
28. accordingly, the Filer has determined that it is not possible to prepare audited annual financial statements of Miguel's for the year ended December 31, 2009, and unaudited interim financial statements for the three month period ended March 31, 2010, because the books, records and other justificatory documents pertaining to the Miguel's Intellectual Property for these periods were abandoned when the corporate entity "Miguel's Products LLC" ceased operations after the public sale of the Purchase Assets and were subsequently destroyed;
29. apart from the requirements to include annual financial statements of Miguel's for the year ended December 31, 2009, interim financial statements that include financial results for the three month period ended March 31, 2010, and certain *pro forma* financial statements required under subsection 8.4(5) of NI 51-102, the Filer is otherwise able to prepare and file the BAR in accordance with NI 51-102;
30. the Filer will include in the BAR the following alternative financial information:

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- (a) an audited statement of assets acquired and liabilities assumed by the Filer as at the closing date of the Transaction;
- (b) audited annual financial statements of Miguel's for the year ended December 31, 2008;
- (c) unaudited financial statements with respect to the Purchase Assets as at September 30, 2010 and for the period from April 1, 2010 to September 30, 2010;
- (d) an unaudited consolidated *pro forma* balance sheet of the Filer as at August 31, 2010 giving effect to the Transaction;
- (e) a *pro forma* statement of operations for the Filer for the three months ended August 31, 2010 that gives effect to the acquisition of Miguel's Intellectual Property as if it had taken place at June 1, 2010; and
- (f) an explanation as to why audited financial statements of Miguel's for the year ended December 31, 2009, unaudited statements of Miguel's for the period January 1, 2010 to March 31, 2010, and certain *pro forma* financial statements could not be prepared and included in the BAR as required under Part 8 of NI 51-102;

(collectively, the Alternative Information); and

35. the Filer is not in default of securities legislation in any jurisdiction.

### Decision

- ¶ 4 The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that the Filer includes the Alternative Information in the BAR.

Martin Eady, CA  
Director, Corporate Finance  
British Columbia Securities Commission