

Blakes Bulletin

Securities Regulation

Canadian Government Releases Proposed Canadian Securities Act

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On May 26, 2010, the federal Canadian Department of Finance (Finance) released a proposed draft Canadian *Securities Act* (the Proposed Act). The Proposed Act was drafted by the Canadian Securities Transition Office (the CSTO), a body established by the Government of Canada in July 2009 to assist in establishing a Canadian securities regulator.

Representatives from 10 of the 13 provinces and territories of Canada (collectively, the Participating Jurisdictions) assisted the CSTO in developing the Proposed Act. The provinces of Alberta, Manitoba and Quebec have to date not participated in the development of the Proposed Act or the federal securities regulatory regime.

PROPOSED TIMING FOR ESTABLISHMENT OF REGULATORY REGIME

Finance has referred the Proposed Act to the Supreme Court of Canada to obtain a ruling as to whether the Proposed Act is within the legislative competence of the federal Parliament and has stated that it expects it will take 10 to 24 months for the Supreme Court to issue its ruling.

The CSTO is drafting a transition plan (the Transition Plan) which it expects to deliver to the Minister of Finance (Canada) and the Participating Jurisdictions by July 12, 2010. According to the CSTO, the Transition Plan will provide a roadmap for establishing the Canadian Securities Regulatory Authority (the Authority) (the securities regulatory body that will administer the Proposed Act), and will also include information on governance, organizational design and other administrative aspects.

Finance has also announced that the CSTO intends to begin discussions with each Participating Jurisdiction for the purposes of co-ordinating the establishment of the Authority and the implementation of the proposed securities regulatory regime. The Canadian government has set aside C\$150-million to enter into financial arrangements with the Participating Jurisdictions to assist with the move from provincial and territorial securities regulators to a Canadian securities regulator.

Finance has announced that it is targeting 2012 or 2013 for the establishment of the Authority.

THE CANADIAN SECURITIES REGULATORY AUTHORITY

The Proposed Act establishes the Authority as a Crown corporation and specifies its mandate and structure. Pursuant to the Proposed Act, the Authority will be self-financing and must fund its activities and operations from funds received under the Proposed Act (presumably from filing and market participation fees paid by market participants such as issuers and securities dealers).

The Authority will be comprised of two divisions, the Regulatory Division led by the Chief Regulator, which is responsible for administering the Proposed Act, and the Canadian Securities Tribunal, which would be headed by the Chief Adjudicator and would be responsible for adjudicating matters arising under the Proposed Act. The Proposed Act states that the Canadian Securities Tribunal is independent of the Authority in the performance of its adjudicative functions.

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Highlights

- Canadian government expects national securities regulatory regime to be established by 2013
- Opt-in mechanism allows for provinces and territories to willingly participate in the federal securities regulatory regime
- Criminal offences would apply in all Canadian provinces and territories, regardless of whether the province or territory had opted into the federal securities regulatory regime

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The Proposed Act also requires that Deputy Chief Regulators be appointed for each region fixed by the board of directors of the Authority. Although the Proposed Act does not specify the regions to be created under the Proposed Act, Finance expects that each Participating Jurisdiction would have an office with the expertise to meet the needs of the area it serves.

STRUCTURE OF THE PROPOSED ACT

According to Finance, the Proposed Act is designed to set out the "core fundamental provisions [of Canadian securities regulation], while the more detailed and technical requirements would be set out in the forthcoming regulations". Accordingly, the Proposed Act only provides a general framework and refers to regulations (which have not yet been prepared) for most of the particulars relating to securities regulation.

While Finance notes that the regulations will be "primarily derived from the harmonized national instruments that have been developed by provincial and territorial securities regulators", such regulations have not yet been prepared and Finance has indicated that it expects to begin drafting the regulations to the Proposed Act in the fall of 2010.

Some notable aspects of the Proposed Act are described below.

OPT-IN MECHANISM

The Proposed Act contains an "opt-in mechanism" pursuant to which willing provinces and territories could opt into the federal securities regulatory regime and thus become subject to such regime. For provinces and territories which do not opt into the federal securities regulatory regime, their provincial securities legislation will continue in full force.

The Report of the Hockin Commission, which recommended the move to a Canadian securities regulator, had suggested that market participants (such as issuers or dealers) could still opt into the federal securities regulatory regime even if the province or territory with which they had a "substantial connection" chose not to opt into the regime (i.e., market participants could unilaterally subject themselves to the federal securities regulatory regime). However, the Proposed Act does not contain any opt-in mechanism for market participants. Therefore, an issuer with a substantial connection to a province or territory that

does not opt into the Proposed Act would continue to be subject to such province's or territory's securities legislation. If such issuer also had a substantial connection to a province or territory that had opted into the Proposed Act, such issuer would also be subject to the Proposed Act in respect of such province or territory. Accordingly, an issuer with a substantial connection to more than one province or territory could find itself subject to multiple securities regulatory regimes in Canada (although fewer than is currently the case).

CRIMINAL OFFENCES

The Proposed Act contains provisions designating certain acts as criminal offences, including fraud, market manipulation, insider trading and intentional misrepresentations. Persons found guilty of such offences could be liable for up to 14 years imprisonment. These offences now exist in the *Criminal Code*, and the proposal is to move them into the Proposed Act.

As currently drafted, the criminal offence provisions of the Proposed Act would apply nationally, in both Participating Jurisdictions and non-Participating Jurisdictions. Therefore, a market participant with a substantial connection to a province or territory that has not opted into the federal securities regulatory regime, and is therefore not otherwise subject to the Proposed Act, would still be subject to the criminal offence provisions of the Proposed Act.

ENFORCEMENT POWERS

In addition to the creation of criminal offences, the Proposed Act empowers the Chief Regulator to designate a person or classes of person for the purpose of enforcing the Proposed Act (a Designated Person). A Designated Person has broad powers to verify compliance with the Proposed Act including:

- (i) reviewing the business and conduct of any market participant;
- (ii) requiring delivery of any records, filings, reports or other communications made to any regulatory agency in or outside Canada; and
- (iii) entering during normal business hours into a place believed to contain anything relevant to the review of a market participant, examining anything in such place, including any computer system, and removing anything from such place.

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In addition, certain authorized individuals investigating criminal activity under the Proposed Act are able to obtain a court order to compel a recognized entity (such as an exchange, clearing agency or self-regulatory organization) to provide a list of registrants who purchased or traded a security during a specified period and to compel a registrant to produce a document that contains the names of all persons on whose behalf the registrant purchased or traded a specified security during a specified period, as well as the time and date of the purchase or trade.

REGULATION OF DERIVATIVES

The Proposed Act contains an entire part devoted to the regulation of derivatives and also grants the Chief Regulator the power to designate any security as a derivative. While the Proposed Act indicates that most types of derivatives would be subject to different rules (including different disclosure rules) than conventional securities, little information regarding the regulation of derivatives is contained in the Proposed Act, as such details have been left to the regulations.

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