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Blaneys on Business
SPECIAL MINING EDITION

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This newsletter is designed to bring news of changes to the law, new law, interesting deals and other matters of interest to our commercial clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, the editor, or the head of our Corporate/Commercial Group:

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ONTARIO MINING ACT AMENDMENTS TAKE FULL EFFECT APRIL 1, 2013

Catherine MacInnis

A "new" Ontario *Mining Act*[1] comes into full force April 1, 2013.

The last time the *Mining Act* had a major overhaul, famed American gangster Bugsy Siegel was a newborn and Sir Wilfrid Laurier was Prime Minister of Canada. The year was 1906.

The amendments are being sold by the province as a "modernization." It is too early to know whether that is just a euphemism, but one thing is certain -- the changes are going to demand much more work, planning and spending on the part of mining companies in Ontario.

As indicated above, the Ontario *Mining Act* was largely a static statute for all of the 20th century. During that period, the mining business in the province flourished under the "free entry" system of mineral allocation (under which staking a claim was relatively direct, fast and cheap). For most of those years, that meant that neither the Ontario government nor mining companies adequately consulted with stakeholders (if at all), including the province's First Nations groups.

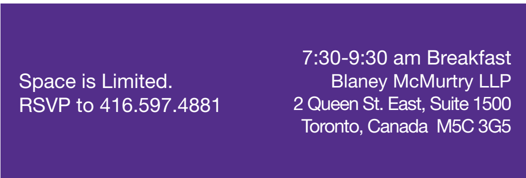
[1] R.S.O. 1990, c. M.14.

Tuesday, March 5th

Complimentary Networking Breakfast

Organizedby Blaney McMurtry LLP, Mexico-Canada Alliance of Commerce and Peruvian-Canadian Chamber of Commerce

A valuable networking and information gathering occasion for anyone (mining companies, investors, government officials, advisors, consultants, geologists, suppliers, etc.) with an interest in mining in Latin America.



"Aboriginal consultation is now required prior to the submission of a certified closure plan or amendment."

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In 2004, however, the Supreme Court of Canada issued a decision that made it clear that the Ontario government has a duty to consult with, and accommodate, Aboriginal groups in Ontario. Then, in 2009, the present amendments to the *Mining Act* were passed by the Ontario legislature. Those amendments took effect in November, 2012, and will be implemented fully by April 1, 2013.

Some critics believe that "modernization" of the *Mining Act* is nothing more than an attempt by the provincial government to download time- and money-consuming consultation and accommodation responsibilities onto mining companies, prospectors, and First Nations groups.

The critics also contend that this downloading carries with it a risk of destroying the industry in Ontario because new front-end exploration and development costs that the amendments mandate will drive miners to other jurisdictions where it is cheaper to do business.

For its part, the Ontario government has defended the changes as an attempt to 'promote mineral exploration in a manner that recognizes Aboriginal and treaty rights, is more respectful of private landowners and minimizes the impact of mineral exploration and development on the environment.'

What Will Modernization Mean for You?

Here are some highlights:

- **Prospectors' *Mining Act* Awareness Program:** If you wish to apply for, or renew, a prospector's licence, you must first complete the Awareness Program, which includes basic information on staking claims, Aboriginal consultation and the amendments to the *Mining Act*. The program can be accessed online and is intended to "raise awareness of the importance of considering other users of public land".
- **Sites of Aboriginal Cultural Significance:** Sites of cultural significance for Aboriginal communities may be withdrawn (on application), so that mining claims cannot be staked on them.
- **Exploration Plans:** Exploration plans for early exploration activities, valid for two years and mandatory as of April 1, 2013, are to be submitted in advance and any surface-rights owners are to be notified. Additionally, any Aboriginal groups potentially affected by exploration plan activities will be notified by the Ministry of Northern Development and Mines (MNDM) and will have an opportunity to provide feedback. Exploration plans are expected to be expensive because the services of geotechnical experts, accountants, lawyers other specialists will be needed.
- **Exploration Permits:** Mining companies will be required to obtain permits in advance of certain activities (e.g. drilling with equipment heavier than 150 kilograms). The permits, valid for three years, are mandatory as of April 1, 2013. Permit applications will be subject to approval by the MNDM and will require consultation with Aboriginal groups. The target turnaround time for issuing the permits is 50 days, but that can be extended if further consultation is required.
- **Closure Plans:** Aboriginal consultation is now required prior to the submission of a certified closure plan or amendment. ■

"...any Canadian company that carries on business in a country having a high level of corruption can also be vulnerable to a [Corruption of Foreign Public Officials Act] violation."

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ANTI-CORRUPTION COMPLIANCE PROGRAMS ESSENTIAL FOR CANADIAN CORPORATIONS OPERATING GLOBALLY

Henry J. Chang

It has become increasingly clear that Canadian multinationals whose global operations intersect with foreign governments and agencies have a vital interest in establishing rigorous anti-corruption compliance programs and implementing them with strict discipline. In this article, Blaney McMurtry partner Henry J. Chang discusses why, who is most at risk, what these programs should contain, and what benefits they confer.

Introduction

United States companies recognize the importance of establishing an effective anti-corruption compliance program in order to prevent and detect potential violations of the *Foreign Corrupt Practices Act of 1977* (FCPA)[1]. This awareness results from a long history of aggressive FCPA enforcement by the Fraud Section of the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC).

North of the border, the Royal Canadian Mounted Police have only recently started to investigate and prosecute Canadian companies aggressively for violations of the *Corruption of Foreign Public Officials Act* (CFPOA). As a result, Canadian companies have been slower to recognize the value of implementing their own anti-corruption compliance programs.

Despite this lack of awareness, the need to establish an effective anti-corruption compliance program should not be underestimated. This need is expected to increase significantly in the future as CFPOA prosecutions become more frequent.

Who is at Risk?

The Canadian companies that are most vulnerable to a CFPOA violation are those that typically rely heavily on: (a) foreign government regulatory approvals, (b) joint venture or production sharing arrangements with foreign governments or state-run agencies, or (c) procurement agreements with foreign governments or state-run agencies. For example, companies that deal with energy and natural resources (such as mining) are at risk because they typically operate in countries that have been found to have high levels of corruption; their activities usually require regulatory approval from the foreign government, and they may enter into joint venture or production sharing agreements with a foreign government or state-run agency.

Of course, any Canadian company that carries on business in a country having a high level of corruption can also be vulnerable to a CFPOA violation. This risk can be assessed by considering the Corruption Perception Index (CPI) for each country where the company carries on business.

Each year, Berlin-based Transparency International[2] assesses each country according to its perceived level of public sector corruption and assigns it a CPI score. A CPI score below 5.0 indicates a serious level of corruption in that particular country.

The Benefits of Establishing an Anti-Corruption Compliance Program

An effective anti-corruption compliance program will reduce the chances of a COFPA violation

[1] 15 U.S.C. §§78dd-1, et seq.
[2] http://www.transparency.org/.

"The company must establish a rigorous anti-corruption compliance code designed to detect and deter violations of the [Corruption of Foreign Public Officials Act]..."

significantly. It may also reduce the likelihood of a criminal prosecution or limit the penalties that may be imposed if a violation is ultimately discovered.

In the United States, the existence (or absence) of an effective anti-corruption compliance program carries considerable weight when the DOJ and SEC decide whether to bring criminal charges or a civil enforcement action against the company. Even where the company had no such program in place at the time of the violation, by taking subsequent steps to implement an effective anti-corruption compliance program, it may still receive more favourable treatment when penalties are ultimately assessed.

Guidelines for Developing an Anti-Corruption Compliance Program

The problem with establishing an anti-corruption compliance program in Canada is that few guidelines exist on how such a program might be implemented. The only helpful Canadian guidance appears in the 2011 probation order issued against Calgary-based Niko Resources Ltd. (Niko) after it pleaded guilty to a charge of bribery under the COFPA. The language of the probation order specifically requires Niko to adopt the following internal controls, policies, and procedures:

a) The company must establish a system of internal accounting controls designed to ensure that it makes and keeps fair and accurate books, records, and accounts.

b) The company must establish a rigorous anti-corruption compliance code designed to detect and deter violations of the CFPOA (and other applicable anti-corruption laws) which, at a minimum, include:

   1) A clearly articulated and visible corporate policy against violations of the CFPOA and other applicable anti-corruption laws.

   2) Strong, explicit, and visible support by senior management of the corporation's policy against violations of anti-corruption laws and its internal compliance code.

   3) Compliance standards and procedures designed to reduce the prospect of violations, which apply to all directors, officers, employees and outside parties acting on behalf of the company. These standards shall include policies governing: (i) gifts, (ii) hospitality, (iii) entertainment and expenses, (iv) customer travel, (v) political contributions, (vi) charitable donations and sponsorships, (v) facilitation payments, and (vi) solicitation and extortion.

c) The above compliance standards and procedures must be based on a risk assessment that addresses the specific foreign bribery risks facing the company, including:

   1) The company's geographical organization;

   2) Interactions with various types and levels of government officials;

   3) Industrial sectors of operation;

   4) Involvement in joint venture agreements;

   5) Importance of licences and permits in the company's operations;

   6) Degree of governmental insight and inspection; and

   7) Volume and importance of goods and personnel clearing through customs and immigration.

"The company must institute appropriate disciplinary procedures to address violations of anti-corruption laws, and its own internal anti-corruption compliance code, by its directors, officers, and employees."

d) The company must review and update anti-corruption compliance standards and procedures no less than annually.

e) The company must assign anti-corruption compliance responsibility to one or more senior corporate executives for the implementation and oversight of the company's anti-corruption policies, standards and procedures. In addition to any other direct reporting required by the company, these corporate officials must have direct reporting obligations to independent monitoring bodies (including internal audit, the Board of Directors, or any appropriate committee of the Board of Directors). They must also have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy.

f) The company must ensure that it has a system of financial and accounting procedures reasonably designed to ensure the maintenance of accurate books, records, and accounts to ensure that they cannot be used for the purpose of bribery or concealing bribery.

g) The company must implement mechanisms designed to ensure that its anti-corruption policies, standards, and procedures are effectively communicated to all directors, officers, employees (and, where appropriate, agents and business partners). These mechanisms should include:

   1) Periodic training for all directors, officers, and employees (and, where appropriate, agents and business partners); and

   2) Annual certifications by all directors, officers, and employees (and, where appropriate, agents and business partners) certifying compliance with the training requirements.

h) The company must establish an effective system for:

   1) Providing guidance and advice to directors, officers, and employees (and, where appropriate, agents and business partners) on complying with the company's anti-corruption compliance policies, standards and procedures, including when they require advice on an urgent basis or in any foreign jurisdiction where the company operates;

   2) Internal and confidential reporting by (and whistleblower protection for) directors, officers, employees (and, where appropriate, agents and business partners) who make good faith reports of suspected wrongdoing within the company; and

   3) Responding to such requests and undertaking appropriate action in response to such reports.

i) The company must institute appropriate disciplinary procedures to address violations of anti-corruption laws, and its own internal anti-corruption compliance code, by its directors, officers, and employees.

j) To the extent that the use of agents and business partners is permitted by the company, it must institute appropriate due diligence and compliance requirements for the retention and oversight of agents and business partners, including:

   1) Properly documenting risk-based due diligence relating to the retention and oversight of agents and business partners;

"The implementation of an effective anti-corruption compliance program is an essential precaution for Canadian companies that operate in vulnerable industries or in countries having a high [Corruption Perception Index]."

2) Informing agents and business partners of the company's commitment to abiding by anti-corruption laws, the company's ethics, and the company's compliance policies and standards; and

3) Seeking a reciprocal compliance commitment from agents and business partners.

k) Where appropriate, the company must include standard provisions in agreements with all agents and business partners that are reasonably calculated to prevent violations of anti-corruption laws, which may include:

1) Anti-corruption representations and undertakings relating to compliance with anti-corruption laws;

2) Rights to conduct audits of the books and records of the agent or business partner to ensure compliance with the foregoing; and

3) Rights to terminate an agent or business partner in the event of any breach of anti-corruption laws or the company's policies in that regard.

l) The company must conduct a periodic review and testing of its anti-corruption compliance code, in order to evaluate and improve its effectiveness in preventing and detecting violations of anti-corruption laws and the anti-corruption compliance code itself.

The Relevance of U.S. Anti-Corruption Law in Canada

The leading U.S. case on anti-corruption compliance programs is *Securities and Exchange Commission v. Siemens Aktiengesellschaft*, Civil Action No. 08 CV 02167 (D.D.C.). In that case, the SEC brought an enforcement action against Siemens Aktiengesellschaft (Siemens) for several FCPA violations, which allegedly occurred between March 12, 2001 and September 30, 2007.

As part of its 2008 plea agreement, Siemens consented to a court order: (a) permanently enjoining it from future violations of the FCPA, (b) ordering it to pay a total of $1.6 billion for disgorgement of profits and fines, and (c) ordering it to comply with certain undertakings regarding its FCPA compliance program. Many of the undertakings that appeared in the Siemens court order now typically appear in U.S. plea agreements, non-prosecution agreements, and deferred prosecution agreements involving alleged FCPA violations.

When one reviews the undertakings contained in the Siemens court order, it becomes clear that the court in the Niko case borrowed liberally from it when drafting its own probation order. In fact, the Siemens undertakings are virtually identical to the terms and conditions imposed on Niko.

This indicates that Canada is applying U.S. guidelines, at least when assessing the effectiveness of anti-corruption compliance programs. As a result, U.S. cases that address the effectiveness of anti-corruption compliance programs should have relevance in Canada as well.

Conclusion

The implementation of an effective anti-corruption compliance program is an essential precaution for Canadian companies that operate in vulnerable industries or in countries having a high CPI. However, a mediocre compliance program will neither prevent nor detect COFPA violations; it will also do little to discourage the laying of criminal charges or the imposition of onerous penalties if a violation is discovered.

BLANEYS ON BUSINESS

"The most successful mining and other extraction companies in today's global economy have the most alert, professional and disciplined policies and procedures in this area."

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It is clear that the Niko case, which provides the only Canadian guidance on how an anti-corruption compliance program should be structured, borrows extensively from U.S. guidelines. Given the significance of U.S. law in this area, a legal advisor who possesses knowledge of both U.S. and Canadian anti-corruption law will be in the best position to develop an effective anti-corruption compliance program for a Canadian company. ■

CORPORATE SOCIAL RESPONSIBILITY, RESULTING 'SOCIAL LICENCE' NOW A MUST FOR MINING COMPANIES AND OTHER RESOURCE FIRMS

Ralph Cuervo-Lorens

Corporate social responsibility (CSR) and the resulting 'social licence' that its faithful exercise can deliver is becoming as basic to the needs of ore mining, oil and gas, forestry, fishery and other resource-based businesses as extraction licences and permits.

Complacency and sloppy (or non-existent) CSR planning and practice have cost corporations dearly in project delays and interruptions, profitability and reputation.

The most successful mining and other extraction companies in today's global economy have the most alert, professional and disciplined policies and procedures in this area.

Once upon a time, it has been said, corporate social responsibility had a reputation for outright flakiness. The idea that social considerations (including environmental ones), should be added to the profit-motive as key drivers of corporate conduct was simply anathema and our laws and standards reflected that view.

Today, most large companies have entire departments devoted to CSR. Its evolution has taken it from a new-age fantasy to a focus on managing corporate reputations to, more recently, a key element of the fundamentals of running almost any kind of business.

The ever-increasing basket of CSR concerns (now social, environmental, and cultural) is grouped under the older and narrower concept of "sustainability" which, until recently, was confined to environmental matters. Companies across all sectors are busy creating "chief sustainability officers", setting up "sustainability units", generating all manner of sustainability indexes and reports and, not surprisingly, hiring sustainability consultants. The buzzword in management circles being "sustainability", corporations large, medium and small are seeking to incorporate the concept into product development, marketing, branding, relationships with suppliers and distributors, environmental footprint management and, increasingly, the full range of social impacts from the company's activities.

What is clear is that CSR- type concerns can no longer be ignored: corporate social responsibility holds the promise of pushing business to becoming more thoughtful in its use of resources and more creative about what at any given time can give it that extra competitive edge.

But how is this all playing out among Canadian miners?

"In 2009, Ottawa launched its [Corporate social responsibility] strategy, the centre pillar of which was the promotion of widely-recognized voluntary international CSR performance guidelines among Canadian mining companies operating abroad."

Canada's Mining Sector

Canada is a global player in the mining sector by any measure. It is a leading producer of potash, iron ore, coal, uranium, nickel, copper, gold and diamonds and plays an important role as home to many of the world's junior exploration companies and several top-tier global mining companies. It is home to the most active capital markets serving the sector with Toronto the center of financing for capital used to fund mineral exploration. In 2011, for example, Canadian markets were ranked first in listed mining companies worldwide, with more than 90 per cent of all global mining equity financings being completed in Toronto. Of all stock market listings in Toronto, 43 per cent are in mining. Thirty-nine per cent of the equity capital raised globally for mining was raised on the Toronto Stock Exchange and its junior venture exchange.

But mining as an industry can be hard on both the natural and social environments. Poor project execution can easily lead a mining company into protracted and newsworthy disputes over land tenure, resource development and benefit-sharing, particularly in developing countries where Canadian mining companies have a significant part of their operations today and where such disputes can run into archaic land tenure systems, modern forms of resource nationalism and great cultural divides.

Industry Based CSR

These factors, together with sustained public criticism of the industry in relation to environmental and social issues both in Canada and abroad, have pushed government, as well as the mining industry, to embrace CSR. In this sector, CSR to date has taken the form of non-regulated, voluntary actions by mining companies intended to provide benefits to affected communities, together with a myriad of voluntary "best practices." Such efforts in the private sector have had the active support of industry associations, such as the Mining Association of Canada and the Prospectors and Developers Association (PDAC). For example, we have seen the creation of standard-setting initiatives such as the Mining Association of Canada's *Towards Sustainable Mining*, PDAC's *e3 Plus*, and the Canadian Institute of Mining, Metallurgy and Petroleum.

The Mining Association of Canada's standards and reporting are mandatory for members (although they represent only a minority of companies operating mines in Canada). PDAC's *e3 Plus* provides members with a guideline "to help exploration companies continuously improve their social, environmental, and health and safety performance, and to comprehensively integrate these three aspects into all of their exploration programs around the world." The *e3 Plus* guideline is intended to complement established international norms.

International Standards

The federal government jumped into this arena with both feet because of its concerns with Canada's reputation in the world following an unfortunate series of bad news stories relating to Canadian mining and oil operations abroad and with the country's obligations under international law. In 2009, Ottawa launched its CSR strategy, the centre pillar of which was the promotion of widely-recognized voluntary international CSR performance guidelines among Canadian mining companies operating abroad. In 2010, it created Canada's first *Office of the Extractive Sector CSR Counsellor*. (The first and current Counsellor, Dr. Marketa Evans, was a Blaneys guest speaker last October).

"All of these standards and initiatives remain voluntary, although market and competitive pressures as well as the demands of stakeholders are gradually ensuring that not adhering to the standards will require a good explanation."

Chief among the international guidelines the Government of Canada is promoting are:

- International Finance Corporation (IFC) *Performance Standards on Social & Environmental Sustainability* for mining projects with potential adverse social or environmental impacts;
- The OECD's *Guidelines for Multi-national Enterprises*;
- The UN *Global Compact*;
- The *Extractive Industry Transparency Initiative*;
- The *Voluntary Principles on Security and Human Rights* for projects involving private or public security; and
- The *Global Reporting Initiative* (GRI) for CSR reporting to enhance transparency and encourage market-based rewards for positive CSR performance.

Of these, two main sets of standards have gained the most traction in the mining industry, particularly with those operating in the developing world.

The IFC's Performance Standards on Social & Environmental Sustainability (http://www1.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_pps) have become the performance benchmark for projects in developing and emerging countries. The IFC standards address sustainability across a broad range of areas: social and environmental assessment and management systems; labor and working conditions; pollution prevention and abatement; community health, safety and security; land acquisition and involuntary resettlement; biodiversity conservation and sustainable natural resource management; indigenous peoples; and cultural heritage. Through the *Equator Principles*, adopted by 77 of the world's leading banks, adherence to the IFC Standards is also now one of the factors used in the project financing approval process.

The Global Reporting Initiative (GRI), designed to ensure that reliable and transparent CSR-related information was available in standardized form to interested stakeholders, was developed (and continues to evolve) via a multi-stakeholder process involving industry, investors, civil society and labor. It has come to be recognized as the gold standard in CSR reporting.

All of these standards and initiatives remain voluntary, although market and competitive pressures as well as the demands of stakeholders are gradually ensuring that not adhering to the standards will require a good explanation. It can be expected that they will fill the void in the law for a time. But the trend toward increasing regulation and standard setting, whether those of the moral suasion or legal kind, is clear. Recent bilateral trade treaties, such as the Canada-Peru Free Trade Agreement, explicitly encourage the promotion and enforcement of such standards as an exception to the obligations of the signatory states to liberalize trade.

Domestic Regulation

In Canada as in other countries, binding legal regulation in this area has lagged, but it is not nonexistent. Although they remain in their early stages, disclosure requirements for public companies under various provincial securities laws are becoming the norm. Issuers, for example, are now required to disclose specified information about environmental matters in their annual filings.

"As Canadian corporations have increased their presence in global markets in recent years, companies from emerging markets have been seeking to access Canadian capital markets in greater numbers."

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All of this is over and above private sector initiatives which are not sector-specific, such as those targeted at corporate boards of directors as a matter of good corporate governance or the incentives created by movements, such as those seeking to promote change in corporate conduct through socially responsible investment.

Where there has been real progress toward direct legal regulation has been in relation to corruption of foreign officials. (See Henry Chang's foregoing article on the need for comprehensive and effective anti-corruption compliance programs.) The UK, the U.S., Canada and other first world countries introduced strong legislation intended to dissuade companies operating abroad from indulging corrupt local officials in pursuit of project development or local contracts (Canada has recently amended its legislation to provide for higher penalties and tighter enforcement, more in line with the regimes of those two other countries). At least two significant cases against Canadian extractive sector companies have resulted in stiff fines. The development has led countries with emerging economies and strong interests in foreign investment in the sector (such as Mexico) to also introduce weaker forms of this type of legislation.

Conclusion

According to the federal government, the number of companies in Canada reporting publicly on their CSR practices and performance doubled between 2001 and 2005. Eighty percent of all companies listed on the Toronto Stock Exchange in 2010 were reporting at least some CSR related information. The concept has come of age and companies in all sectors ignore it at their peril. ■

EMERGING MARKETS ISSUERS MAY FACE NEW LISTING REQUIREMENTS

Patrick Gervais and Brian Lau

Canadian issuers with significant business operations in emerging markets are coming under increased scrutiny by market regulators here. In the last 12 months, the Ontario Securities Commission (OSC) and the two major Canadian stock exchanges have published three papers on the adequacy of regulations governing emerging-market issuers.

On March 20, 2012, the OSC published the results of a regulatory review of emerging market issuers: *Staff Notice 51-719 - Emerging Markets Issuer Review* (OSC Review). Following that, on November 9, 2012, the OSC published an issuer guide for companies operating in emerging markets: *Staff Notice 51-720 – Issuer Guide for Companies Operating in Emerging Markets* (Issuer Guide). Subsequently, on December 17, 2012, the TSX and the TSXV (collectively, the Exchanges) published a consultation paper on emerging market issuers: *Consultation Paper on Emerging Market Issuers* (Consultation Paper).

The term "emerging market issuer" generally means an issuer with a significant connection, or significant business operations, in a jurisdiction outside of Canada, the United States, Western Europe, Australia and New Zealand. As of April 30, 2011, there were 108 issuers from emerging markets listed on the TSX, the TSXV, and the CNSX. Of those, 44 per cent were operating in the mining industry, a bigger proportion than in any other industry.[1] (The remaining 56 per cent included oil and gas operators, forestry concerns, technology companies and diversified enterprises.)

[1] OSC Review, at 3-4.

"Many jurisdictions require specific permits or business licences, particularly if the business is considered foreign. This may affect the issuer's ability to carry out its business operations."

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As Canadian corporations have increased their presence in global markets in recent years, companies from emerging markets have been seeking to access Canadian capital markets in greater numbers. While this presents a growing opportunity for investors, regulators are concerned about risks that can be associated with such investments, and whether existing investor protection measures are adequate.

The OSC Review was conducted to assess the quality and adequacy of disclosure and corporate governance practices for existing emerging market issuers, as well as the adequacy of the "gatekeeper" roles played by auditors, underwriters and exchanges. An analysis of 24 sample issuers was undertaken, following which general areas of concern were highlighted and recommendations made.

In response to the OSC Review, a decision was made to work within the existing regulatory framework, without creating or modifying regulations. The OSC published the Issuer Guide to clarify the existing continuous disclosure requirements for emerging market issuers. The Issuer Guide identifies eight areas to consider for companies operating in emerging markets, with disclosure tips to help companies and their boards assess risks and comply with securities laws.

The Exchanges, also recognizing potential risks associated with emerging market issuers, began their own review, which identified areas of concern that resembled those identified by the OSC, including:

Management and Corporate Governance

- Management based in emerging markets may be unfamiliar with, and inexperienced in, Canadian securities law requirements.
- Communication issues due to lack of language fluency.
- Management based in Canada may be unfamiliar with, and inexperienced in, the laws and requirements of the local business jurisdiction.

Financial Reporting

- Canadian auditors may lack sufficient experience and expertise in the applicable jurisdiction.
- Differences in banking systems, business cultures, and rules may lead to inadequate internal controls over financial reporting matters.
- If based in the other jurisdiction, the CFO or audit committee may lack sufficient expertise and experience with applicable audit practices and procedures.

Non-Traditional Corporate/Capital Structures

- Tax or foreign ownership restrictions in certain jurisdictions may encourage or necessitate more complex corporate or capital structures. This may lead to inadequate disclosure of the risks and limits on the ability of shareholders to have recourse against the assets of the issuer.

Legal Matters Relating to Title and Ability to Conduct Operations

- It may be difficult for issuers to demonstrate that they have title to principal operating assets.
- Many jurisdictions require specific permits or business licences, particularly if the business is considered foreign. This may affect the issuer's ability to carry out its business operations.

The Consultation Paper was published by the Exchanges to i) present potential risks associated with the listing of emerging market issuers, ii) provide preliminary guidelines to issuers, and iii) solicit comments from market participants on possible new guidelines or requirements. The TSX and TSXV each have separate lists of questions for public comment. In addition, the TSXV published a proposed policy document for comment. The consultation period concluded February 28. Comments are being reviewed and each exchange will determine whether it will implement new guidelines or requirements for listing emerging market issuers.

For issuers in the resources industry, the Consultation Paper notes that the TSX considers certain emerging market risk factors to be mitigated if the issuers have produced independent technical reports. The consultation process is asking whether other factors should be considered when determining if an issuer should be qualified as an emerging market issuer, or whether resource issuers with independent technical reports should be automatically exempted from the definition (and therefore from certain regulatory requirements) if other conditions are met.

The proposed policy document for the TSXV creates a class of issuers known as "excluded resource issuers", which are subject to relaxed listing requirements as compared to issuers falling under the definition of emerging market issuer. As set out in the proposed policy document, an excluded resource issuer is a mining or oil and gas issuer for which a majority of the issuer's senior officers, directors, control persons or associates of a control person of the issuer have not been resident in an emerging market jurisdiction for a majority of the 10 years preceding the issuer's application for listing.

For now, emerging market issuers should be aware that they may soon be subject to new regulatory rules and so should consider a review of their operations in light of the risk factors listed above.

The disclosure tips contained in the Issuer Guide should also help identify areas that are becoming the focus of OSC investigations and TSX review.

The Issuer Guide can be found at http://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20121109_51-720_issuer-guide.htm ■

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