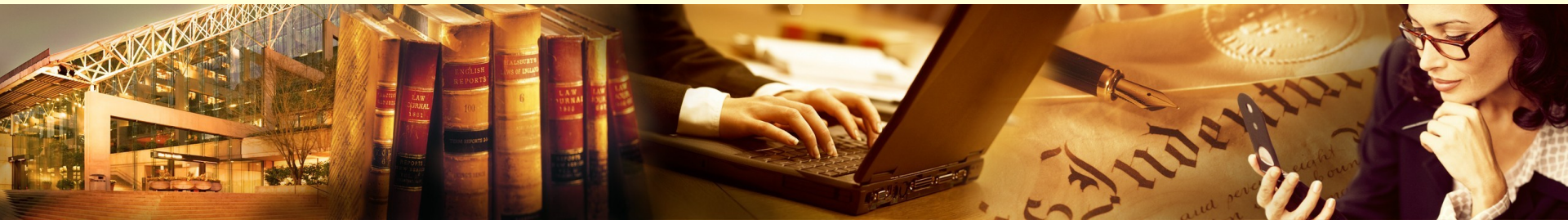


# Dodd-Frank Wall Street Reform and Consumer Protection Act *International Aspects*



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## *4 ways that a Canadian issuer can get caught up in the new US rules*

1. Be subject to US reporting requirements (e.g. required to file annual reports on Form 20-F or Form 40-F)
2. Be listed on a US Exchange
3. Canadian securities regulators enact similar legislation
4. The new governance or disclosure requirement becomes industry best practice and is voluntarily adopted

- New US rule – shareholders owning more than 3% (and holding for three years) are entitled to nominate candidates for election to the board
- Applicability to Canadian issuers – generally, foreign private issuers are exempt from US proxy rules
- Many Canadian corporate statutes have “proposal provisions” which can be used to replace a board

- New US rule – non-binding “say-on-pay” vote held at least every 3 years; “say-on-pay” vote on “golden parachutes” at time of transaction approval
- Applicability to Canadian issuers – US proxy rules generally don’t apply to foreign private issuers
- Non-binding “say-on-pay” votes have recently become the norm among Canadian financial institutions, particularly the big banks

# *Internal Pay Equity and Hedging of Stock Compensation*

- New US rule - include in proxy information circular a “pay equity” comparison showing the rates between the median total compensation for all employees worldwide and the CEO’s total compensation.
- A US company must also disclose their policy on whether employees and directors are allowed to purchase financial instruments that would hedge the downside risk in their stock compensation programs.
- Applicability to Canadian issuers - Foreign private issuers exempt from the US proxy rules

- New US rule – New *Exchange Act* s.10C requires each member of the compensation committee to be independent and have full control over hiring independent consultants
- Applicability to Canadian issuers – foreign private issuers need not comply if they do not have such a committee or if they provide an explanation in annual disclosure documents as to why they do not comply

- New US rule – New *Exchange Act* s.10D requires Exchanges to impose requirement that issuers clawback compensation awarded in the 3 years preceding a financial restatement occasioned by a material non-compliance with reporting requirements (extends SOX which was 1 yr and based on misconduct)
- Applicability to Canadian issuers – generally, foreign issuers are exempt from Exchange’s corporate governance rules and permitted to comply with home company governance rules; but in this instance the *Dodd-Frank Act* refers to “issuers” perhaps removing the ability of SEC to exempt “foreign issuers”

- New US rule – domestic reporting companies must disclose in proxy circulars why they have chosen one person to act as Bd. Chair and CEO
- Applicability to Canadian issuers – Canadian corporate governance disclosure rules already require this disclosure

- New US rule – further limits on broker discretionary voting
- Applicability to Canadian issuers – no broker discretionary voting in Canada

# *Commercial Development Payments to Governments – Section 1504*

- New US rule – resource extraction companies must disclose all payments to US and foreign governments in respect of commercial development; e.g., taxes, royalties, fees, bonuses, production entitlements, other material benefits
- Applicability to Canadian issuers – must be disclosed (Form 20-F, Form 40-F)

- New US rule – US Secretary of State has designated certain minerals including gold as “conflict minerals” which, depending on the source, may be used to finance conflict in the DRC or surrounding areas. Issuers (e.g. jewelers, electronics manufacturers) using these “conflict minerals” must disclose source and chain of custody and provide independent private sector report
- Applicability to Canadian issuers – Annual disclosure required in Form 20-F or Form 40-F, together with independent report filed with the SEC and posted on the issuer’s website

- New US rule – disclosure of safety infringements and incidents under US federal mining regulations at coal and other mines – must file Form 8-K when an “imminent danger” order is issued or a notification of a potential pattern of violations is received
- Applicability to Canadian issuers – Where applicable, disclosure must be made on Form 20-F or Form 40-F - applies only with respect to US operations subject to US Federal *Mine Safety Act* and Mine Safety Health Administration; but must disclose deaths occurring in any jurisdiction. No Form 6-F obligation to disclose imminent danger orders

- New US rule – withdrawal of exemption in *Securities Act* Rule 436(g) for credit agencies from the requirement to consent to inclusion of rating in registration statement. This attracts liability for material misstatements or omissions.
- Applicability to Canadian issuers – under Canadian law, issuers are required to disclose in prospectuses and AIF's any ratings, to explain the rating and to describe in relation to the rating agencies system. Where these ratings are referred to in Form 40-F or Form 6-K reports, they are then incorporated by reference in US registration statement and prospectuses; e.g. on Form F-3 or F-10.
- Issues – rating agencies are refusing to provide consents; Canadian solution is to publish rating in Canadian prospectus but to strip it from the US filing. Canadian regulations are currently considering changing to the US rule.

- New US rule – permanent exemption for smaller issuers from auditor attestations in respect of internal control over financial reporting. SOX s.404 now applies only to accelerated and large accelerated filers
- Applicability to Canadian issuers – Canada already has an exemption for TSX-V issuers


- New US rule – net worth test now excludes primary residence
- Applicability to Canadian issuers – Canadian accredited investor net worth test has always excluded the principal residence

# *Questions*

15



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