

2005 BCSECCOM 219

March 18, 2005

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – Securities Act, Section 119 – Proxy/Information circular requirements NI 51-102 – Continuous disclosure obligations - An issuer wants relief from the requirement to include prospectus-level disclosure in an information circular to be circulated in connection with an arrangement, reorganization, acquisition or amalgamation - The securities that are being issued will only be outstanding for a short period of time before they are redeemed for cash; the securities are being issued for tax reasons only, not so the shareholders continue to have an interest in the issuer; finances have been secured to fund the redemption of the securities

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, s. 119

National Instrument 51-102 *Continuous Disclosure Obligations*, s 13.1

Form 51-102F5 – *Information Circular*, Item 14.2

In the Matter of
the Securities Legislation
of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova
Scotia and New Brunswick (the Jurisdictions)

and

In the Matter of
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of CFM Corporation (the Filer)

MRRS Decision Document

Background

The local securities regulatory authority or regulator (the “Decision Maker”) in each of the Jurisdictions has received an application from the Applicant for a decision under the securities legislation of the Jurisdictions (the “Legislation”) for a decision that the Applicant be exempt from the requirement to include prospectus level disclosure in a management proxy circular of the Applicant relating to the meeting of its shareholders to consider, and if deemed advisable to approve, among other things, the amalgamation of the Applicant with another company in accordance with the Legislation (the “Requested Relief”).

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Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

Representations

This decision is based on the following facts represented by the Applicant:

1. The Applicant is a corporation amalgamated under the OBCA. The common shares of the Applicant (the “Common Shares”) are listed on the Toronto Stock Exchange.
2. The Applicant is a reporting issuer or the equivalent thereof in each of the Jurisdictions. Other than as set out in paragraph 3 below, the Applicant is not, to its knowledge, in default of its reporting issuer obligations under the Legislation.
3. The Applicant is in default under its obligations to file and mail its interim financial statements for the first fiscal quarter ended January 1, 2005 and its management’s discussion and analysis (“MD&A”) relating thereto. The Applicant is also in default of its obligation to file its interim certificates for the first fiscal quarter ended January 1, 2005 required to be filed under Multilateral Instrument 52-109 — *Certification of Disclosure in Issuers’ Annual and Interim Filings* (“MI 52-109”). The Applicant is complying with OSC Policy 57-603 — *Defaults by Reporting Issuers in Complying with Financial Statement Filing Requirements* and CSA Staff Notice 57-301 — *Failing to File Financial Statements on Time — Management Cease Trade Orders*. The Applicant anticipates that it will file its interim financial statements for the first fiscal quarter ended January 1, 2005 and its MD&A relating thereto by March 31, 2005. In addition, the Applicant is required to deliver such statements prior to March 31, 2005 pursuant to the terms of an intercreditor and forbearance agreement among the Applicant, the holders of its senior notes and its credit facility lender. Promptly upon filing its interim financial statements for the first fiscal quarter ended January 1, 2005 and its MD&A relating thereto, the Applicant will communicate such fact to the marketplace by way of a news release.

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4. The Applicant is subject to a Management Cease Trade Order issued by the Ontario Securities Commission on March 1, 2005 as a result of the Applicant's failure to file its interim financial statements for the three-month period ended January 1, 2005.
5. The Applicant was previously in default under its obligations (i) to file and mail its annual financial statements for the fiscal year ended October 2, 2004 and its MD&A relating thereto, (ii) to file its annual information form for the fiscal year ended October 2, 2004 and (iii) to file its annual certificates for the fiscal year ended October 2, 2004 required to be filed under MI 52-109. The Applicant corrected such defaults on March 11, 2005.
6. On February 22, 2005, the board of directors of the Applicant approved the acquisition transaction by way of an amalgamation (the "Amalgamation") of the Applicant and 1650150 Ontario Inc. ("Subco") pursuant to Sections 174 and 175 of the *Business Corporations Act* (Ontario) (the "OBCA") (the amalgamated company to be formed by the Amalgamation being referred to as "Amalco"). The acquisition transaction was announced the next day before market opening.
7. Subco is a corporation incorporated under the OBCA and is a subsidiary of Ontario Teachers' Pension Plan Board ("OTPPB"), an independent corporation without share capital established by the *Teachers' Pension Act* (Ontario). Subco is not a reporting issuer in any province or territory of Canada. Subco was incorporated solely for the purpose of effecting the Amalgamation.
8. Pursuant to the terms and conditions of an amalgamation agreement dated February 22, 2005 among the Applicant, Subco and OTPPB (the "Amalgamation Agreement"), Applicant and Subco have agreed to amalgamate.
9. The Applicant proposes to hold its annual and special meeting of shareholders on or about April 8, 2005 (the "Meeting"). At the Meeting, the Applicant will seek the requisite approval of the shareholders of the Applicant in respect of a special resolution to approve the Amalgamation.
10. In connection with the Meeting, the Applicant expects to mail on or about March 14, 2005 to each shareholder of the Applicant (i) a notice of the Meeting, (ii) a form of proxy, and (iii) a management proxy circular (the "Circular") prepared in accordance with the OBCA and applicable securities laws.

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11. Pursuant to the Amalgamation:

- (a) at the effective time of the Amalgamation, by virtue of the Amalgamation and without any further action on the part of Subco, the Applicant or the holders of common shares of the Applicant, (A) each common share of the Applicant (other than any common share of the Applicant held by a shareholder who has not effectively withdrawn or otherwise ceased to be entitled to such dissent rights pursuant to Section 185 of the OBCA (each a "Dissenting Share")) will be cancelled and converted automatically into one validly issued, fully paid and non-assessable redeemable preferred share in the capital of Amalco (each a "Redeemable Preference Share") and (B) each Dissenting Share will be cancelled and be converted automatically into the right to receive payment from Amalco with respect thereto in accordance with Section 185 of the OBCA;
- (b) each Class A share of Subco issued and outstanding prior to the effective time of the Amalgamation will be converted into and exchanged for one validly issued, fully paid and non-assessable Class A share of Amalco; and
- (c) each Class B share of Subco issued and outstanding prior to the Effective Time will be considered into and exchanged for one validly issued, fully paid and non-assessable Class B share of Amalco.

12. Immediately following the effective time of the Amalgamation, each Redeemable Preference Share will be redeemed by Amalco (the "Redemption") for a cash amount equal to \$1.50 per share (subject to increase to \$1.60 per share in certain circumstances to be determined 10 days prior to the Meeting) (the "Redemption Amount"). No new certificates evidencing the Redeemable Preference Shares will be issued to the holders of Common Shares who will continue to hold their Common Share certificates until exchanged for the aggregate Redemption Amount represented by such certificates as provided for in the Amalgamation Agreement.

13. The Redeemable Preference Shares to be issued by Amalco to the shareholders of the Applicant upon the Amalgamation will be outstanding for an instant in time following the Amalgamation and will automatically be redeemed for the Redemption Amount in accordance with the terms of such Redeemable Preference Shares contained in the articles of amalgamation of Amalco. Holders of Common Shares are being issued the Redeemable Preference Shares for the purpose of transferring the tax accounts of the Applicant to Amalco.

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14. All holders of Common Shares, including insiders of the Applicant, will receive identical consideration for their shares in the Amalgamation.
15. The consideration paid by Amalco on redemption of the Redeemable Preference Shares will be funded directly or indirectly by OTPPB and/or Subco.
16. OTPPB has advised the Applicant that it intends to ensure that Amalco will have sufficient funds to pay in full the aggregate Redemption Amount on the redemption of the Redeemable Preference Shares.

Decision

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted provided that:

- (a) the Applicant complies with all other provisions of the Legislation applicable to the Circular;
- (b) the Applicant files copies of the following documents on its SEDAR profile no later than five days before the Meeting or any adjournment or postponement thereof:
 - (i) its interim financial statements for the first fiscal quarter ended January 1, 2005 and its MD&A relating thereto; and
 - (ii) its interim certificates for the first fiscal quarter ended January 1, 2005; and
- (c) the Applicant, upon filing its interim financial statements for the first fiscal quarter ended January 1, 2005 and its MD&A relating thereto, communicates such fact to the marketplace by way of a news release.

Erez Blumberger
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Ontario Securities Commission-