

SECURITIES LAW UPDATE

The Securities Law Update is a periodic publication of the Securities and Corporate Law Practice Group of McLean & Kerr LLP.

In this Update the following topics are covered:

- Amendments to the *Securities Act* and *Commodity Futures Act*
- TSX Group Proposals
- New Harmonized Continuous Disclosure Obligations Proposed
- Recent Canadian Institute of Chartered Accounts' Initiatives
- Canadian Trading and Quotation System

AMENDMENTS TO THE *SECURITIES ACT* AND *COMMODITY FUTURES ACT*

On December 9, Bill 198 received Royal Assent by the Ontario legislature. Included in Bill 198 are certain amendments to the *Securities Act* (Ontario) and *Commodity Futures Act* (Ontario) **which will come into force on the day to be named by proclamation of the Lieutenant Governor**. The proposed amendments to the *Securities Act* (Ontario) and *Commodity Futures Act* (Ontario) are intended to improve investor confidence in the integrity of Ontario's capital markets.

Among the significant amendments to the *Securities Act* (Ontario) are the following:

- The concept of reviews of the continuous disclosure record of a reporting issuer is added.
- The maximum penalties that can be imposed by the court for offences under section 122 of the *Securities Act* (i.e. a contravention of Ontario securities law) are increased from a fine of \$1 million and imprisonment for two years to a fine of \$5 million and imprisonment for five years less a day.
- The creation of express prohibitions against securities fraud, market manipulation and making misleading or untrue statements.
- The Ontario Securities Commission (the "OSC") is given the power to impose an administrative fine of up to \$1 million where there has been non-compliance with Ontario securities law.
- The OSC is given the power to order a person or company to disgorge amounts obtained as a result of non-compliance with Ontario securities law.
- A statutory right of action is given to investors in the secondary market and includes the right to sue companies and other responsible persons for misrepresentations (written or oral) or a failure to make timely disclosure.

- The OSC is given authority to require reporting issuers to appoint audit committees and to prescribe requirements relating to the functions and responsibilities of audit committees, including independence requirements.
- The OSC is given authority to require reporting issuers to establish and maintain internal controls and disclosure controls and procedures and requiring chief executive officers and chief financial officers to provide certifications related to internal controls and to disclosure controls and procedures. (The OSC's current rule making authority would permit it to address other aspects of the certification regime as appropriate.)

Parallel amendments are also being made, where applicable, to the *Commodity Futures Act*. This legislation may be viewed on www.ontla.on.ca or on www.osc.gov.on.ca.

TSX GROUP PROPOSALS

In August of 2002 the TSX Group, which operates the Toronto Stock Exchange (the "TSX") and the TSX Venture Exchange, was asked by the Chair of the Ontario Securities Commission for the analysis and views of the TSX as to the appropriateness of the TSX adopting mandatory requirements similar to those measures now mandated in the United States in legislation, regulations and securities exchange requirements. The TSX Group published its response in September of 2002 which included its re-examination of certain proposals relative to its corporate governance standards which it had previously published for public comment in April of 2002. The revised proposals would, if implemented, expand the listing requirements of the TSX and enhance the framework of disclosure within which TSX listed companies must operate. In addition, the proposals would, to a limited extent, harmonize the TSX's requirements with those of certain major U.S. exchanges and new U.S. laws and regulations.

Specifically, the revised proposals include requiring as conditions of continued listing on the TSX that:

- companies maintain a board of directors composed of at least two independent directors;
- companies have an audit committee with at least two independent committee members;
- "independent" director be defined as meaning an outside director who is not a member of management and is free from any business, family or other relationship which could reasonably be perceived to materially interfere with the director's ability to act with a view to the best interests of the issuer, other than interest and relationships arising solely from holdings in the issuer;
- companies disclose the status of each director, the nature of their relationship with the company and the basis of the determination of their status;
- companies adopt an audit committee charter and publish such charter; and

- chief executive officers of listed companies annually certify the accuracy of their disclosure in reference to the TSX corporate governance guidelines.

In addition, the TSX is considering (i) publishing an annual review of governance disclosure on a three-year rotating basis, which would include a review of the quality of management of all listed companies, and (ii) requiring that listed companies adopt and publish a code of business conduct.

The TSX's revised proposals have yet to be published for public comment and, accordingly, **listed companies are not yet required to comply with the new TSX corporate governance requirements.**

NEW HARMONIZED CONTINUOUS DISCLOSURE OBLIGATIONS PROPOSED

In June of 2002 the OSC published for comment Ontario's proposed Rule 81-801 Implementing National Instrument 51-102 ("NI 51-102") Continuous Disclosure Obligations, proposed amendments to OSC Rule 56-501 Restricted Shares, proposed revocation of OSC Rule 51-501 AIF & MD&A, OSC Rule 52-501 Financial Statements, OSC Rule 54-501 Prospectus Disclosure and OSC Rule 62-102 Disclosure of Outstanding Share Data.

Implementing NI 51-102 is consistent with the OSC's goal of producing one harmonized rule for continuous disclosure obligations application to reporting issuers in all Canadian jurisdictions. When the Rule takes effect in Ontario, reporting issuers, other than investment funds, will need only refer to NI 51-102 for their Ontario securities requirements regarding continuous disclosure, proxies and proxy solicitation.

The OSC is currently reviewing comments received prior to the September 2002 deadline. **The OSC has advised McLean & Kerr LLP that it plans to republish the proposed Rule in the summer of 2003 and does not expect the Rule to take effect before January 1, 2004, at the earliest.**

RECENT CANADIAN INSTITUTE OF CHARTERED ACCOUNTS' INITIATIVES

In November of 2002 the CICA published *Management's Discussion and Analysis: Guidance on Preparation and Disclosure* (the "Guidance") to assist senior management and boards of directors in preparing and issuing MD&A reports. The Guidance sets out principles and a framework for fact-based MD&A disclosures, going beyond existing regulations, and emphasizing aspects of the regulations that may not currently be implemented in the most effective manner. In addition, the CICA has established an electronic resource centre to provide additional information helpful to MD&A preparers and to facilitate timely updating of the Guidance. The Guidance can be obtained and the resource centre may be accessed at www.cica.ca.

In September of 2002 the Public Interest and Integrity Committee of the CICA published its proposed independence standards (the "Standards") for auditors and other assurance providers. The Standards require auditors be independent, which is defined as free of any influence, interest or relationship which, in respect of the engagement, impairs the professional judgment or objectivity of the auditor, or which, in the view of the reasonable observer, would

impair the professional judgment or objectivity of the auditor. The Standards also include an illustrative list of prohibited relationships and services that would threaten auditor independence. The Public Interest and Integrity Committee has yet to complete and publish its final report and recommendation on the Standards.

CANADIAN TRADING AND QUOTATION SYSTEM

In McLean & Kerr LLP's August 23, 2002 Securities Law Update, we advised that the Canadian Trading and Quotation System Inc. ("CNQ") had applied to the OSC for approval of its proposal to own and operate an electronic quotation and trade reporting system for non-exchange listed equity securities of Ontario reporting issuers. We also advised that in July of 2002 the OSC published for comment the CNQ's application, including the policies and rules and draft OSC recognition order for CNQ.

In September of 2002, Douglas G. Reeson, Secretary of the OSC, published his comments on the application. The OSC Secretary is generally supportive of CNQ's application and states that the new securities marketplace should help improve the capital formation process for Ontario small/micro cap companies. **CNQ has advised McLean & Kerr LLP that it expects to receive OSC approval of its application in April of 2003.**

HOW MCLEAN & KERR LLP CAN HELP

We are available to answer any questions you may have regarding the items discussed in this Update and to assist you comply with the securities and exchange requirements.

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