

February 1, 2008

## Noteworthy U.S. Legal and Regulatory Developments During 2007 of Interest to Canadian Companies

The following 2007 U.S. legal and regulatory developments may be of interest to our Canadian clients and friends.

1. **Management's Assessment of Internal Control**: In June 2007, the SEC amended its rules relating to internal control over financial reporting to ease the burden of compliance for issuers. The amendments and related management guidance seek to streamline the audit process, making it more cost-effective and providing greater flexibility to management by emphasizing a principles-based, top-down, risk-based approach. Importantly, the amendments also provide that auditors are no longer required to issue an attestation on management's evaluation of the effectiveness of a registrant's internal control over financial reporting. Instead, the auditors' attestation must directly opine on the effectiveness of the registrant's internal controls. This change too should result in a more streamlined and therefore less costly process. Issuers should ensure that both management's report on internal control and the auditors' attestation contained in the 2007 Form 40-F reflect the changes to the attestation the auditors provide.
2. **SEC Recognition of IFRS**: In November 2007, the SEC introduced its most significant accommodation of non-U.S. companies in a number of years when it approved rule changes to allow foreign private issuers to file financial statements prepared under International Financial Reporting Standards ("IFRS") without reconciliation to U.S. GAAP. To benefit from the rule, the IFRS financial statements must be in full compliance with the English language version of IFRS, as published by the International Accounting Standards Board. Oil and gas companies should note that U.S. Financial Accounting Standards Board ("FASB") Statement No. 69 accounting methods will continue to apply, even where no U.S. GAAP reconciliation is otherwise required.

On a related note, FASB plans to release in early 2008 a proposed codification of FASB Accounting Standards, which will facilitate convergence of GAAP and IFRS. The codification attempts to integrate and organize all relevant accounting pronouncements issued by FASB, the American Institute of Certified Public Accountants and the Emerging Issues Task Force.

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3. **Shortened Holding Period for U.S. Restricted Securities:** In order to increase the liquidity of privately placed securities and thereby decrease the cost of capital, the SEC has approved a series of amendments to Rule 144, which governs resales of securities issued in private placement transactions. The most important of these shortens the current one year and two year holding periods for resales of restricted securities to six months and one year, respectively.
4. **Executive Compensation:** In October 2007, the SEC issued comments on company disclosure in the wake of the new executive compensation disclosure rules applicable to U.S. companies. The focus of the SEC's comments was on enhanced disclosure of pay differentials among executives, change of control agreements and severance payments, performance targets (which often did not provide, in the SEC's opinion, adequate disclosure of targets), and benchmarking (which a number of commentators believe causes unwarranted increases in executive pay, as each company increases compensation in order to remain "competitive").

"Say on Pay" shareholder proposals (which require companies to seek shareholder ratification of executive compensation packages) have also received attention lately, as both Aflac and Verizon have voluntarily adopted non-binding shareholder votes on executive compensation. Institutional Shareholder Services ("ISS"), which issues vote recommendations on executive compensation packages that many institutional investors strictly follow, has indicated that it will withhold or recommend voting against compensation committee members, boards and CEOs that follow what ISS considers to be "poor pay practices", including, among other things, post-retirement perks and single-trigger equity award vesting. Additionally, ISS recommends adopting "Say on Pay" to confirm that pay packages are in line with shareholder expectations.

5. **SEC Comment Letters:** An analysis of the now public SEC comment letters has shown that the SEC's review of U.S. company periodic reports is overwhelmingly focused on U.S. GAAP issues and accounting-related disclosure. The most common of the SEC's comments include:
  - incomplete disclosure of revenue recognition on multiple-element contracts;
  - incomplete or inconsistent internal control effectiveness letters;
  - incomplete reconciliation of non-GAAP measures;
  - inadequate discussion in MD&A, including inadequate explanations for changes in financial statements, lack of discussion of specific operational issues, inadequate discussion of critical accounting policies and items missing from tables of contractual obligations;
  - incomplete and inconsistent segment reporting;
  - inadequate disclosure of derivatives;
  - unclear allocation of purchase price in business acquisition;

- inadequate disclosure of process for testing goodwill impairment or amortization of goodwill;
  - inadequate discussion of impairments in critical accounting policies; and
  - inadequate disclosure of stock option accounting, particularly lack of pro forma income numbers.
6. **Shareholder Access**: After receiving over 8,000 comment letters (one of the largest number of comments ever received) the SEC has decided not to implement the proposal to permit shareholders to use a company's proxy statement to solicit votes for their director nominees. Instead it has chosen to codify the status quo, which permits companies to exclude shareholder proposals that would result in an immediate election contest. Companies anticipating innumerable election contests by activist shareholders breathed a collective sigh of relief, although it is clear that various other recent reforms (such as majority voting by-laws, the proposed elimination of broker non-voting and the e-proxy reforms) give, or would give, shareholders significant new influence over director elections.
7. **E-proxy**: The SEC has published final rules permitting companies to choose between the notice and electronic access method of distribution for all proxy solicitations (other than for business combinations) and a full set delivery option. Under both options, companies must deliver to shareholders a notice of internet availability of proxy materials and post proxy materials on a publicly accessible website. Under the full set delivery option, companies and other soliciting persons must also mail a paper copy of a full set of proxy materials. Under the notice and access option, companies post the proxy materials on a website in lieu of making a full mailing.

The primary advantage of e-proxy is the lowered cost in printing and mailing full proxies. Any savings will be mitigated by costs associated with printing and mailing any requested full proxies, although early returns indicate that only three to four percent of shareholders are requesting such full proxies. Disadvantages include a potential decline in shareholder participation if shareholders who had previously completed proxy cards received in the mail choose not to participate via the internet.

8. **Deregistration**: The SEC has moved to address the "Hotel California" effect of the U.S. Exchange Act registration and reporting regime on foreign private issuers by adopting new rules which permit foreign private issuers to terminate their registration and reporting obligations under more flexible standards. The SEC had estimated based on 2004 data that 28% of the 1,200 foreign private issuers would be eligible to deregister under the new rule. By August 2007, 6% of foreign private issuers had sought to deregister.
9. **A Decline in U.S. Class Actions?**: While class actions in 2007 dropped below the ten-year historical average of 186 cases, the 166 cases filed represent a 43% increase from 2006, many related to the burgeoning subprime mortgage crisis.

**10. Oil and Gas Disclosure:** In December 2007, the SEC issued a release soliciting comments on possible revisions to the disclosure requirements for oil and gas reserves. Comments are sought, the SEC has said, in light of technological changes that have occurred in the oil and gas industry in the nearly three decades since the SEC first adopted its oil and gas disclosure rules. The SEC has specifically sought comments on:

- whether the SEC should revise the proved reserves definition; and
- whether the rules should require third party verification of the reserves estimates companies report in their filings.

Comments must be submitted by February 19, 2008.

**11. Climate Change:** In light of two events occurring in September 2007, companies with significant carbon emissions or operations that could be affected by climate change-related events may wish to revisit their disclosure. First, a group of state pension plans, institutional investors and environmental groups sent a petition to the SEC asking it to issue an interpretive release clarifying when issuers are required to disclose how climate change could affect their financial condition or operating performance. Second, New York State Attorney General Andrew Cuomo issued subpoenas to five large energy companies (AES Corporation, Dominion, Dynegy, Peabody Energy and Xcel Energy) seeking information relating to internal analyses of their climate change risks and disclosures of such risks to investors. In his subpoenas, the Attorney General alleged that the companies “did not attempt to evaluate or quantify the possible effects of future greenhouse gas regulations, or discuss their impact on the company,” and that these omissions “make it difficult for investors to make informed decisions.” The Attorney General did not accept claims that “there is insufficient information concerning known climate change trends and uncertainties.”

**12. XBRL:** The SEC has brought XBRL, the system for encoding the data found in issuers’ financial statements, one step closer to reality, announcing that it will be soliciting comments on the XBRL technology and instructions to issuers developed to date. In its final form, XBRL will provide interactive financial data that may be used by the public to sort and compare data across industries, companies and reporting periods. To provide a glimpse of what XBRL has to offer, and to encourage its voluntary adoption, the SEC has unveiled a website that uses XBRL technology to display and sort the executive compensation for the top 500 companies in the U.S. by industry, market cap and revenue. The site is available at <http://216.12.130.224/compensation/action/main/list.action>.

**13. FCPA:** The Foreign Corrupt Practices Act (“FCPA”) remains in the spotlight as the SEC and Department of Justice (“DOJ”) more than doubled the number of enforcement actions in 2007, with 38 prosecutions compared to 15 in 2006. More companies are under investigation. Most notably, the SEC and DOJ have begun targeting individual defendants, and seeking disgorgement of any money obtained through corrupt practices, which could include the entire gross revenue of a contract obtained in violation of FCPA.

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This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Questions concerning issues addressed in this memorandum should be directed to Edwin S. Maynard ((212) 373-3024), Andrew J. Foley ((212) 373-3078) or Kathleen McCabe ((212) 373-3711).