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CAPITAL MARKETS

Reducing the regulatory burden: Positive changes in corporate and securities law

There were a number of significant developments in the corporate and securities landscape in Canada in 2020 arising from regulatory amendments, pending proposals and the impact of the COVID-19 pandemic. These changes will impact a variety of capital markets participants, including reporting issuers, investors and dealers. Notwithstanding the impact of the COVID-19 pandemic on the Canadian economy, regulatory initiatives continued to advance through 2020. In particular, the Canadian Securities Administrators, the umbrella organization of the provincial and territories securities regulatory authorities (the CSA), has continued to implement and propose changes seeking to "reduce the regulatory burden" on capital markets participants.

In Ontario, the Capital Markets Modernization Taskforce (the Taskforce) presented its preliminary consultation report. The report included a number of draft recommendations that attracted a mix of praise and pushback from a variety of market participants. It remains to be seen how the Taskforce will work through the significant differences of opinion on how to enhance Ontario's capital markets among stakeholders in arriving at the Taskforce's final recommendations. In addition, the Taskforce will need balance its focus on the capital markets in Ontario with the current approach of harmonization of securities law through the CSA.

Here is our list of the year's most notable developments. Additional items are included in our Top public M&A legal developments in 2020 article and in our The rules they are a-changin': Corporate governance developments in 2020 article.

Securities law and regulation

1. The impact of COVID-19 on capital markets

Beginning in March of 2020, restrictions on travel, public gatherings and carrying on business were imposed, as the effects of the COVID-19 pandemic started to take hold. In light of the serious potential impact of the pandemic on the Canadian capital markets, the CSA issued a series of notices[1] seeking to provide immediate relief to reporting issuers. These notices addressed a variety of topics, including postponing financial reporting deadlines, extending the required timeline to call and hold annual shareholder meetings under applicable securities laws and extending comment periods for regulatory proposals. Since the COVID-19 pandemic has now persisted for such a long period of time, much of the initial relief provided is no longer relevant or available.

For more information, refer to the following Osler Updates on osler.com on this subject: CSA to provide blanket relief for some regulatory filings due to COVID-19 (March 19), TSX delays deadline for holding annual meetings and provides other blanket relief in response to COVID-19 (March 24), Q1 disclosure in the age of COVID-19 (April 17) and Room to move: delaying continuous disclosure obligations in 2020 (May 8).

2. Capital markets changes on the horizon? The Ontario Capital Markets Modernization Taskforce reports

On July 9, 2020, the Ontario Government's Capital Markets Modernization Taskforce (the Taskforce) published its widely anticipated, preliminary consultation report seeking public feedback on 47 preliminary policy proposals. The Taskforce sought comments to its proposals by September 7, 2020 (the Labour Day holiday). The consultation report included proposals in a variety of areas that could have significant impacts on Ontario's capital markets. Although the Taskforce has not yet published the comment letters it received, a number of commenters have made their letters publicly available. Feedback so far has been mixed, with competing views from issuers, investors and other capital markets

1 See CSA notices issued on March 16, March 18, March 19, March 20, March 23, April 9, April 16, May 1, May 20, May 21, May 29 and October 29.

participants on a number of the proposals. The Taskforce is due to finalize its comments and make a final report to the government by the end of 2020.

For more information, refer to our Osler Update entitled "Osler comments on Capital Markets Modernization Taskforce consultation report" on osler.com regarding our submissions and our comment letter on the Taskforce report.

3. Adoption of an "access equals delivery" model

Among the first proposals published by the CSA in 2020 was a consultation paper regarding the proposed adoption of an "access equals delivery" model for document distribution. Under this model, which currently exists in the United States and other jurisdictions, delivery of documents would be effected by the issuer alerting investors that the relevant document was available on the issuer's website and on the System for Electronic Document Analysis and Retrieval (SEDAR). The consultation paper solicited feedback regarding the potential scope of such a model in Canada. In particular, the paper sought input regarding its use for prospectus offerings and to satisfy continuous disclosure document dissemination requirements (such as financial statements, proxy circulars and annual information forms). The comment period ended March 9, 2020. To date, no further updates have been provided by the CSA.

A copy of Osler's comment letter regarding the consultation paper is available here.

4. Clearing comments confidentially – Prospectus confidential pre-file review comes to Canada

The CSA's Staff Notice establishing a nationally harmonized process for the confidential pre-filing and review of prospectuses was well-received and is now in widespread use. The Staff Notice brings Canadian practice more in line with the United States, where confidential submissions have been permitted for emerging growth companies since the adoption of the JOBS Act in 2012 and are now permitted more generally. It also extends this practice beyond cross-border initial public offerings, which were previously the only circumstances where Canadian securities regulators permitted prospectuses to be filed and reviewed on a confidential basis.

Confidential pre-files are now permitted for all prospectuses (long-form, short form and shelf), subject to limited exceptions. The process is not available for non-offering prospectuses (other than in connection with a cross-border financing) and prospectuses solely used to qualify the issuance of securities on conversion of convertible securities.

Generally, staff will use their best efforts to provide initial comments within 10 working days, which is the same standard that applies to a review of a publicly filed long-form prospectus. This time period also applies to the confidential review of a short form prospectus, although it may be possible for this period to be shortened in appropriate circumstances.
Staff have noted their expectation that a pre-filed prospectus be of the same form and quality as would be required for a publicly filed preliminary prospectus and that it contain the disclosure (including financial statements)

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prescribed under securities legislation for the type of prospectus that the issuer intends to use. We expect the use of the confidential pre-file procedures to become standard for Canadian-only IPOs and potentially helpful in a wide variety of other offering scenarios.

5. Non-IFRS (Non-GAAP) disclosure – What can an issuer really say?

Following an initial proposal published in September 2018, the CSA published a second notice and request for comment relating to an updated proposal regarding Non-GAAP and other financial measures. The proposed rule would establish disclosure requirements for issuers that disclose Non-GAAP and other financial measures, replacing Staff Notice 52-306 – *Non-GAAP Financial Measures*. The updated proposal reduces the scope of the proposed rule compared to the initial 2018 proposal and more clearly identifies the types of measures to be subject to the rule.

6. Making ATM distributions easier

"At-the-market" (ATM) distributions have become a popular way to permit periodic capital raising. However, Canadian securities regulation previously required that issuers seeking to undertake an ATM distribution apply for exemptive relief from certain prospectus requirements. That changed in June 2020. The CSA published final amendments to the applicable instruments that streamline requirements for ATM distributions in Canada and eliminate the need for exemptive relief in order to undertake an ATM program in Canada. The amendments became effective August 31, 2020. We anticipate a modest increase in the use of ATM programs by issuers in Canada as a result of the adoption of the final amendments.

For more information, refer to our Osler Update entitled "Amendments to "at-the-market" equity offerings a welcome change" on osler.com.

7. The burden of the BAR reduced

On August 20, 2020, the CSA announced amendments to the significant acquisition and business acquisition report requirements in an effort to reduce the regulatory burden of the existing framework. Effective November 18, 2020, the criteria for determining the significance of an acquisition to reporting issuers (other than venture issuers) will be amended to require that at least two of the three existing significance tests set out in National Instrument 51-102 – *Continuous Disclosure Obligations* be triggered in order for an acquisition to be considered significant. Previously, only one test had to be triggered. The amendments also increase the significance threshold in those tests from 20 per cent to 30 per cent. It is hoped that these changes will eliminate the need for BAR disclosure in many acquisition scenarios.

8. One or two? Review of the SRO framework

On June 25, 2020, the CSA published a consultation paper seeking feedback on the framework for self-regulatory organizations (SROs) in Canada. The current SRO framework requires investment dealers to be members of the Investment Industry Regulatory Organization of Canada (IIROC). Mutual fund dealers, except in Québec, must be members of the Mutual Fund Dealers Association of Canada (MFDA). The CSA sought comments on whether the current framework best serves Canadian investors and the investment industry, in light of the evolution of the financial services industry. Both IIROC and MFDA have commented on the SRO regime in Canada. In February 2020, MFDA issued a special report titled A Proposal for a Modern SRO and in June 2020, IIROC published a paper titled Improving Self-Regulation for Canadians. Both call for changes and echo the concern that the multi-regulatory model has failed to keep pace with the technology-driven transformation of the financial services industry. Comments on the CSA consultation paper were due by the end of October 2020 and it is anticipated that the CSA will move towards a single regulator for both investment dealers and mutual fund dealers.

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9. Approach changes for mutual fund charges

On February 20, 2020, CSA member jurisdictions other than Ontario announced the adoption of rules that would ban deferred sales charges (DSC) on mutual funds effective June 1, 2022. On the same day, the Ontario Securities Commission (OSC) announced proposed restrictions on the use of DSCs in lieu of the ban adopted in other jurisdictions. These restrictions were intended to address some of the concerns associated with DSCs, principally that DSCs give dealers an incentive to sell mutual funds that impose redemption fees if investors sell their holdings before a certain period of time. Comments on the Ontario proposal were due in July 2020 and the OSC has yet to provide an update on the proposal.

Subsequently, on September 17, 2020, all CSA jurisdictions announced the adoption of rules to implement prohibition on the payment of trailing commissions by fund organizations to dealers who do not make a suitability determination, such as order-execution-only dealers.

For more information, refer to our Osler Update entitled "OSC proposes restrictions on use of DSC option in the sale of mutual funds" on osler.com about the Ontario DSC changes.

10. Crowds are okay in 2020? New crowdfunding rules

In early 2020, the CSA proposed new crowdfunding rules that were intended to harmonize and replace a number of local rules in force in certain provinces regarding crowdfunding. The proposed rule nationally harmonizes a crowdfunding regime that permits raising up to $1 million per year in reliance on the exemption. It also increases the individual amounts a purchaser can subscribe for to $2,500 per offering, or $5,000 if the purchaser obtains advice from a registered dealer that the investment is suitable. The comment period expired in July 2020 and the rule has not yet been brought into force. In light of the COVID-19 pandemic, the OSC adopted an interim local rule to adopt the crowdfunding rules currently in place in certain other provinces.

11. The state of play in the Ontario burden reduction initiative

On May 27, 2020, the OSC provided an update regarding its progress on the 107 initiatives outlined in the November 2019 *Reducing Regulatory Burden in Ontario's Capital Markets* report. The update noted that 27% had been completed, 36% were noted as being "on track" with the balance (37%) having been delayed (nine directly as a result of the COVID-19 pandemic).

Corporate Law and Stock Exchange Rules

1. Let's Meet... virtually; virtual shareholder meetings

As the COVID-19 pandemic-related restrictions on public gatherings began to be imposed, it became increasingly clear that it would be challenging to safely hold shareholder meetings in person. Although certain provincial business corporations statutes, such as the Ontario *Business Corporations Act* (OBCA) contemplate electronic meetings, many jurisdictions do not fully provide for the use of virtual-only meetings, given limitations in technology.

Additional information on virtual shareholder meetings is included in our Corporate Governance overview.

2. CBCA diversity disclosure requirements

Beginning on January 1, 2020, corporations governed by the *Canada Business Corporations Act* (CBCA) with publicly traded securities have been required to provide shareholders with information on the corporation's policies and practices related to diversity on the board of directors and within senior management, including the number and percentage of members of the board and of senior management who are women, Aboriginal persons, members of visible minorities and persons with disabilities. These requirements go beyond the disclosure required under Canadian securities rules and apply to all "distributing corporations" governed by the CBCA, including venture issuers (which are not subject to the securities law diversity disclosure requirements). Additional information regarding changes to the CBCA is included in our Corporate Governance overview.

3. I see you – B.C. adopts transparency register requirements

Effective October 1, 2020, amendments to the *Business Corporations Act* (British Columbia) came into force requiring B.C. private companies to prepare and maintain a "transparency register" containing specific details regarding each of the company's "significant individuals". B.C. recently amended the initial requirements to reduce their impact on, among others, private equity funds. The change exempted most limited partners of a limited partnership, unless the limited partner is entitled to receive 25% or more of the profits or assets of the partnership or has at least 25% of the votes in partnership management. This welcome change represented a significantly reduced burden from the initial requirement to list *all* partners. The B.C. requirements are in some ways more onerous in scope than the requirements under the *CBCA* applicable to "individuals with significant control", which came into effect in June 2019.

4. Benefit companies in British Columbia

As of June 2020, British Columbia became the first Canadian jurisdiction to enable "benefit companies", which are for-profit businesses that commit to conducting business in a responsible and sustainable way and promote one or more public benefits. Benefit company legislation is currently on the books in 36 U.S. states. It enables companies to promote social goals while being protected from claims that doing so would breach director fiduciary responsibilities. For more information on benefit companies, please see our The rules they are a-changin': Corporate governance developments in 2020 article.

For more information refer to our Osler Update entitled "B.C.'s new legislation on benefit companies" on osler.com.

5. No longer resident – Alberta and Ontario remove director residency

Joining the ranks of several other provinces and all three territories, in the summer of 2020, Alberta amended its *Business Corporations Act* and *Companies Act* to remove all Canadian residency requirements for corporate directors. In October, Ontario proposed to follow suit in the *Better for People, Smarter for Business Act, 2020.* One of the proposed changes would eliminate the existing director residency requirement for corporations under the OBCA. This change removes significant disincentives for foreign-based businesses to choose Alberta or Ontario to incorporate their Canadian subsidiaries.

For more information regarding the Alberta changes, refer to our Osler Update entitled "Alberta to remove Canadian residency requirements for directors: Reducing the burden for foreign-owned corporations" on osler.com.

6. The future of corporate governance?

On October 6, 2020, the TMX Group, the operator of the Toronto Stock Exchange, TSX Venture Exchange and Alpha Exchange, together with the Institute of Corporate Directors (ICD) launched an initiative to update corporate governance guidance in Canada by establishing The Committee on the Future of Corporate Governance.

Osler is providing legal support to the TMX and the ICD on the Future of Corporate Governance project. Additional information on the Committee's initiative is included in our The rules they are a-changin': Corporate governance developments in 2020 article.

2021 and beyond

2020 saw many regulatory developments in both corporate and securities law as governments and regulators continued advancing their burden reduction initiatives. The COVID-19 pandemic caused its own flurry of activity seeking to assist issuers comply with their obligations. The pandemic also presented new opportunities for advancements, such as virtual meetings, that may change the landscape of Canadian practice forever. With the Taskforce report due in the near future and burden reduction efforts continuing, we expect that 2021 will provide for another active year in the regulatory landscape.

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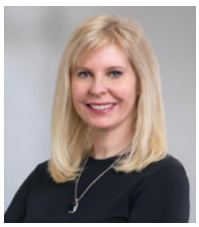

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