

## 2011 and Other Legal Developments Affecting Canadian and Other Non-U.S. Companies

**March 15, 2012**

### **Client Advisory**

March 15, 2012 by Guy P. Lander and Mary Joan Hoene

This memorandum summarizes some of the significant U.S. legal developments that occurred last year that affect Canadian and other non-U.S. companies

### **Revised Net Worth Standard For Accredited Investors in Private Placements.**

The \$1 million net worth test used to determine whether an individual is an “accredited investor” who may invest in Regulation D private placements has been revised. Under the revised calculation of net worth, a person’s primary residence is excluded as an asset and any indebtedness is secured by the person’s primary residence, up to the estimated fair market value of the primary residence, is correspondingly excluded as a liability. However, if any of that indebtedness incurred within 60 days of the purchase of the placement securities and was not in connection with the acquisition of the primary residence, then the new indebtedness would be a liability in the net worth calculation.

### **Public Company Disclosure: Form 20-F**

#### *XBRL Data Phase In*

For U.S. GAAP filers. All foreign private issuers using U.S. GAAP must now provide their financial information to the SEC in the form of interactive data using eXtensible Business Reporting Language (XBRL) and post it on their website.

All foreign private issuers that are large accelerated filers (having aggregate worldwide market value of their securities held by non-affiliates of at least \$700 million) and that prepare their financial information using U.S. GAAP (and were required to submit a “block-tagging” XBRL exhibit for filings containing financial statements for a period ending on or after June 15, 2010) must now include detailed tagging of financial statement footnotes and schedules for fiscal periods ending on or after June 15, 2011.

All other foreign private issuers that prepare financial statements using U.S. GAAP must begin XBRL block-tagging for interim periods ending on or after June 15, 2011 and they will be required to include detailed tagging of footnotes and schedules a year later (for fiscal periods ending on or after June 15, 2012).

IFRS Filers. Foreign private issuers that prepare financial statements using IFRS as issued by the IASB need not provide interactive data using XBRL format until the SEC specifies the XBRL taxonomy for IFRS financial statements. It is not expected that the SEC will publish XBRL taxonomy for filings in 2012 by such foreign private issuers.

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Home Country GAAP Filers. Foreign private issuers that prepare their financial statements using home country GAAP (other than IFRS as issued by the IASB) need not provide financial information in XBRL format.

Dodd-Frank Mine Safety Disclosure Requirements were adopted by the SEC. This new disclosure requirement in Form 20-F (Item 16H), and Form 40-F (Instruction B.16)- applies to any company that is an operator or that has a subsidiary that is an operator of a coal or other mine subject to the U.S. Federal Mine Safety and Health Act (generally mines located in the United States and its territories). These disclosures relate to mine health and safety violations or other related regulatory matters. The SEC adopting release noted that to the extent mine safety issues regarding non-U.S. mines are material to a company, the company may be required to disclose those issues in other portions of its SEC filings.

**Dodd-Frank Conflict Minerals Disclosure Requirements have not yet been adopted by the SEC.**

Dodd-Frank Disclosure of Government Payments by Mining and Natural Resource Extraction Companies for commercial development of oil, natural gas or minerals have not yet been adopted by the SEC.

### **First-time Adopters of IFRS**

For most Canadian foreign private issuers their 2011 financial statements will be prepared for the first time in accordance with IFRS accounting principles. As an accommodation to these companies, the SEC will permit the financial statements in their 2011 Form 20-F to include just two years, rather than three years, of statements of income, changes in shareholders' equity and cash flow, provided they provide the other information required in Instruction G to Form 20-F.

### **Cybersecurity**

The SEC Staff issued guidance on the disclosure obligations of both U.S. companies and foreign private issuer concerning cybersecurity risks and incidents. Essentially, cybersecurity is a business risk. Like other operational and financial risks, companies disclosure of cybersecurity incidents may be required in risk factors (if these issues are among the most significant factors that make an investment in the company risky); MD&A, if the cost or other consequences of cyber incidents represent a material trend, event or uncertainty that is reasonably likely to have a material effect on the company's financial condition); business description, if cybersecurity incidents materially affect products, services, business relationships or competitive position; legal proceedings; and financial statement disclosures. Cyber incidents may also adversely affect disclosure controls and procedures.

### **Investment Advisors Act and Dodd Frank**

The Dodd-Frank Act amendments to the Investment Advisers Act of 1940 and related new SEC rules overhaul the regulation of investment advisors. The private adviser exemption from registration for investment advisers with fewer than 15 clients has been repealed, achieving the goal of requiring hedge fund and other private fund managers to register with or report to the SEC on Form ADV. Dodd-Frank placed mid-sized advisers (with AUM of between \$25 million and \$100 million) under the regulation of the state of their principal office and place of business, if that state has a registration and examination system. Consistent with prior law, small investment advisers (with assets under management ("AUM") of less than \$25 million) remain regulated by the state of their principal office and place of business. Certain categories of both small and mid-size advisers may register with the SEC. Dodd-Frank and the final SEC rules added new exemptions from registration for i) foreign private advisers (those with no place of business in the U.S., fewer than 15 clients and investors in the U.S., and AUM from U.S. clients and investors of less than \$25 million, so long as they do not advertise their services), ii) advisers to venture capital funds, and iii) advisers solely to private funds (with AUM of less than \$150 million). A non-U.S. adviser, i.e., one whose principal office and place of business is outside the U.S., can rely upon the private fund adviser exemption if all its U.S. clients are private funds and assets managed from a place of business in the U.S. are no more than \$150 million. Although exempt from registration as investment advisers, advisers to venture capital funds and private funds of

less than \$150 million AUM must report and provide information to the SEC consisting of certain items of Part 1 of Form ADV. The SEC has the authority to develop record keeping requirements for these advisers, which are now called "exempt reporting advisers". The SEC has also adopted Form PF which requires reporting by large advisers of certain information deemed relevant to "systemic risk, beginning in 2012 for most advisers. Finally, "family offices" that meet the terms of a new exemption defined by the SEC are excluded from the definition of "investment adviser", and not subject to regulation. The new rules are complex and the above descriptions are general in nature.

#### **Coming Soon: Jumpstart Our Business Startups (JOBS) Act**

To spur jobs in the U.S., the House of Representatives recently passed the Jumpstart Our Business Startups (JOBS) Act, which is designed to help mid-sized companies access the U.S. capital markets. The Act would create an "on ramp" for companies to go public by allowing public offerings of up to \$50,000,000 with stripped down disclosure and procedures. The offered securities would not be restricted on resale, the issuer would be permitted to "test-the-waters" and solicit interest in the offering before filing an offering statement, and the would be required to file audited financial statements with the SEC annually. The SEC will likely require that offering material to be filed electronically, disqualify "bad actors" from using the exemption and require filing of periodic reports. The Act would also preempt state regulation for offerings, if the security offered under the new exemption is offered or sold on a national securities exchange or is offered or sold to certain "qualified purchasers". In addition to reforming Regulation A as described above, the Act would reform Regulation D, raise the 500 shareholder threshold for private companies to 2000 shareholders of record and permit "crowd funding". The Act passed the House on Nov. 2, 2012, and again on March 6, 2011. There are also a number of parallel Senate bills and the President has issued a formal Statement of Policy supporting the Act.

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