



Selected U.S. Securities Law Issues

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Cautionary Note

- The material presented herein is not intended to be construed as legal advice

Topics

- **Cross Border Private Placements**
- **Resale of Restricted Securities**
- **Regulation Crowdfunding**
- **Business Combinations Under S. 3(a)(10) of the US Securities Act**
- **Exchange Act Registration**

Cross Border Private Placements

- **Foreign Private Issuers (“FPIs”) vs. US Domestic Issuers (“USDIs”)**
 - Offer and sale of securities must be registered under the US Securities Act and state “blue sky” laws unless an exemption is available
 - Unregistered offerings effected outside the US by FPIs with a “substantial US market interest” or by USDIs are subject to certain offering restrictions under Rule 903 of Regulation S

Cross Border Private Placements (Cont)

- **Foreign Private Issuers (“FPIs”) vs. US Domestic Issuers (“USDIs”)**
 - Generally, securities issued in an unregistered offering in the United States by both FPIs and USDIs will be “restricted securities”
 - Securities issued by a USDI outside the US pursuant to Regulation S will be deemed to be “restricted securities” = U.S. restrictive legend

Cross Border Private Placements (Cont)

– Foreign Private Issuer

- Any foreign issuer (other than a foreign government) except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:
 - More than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and
 - Any of the following:
 - The majority of the executive officers or directors are United States citizens or residents;
 - More than 50 percent of the assets of the issuer are located in the United States; or
 - The business of the issuer is administered principally in the United States

Cross Border Private Placements (Cont)

- Offerings Pursuant to Rule 506
 - Rule 506(b): Exemption for private placements promulgated pursuant to section 4(a)(2) of the US Securities Act
 - Rule 506(c): Exemption for offerings to accredited investors promulgated pursuant to the JOBS Act, effective September 23, 2013
 - “Bad actor” disqualification rules effective September 23, 2013
 - Rule 506 securities are “covered securities” pre-empted from state registration but state notice requirements and filing fees apply
 - Securities are “restricted securities” and must be represented by definitive certificates imprinted with a US restrictive legend

Cross Border Private Placements (Cont)

- Offerings Pursuant to Rule 506
 - Rule 506(b): “Traditional” Rule 506 exemption retained - may offer securities to up to 35 non-accredited investors and an unlimited number of accredited investors
 - Information delivery requirements under Rule 502(b) will not apply if offering limited to accredited investors
 - Prohibition on “general solicitation” and “general advertising”
 - Intermediaries involved in the offering process must have a substantive and pre-existing relationship with each prospective investor they introduce to the issuer

Cross Border Private Placements (Cont)

- Offerings Pursuant to Rule 506 (Cont)
 - Rule 506(c) – statutory exemption for offerings solely to accredited investors
 - General solicitation and general advertising permitted
 - Issuer must take “reasonable steps” to verify accredited investor status of each purchaser (must be documented)
 - Issuer must have a reasonable belief that each purchaser is an accredited investor at the time of sale
 - Intermediaries involved in offering may use general solicitation and general advertising

Cross Border Private Placements (Cont)

- Offerings Pursuant to Rule 506
 - “Bad actor” disqualification under Rule 506(d) – covered persons include:
 - the issuer and any predecessor of the issuer or affiliated issuer;
 - any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer;
 - any beneficial owner of 20% or more of the issuer’s outstanding voting equity securities, calculated on the basis of voting power;
 - any promoter connected with the issuer at the time of the sale;
 - any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers (a “compensated solicitor”); and
 - any director, executive officer, other officer participating in the offering, general partner, or managing member of any such compensated solicitor

Cross Border Private Placements (Cont)

- Offerings Pursuant to Rule 506
 - “Bad actor” disqualification will not apply with respect to disqualifying events before September 23, 2013.
 - However, Rule 506(e) will require issuer to furnish to each purchaser, a reasonable time prior to sale, a description in writing thereof.
 - Failure to timely furnish such information will not prevent the issuer from relying on Rule 506 if the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known of the existence of the undisclosed matter or matters.
 - Eight separate categories of “bad actor” disqualifying events – does not include non-U.S. convictions/sanctions.

Cross Border Private Placements (Cont)

- Offerings Pursuant to Rule 506
 - Issuers required to make a factual inquiry
 - Issuers should have covered persons complete questionnaires at least annually and refresh same ahead of a Rule 506 offering
 - Note that issuers typically rely on Rule 506 to facilitate warrant exercises by U.S. warrant holders; U.S. warrant exercises must be suspended if bad actor disqualification applies

Cross Border Private Placements (Cont)

– Rule 506 Offerings (Cont)

- Form D to be filed electronically with the SEC within 15 days of first sale, as well as applicable state notices
- Finders' fees are problematic and must be disclosed in Form D
- Issuer offering securities to non-institutional accredited investors in New York must be registered as a “dealer” in that state (Form 99) prior to commencement of offering
- Cautionary note: There is no “follow-on” registration exemption that permits exercise of warrants for cash so warrant holder must continue to qualify as an “accredited investor” at time of exercise. Net worth standard for accredited investors who are natural persons has been amended (Dodd-Frank Act)

Cross Border Private Placements (Cont)

- Offerings Pursuant to Rule 144A
 - Rule 144A is a resale safe harbor that is not available to issuers; therefore available only for underwritten offerings
 - Offering may only be made to “qualified institutional buyers” (QIBs), acting for their own accounts or the accounts of other QIBs, that in the aggregate own and invest on a discretionary basis at least US\$100 million in securities of unaffiliated issuers
 - Offered securities must not be listed on a US national securities exchange or quoted on a US automated inter-dealer quotation system, nor, subject to certain exceptions, convertible into such securities
 - “General solicitation” and “general advertising” permitted effective September 23, 2013

Cross Border Private Placements (Cont)

– Offerings Pursuant to Rule 144A (Cont)

- If the issuer is not subject to the reporting requirements of the Exchange Act, nor exempt from reporting pursuant to Exchange Act Rule 12g3-2(b), the holder of the offered securities and the prospective purchaser have the right to receive certain information about the issuer and its affairs pursuant to Rule 144A(d)(4)
- In the cross-border space, Rule 144A is typically relied on where the issuer is effecting an underwritten Canadian prospectus offering, including “bought deals”
- Canadian prospectus forms the core US offering document, supplemented by a US “wrapper”

Cross Border Private Placements (Cont)

– JOBS Act: Regulation “A+”

- JOBS Act has amended section 3(b) of the U.S. Securities Act
- Eligibility - Available to U.S. and Canadian issuers, but not available to:
 - SEC reporting companies
 - “blank check companies”
 - offers and sales of asset-backed securities
 - issuers subject to an Exchange Act Section 12(j) revocation order within past five years
 - issuers that have not filed ongoing reports required by the rules during preceding two years
 - disqualified under the “bad actor” disqualification rules

Cross Border Private Placements (Cont)

– JOBS Act: Regulation “A+” (Cont)

- Regulation A+ is comprised of two tiers of offerings
 - Tier 1 – offerings of up to \$20 million in a 12-month period with not more than \$6 million in offers by selling securityholders that are affiliates of the issuer
 - Tier 2 – offerings of up to \$50 million in a 12-month period with not more than \$15 million in offers by selling securityholders that are affiliates of the issuer
- Both Tier 1 and Tier 2 must file an offering statement (Form 1-A) with the SEC that must be reviewed and qualified by the SEC
- Tier 1 issuers must provide unaudited financials for the two most recent fiscal years, whereas Tier 2 issuers must provide audited financial statements for the two most recent fiscal years

Cross Border Private Placements (Cont)

– JOBS Act: Regulation “A+” (Cont)

– Investment Limits:

- Tier 1 - unlimited securities purchase amount for investors
- Tier 2 – unlimited securities purchase amount for accredited investors, however, non-accredited investors limitations are:
 - *Natural persons* – 10% of the greater of investor’s annual income or net worth (under Rule 501 of Reg D);
 - *Non-Natural persons* – 10% of the greater of the investors revenue or net assets (as of the most recent fiscal year end)

– Ongoing reporting:

- Tier 1 issuers need only file a Form 1-Z Exit Report with the SEC no later than 30 calendar days after termination of the offering
- Tier 2 issuers must file annual and semi-annual reports as well as current event reports with the SEC

Cross Border Private Placements (Cont)

– JOBS Act: Regulation “A+” (Cont)

– Blue Sky Requirements:

- Tier 1 offerings are subject to state securities registration and qualification requirements
- Tier 2 offerings are deemed “covered securities” since investors in Tier 2 offerings are defined as “qualified purchasers”, and therefore, exempt from state securities registration and qualification requirements, but may still be subject to notice filing and fee requirements depending on the state

- Securities sold under Regulation A+ are not “restricted securities” under the U.S. Securities Act, and thus are freely tradable in the secondary market. However, securities issued by a Canadian issuer to U.S. investors will need to bear a Canadian legend

Cross Border Private Placements (Cont)

- JOBS Act: Regulation “A+” (Cont)
 - Issuers may solicit interest in a potential offering with the general public, either before or after the filing of the offering statement, so long as any solicitation materials are preceded or accompanied by a preliminary offering circular

Cross Border Private Placements (Cont)

– Offering Restrictions Under Regulation S

- Rule 903 of Regulation S provides a safe harbor from US federal registration requirements in respect of securities issued in “offshore transactions”
- Conceptually divides issuers into 3 categories:
 - Category 1: FPIs with no “substantial US market interest”
 - Category 2: FPIs with a “substantial US market interest” (if equity securities are offered, FPI must be a reporting company in the US to come within Category 2; otherwise, it’s in Category 3)
 - Category 3: USDIs

Cross Border Private Placements (Cont)

– Offering Restrictions – Regulation S (Cont)

- Rule 903 requirements for all categories of issuers:
 - offer and sale must be made in an offshore transaction
 - no directed selling efforts in the US by the issuer, a distributor, their respective affiliates, or any person acting on their behalf
 - Permitted “general solicitation” and “general advertising” not “directed selling efforts” - will not jeopardize the Regulation S safe harbor for a simultaneous offshore public offering
- Offer or sale of warrants under Category 2 or 3 must comply with additional requirements

Cross Border Private Placements (Cont)

- Offering Restrictions – Regulation S (Cont)
 - Additional Rule 903 requirements for Category 2 issuers, including:
 - offering restrictions are implemented (i.e., distributors must agree in writing to observe limitations imposed by Regulation S, and offering materials must include certain prescribed disclosure); and
 - 40-day “distribution compliance period” is implemented during which the securities must not be offered or sold to a “U.S. person” or for the account or benefit of a U.S. person (other than a distributor).

Cross Border Private Placements (Cont)

– Offering Restrictions – Regulation S (Cont)

– Additional Rule 903 requirements for Category 3 issuers, including the following:

- offering restrictions are implemented;
- 1 year “distribution compliance period” (6 months for a US reporting issuer) is implemented during which the securities must not be offered or sold to a “U.S. person” or for the account or benefit of a U.S. person (other than a distributor);
- the securities of a USDI must contain a legend that transfer is prohibited except in accordance with the provisions of Regulation S, pursuant to registration, or pursuant to a registration exemption; and that hedging transactions may not be conducted unless in compliance with the US Securities Act.

Cross Border Private Placements (Cont)

- Cautionary Note on the Investment Company Act of 1940
 - Agency and underwriting agreements typically include representation by the issuer that is it not registered or required to be registered as an “investment company”
 - unregistered investment company cannot conduct business in the US, and likely may not rely on exemptions from registration under the US Securities Act
 - Problem: The 1940 Act can apply to so-called “inadvertent investment companies”, absent an exemption

Cross Border Private Placements (Cont)

– Cautionary Note on the Investment Company Act of 1940 (Cont)

- if more than 40 percent of an issuer's total assets (after excluding cash and cash equivalents) consist of “investment securities” (such as the shares of non-subsidiary companies), the issuer may be an “investment company”
- even conservative investments such as bankers acceptances and GICs qualify as “investment securities”

Cross Border Private Placements (Cont)

– Resale of Restricted Securities

- Securities issued pursuant to US Securities Act Rule 506 or Rule 144A are “restricted securities” as defined in Rule 144, and may not be offered or sold in the US absent registration or an exemption from registration
- Non-restricted securities held by affiliates of FPIs and USDIs may be “control securities” which, although not necessarily legended, are not eligible for resale under the ordinary trading exemption in section 4(a)(1) of the US Securities

Cross Border Private Placements (Cont)

– Resale of Restricted Securities (Cont)

– Regulation S

- Rule 904 permits resale over a “designated offshore securities market” (including the TSX, TSXV and CSE) by non-affiliates of the issuer, or who are affiliates solely by virtue of being an officer or director of the issuer, subject to certain conditions
- Rule 903, available to affiliates, requires that resale transaction be effected in an “offshore transaction” with an identified purchaser, or in, on or through a physical trading floor of an established foreign securities exchange outside the United States, subject to compliance with certain requirements
- If issuer is a USDI at the time of issuance of the securities (at the time of issuance of warrant shares for exercise of warrants), according to Rule 905 the US legend may not be removed and the requirements of Rule 144 will need to be satisfied in order to remove such US legend

Cross Border Private Placements (Cont)

RULE 144	Affiliate or Person Selling on Behalf of an Affiliate	Non-Affiliate (and Has Not Been an Affiliate During the Prior Three Months)
Restricted Securities of Reporting Issuers	<p>During six-month period - no resales under Rule 144 permitted.</p> <p>After six-month period - may resell subject to all Rule 144 requirements including:</p> <ul style="list-style-type: none"> • Current public information, • Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144 with SEC 	<p>During six-month period - no resales under Rule 144 permitted.</p> <p>After six-month holding period but before one year – unlimited public resales under Rule 144 except that the current public information requirement still applies.</p> <p>After one-year holding period - unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>

Cross Border Private Placements (Cont)

RULE 144	Affiliate or Person Selling on Behalf of an Affiliate	Non-Affiliate (and Has Not Been an Affiliate During the Prior Three Months)
<p>Restricted Securities of Non-Reporting Issuers</p>	<p>During one-year period - no resales under Rule 144 permitted.</p> <p>After one-year period - may resell in accordance with all Rule 144 requirements, including:</p> <ul style="list-style-type: none"> • Current public information, • Volume limitations, • Manner of sale requirements for equity securities,) and • Filing of Form 144 with SEC 	<p>During one-year holding period - no resales under Rule 144 permitted.</p> <p>After one-year holding period - unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>

Cross Border Private Placements (Cont)

– Resale of Restricted Securities (Cont)

– Rule 144 Under the US Securities Act

- Not available to security holders of any issuer that is or was a “shell company” unless the following conditions are met:
 - the issuer has ceased to be a shell company;
 - the issuer is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act;
 - the issuer has filed all reports and material required to be filed under Section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports and materials), other than Form 8-K reports; and
 - at least one year has elapsed from the time that the issuer filed current “Form 10 type information” with the SEC reflecting its status as an entity that is not a shell company
- “Form 10 type information” is information that a company would be required to file if it were registering a class of securities on Form 10 or Form 20-F under the Exchange Act.

Cross Border Private Placements (Cont)

- **Resale of Restricted Securities (Cont)**
- **Rule 144 Under the US Securities Act**
 - “shell company” is an issuer, other than a business combination related shell company or an asset-backed issuer, that has:
 - No or nominal operations; and
 - Either:
 - No or nominal assets;
 - Assets consisting solely of cash and cash equivalents; or
 - Assets consisting of any amount of cash and cash equivalents and nominal other assets.

Cross Border Private Placements (Cont)

- **Resale of Restricted Securities (Cont)**
- **Rule 144 Under the US Securities Act**
 - CPCs and TSX SPACs are “shell companies” but limited SEC no-action relief (as of September 6, 2013) now available for non-shell companies that are former CPCs or TSX SPACs and that, among other things, have filed an AIF at least one year prior to the date of sale; relief not available to a company that has been a shell company at any time subsequent to the completion of the initial transaction pursuant to which it ceased to be a shell company

Regulation Crowdfunding

- Crowdfunding under Section 4(a)(6) of the U.S. Securities Act (effective May 16, 2016)
 - Offering not to exceed \$1 million in a 12-month period
 - Individual investments in all crowdfunding issuers in a 12-month period are limited to:
 - The greater of \$2,000 or 5% of annual income or net worth, if annual income or net worth is less than \$100,000
 - 10% of the lesser of annual income or net worth (not to exceed an amount sold of \$100,000) if both annual income and net worth of the investor are \$100,000 or more
 - Transactions must be conducted through an intermediary that either is registered as a broker-dealer or registered as a “funding portal”

Regulation Crowdfunding (Cont)

- Ineligible Companies:
 - Non-U.S. Companies
 - Companies that already are Exchange Act reporting
 - Certain investment companies
 - Companies that are subject to “bad actor” disqualification
 - Companies that have failed to comply with the annual reporting requirements under Regulation Crowdfunding during the two years immediately preceding the filing of the offering statement
 - “blank check companies”

Regulation Crowdfunding (Cont)

- Resales of securities acquired under 4(a)(6)
 - Securities acquired under 4(a)(6) cannot be transferred by any purchaser for a period of one year unless transferred:
 - to the issuer of the securities;
 - to an accredited investor;
 - as part of an offering registered with the SEC; or
 - to a member of the family of the purchaser or the equivalent, to a trust controlled by the purchaser, to a trust created for the benefit of a member of the family of the purchaser or the equivalent, or in connection with the death or divorce of the purchaser.

Regulation Crowdfunding (Cont)

- Rule 12g-6 – Exchange Act exemption for securities issued under 4(a)(6)
 - The definition of held of record shall not include securities issued under 4(a)(6) by an issuer that:
 - is current in filing its ongoing annual reports obligations under Regulation Crowdfunding
 - has total assets not in excess of \$25 million as of the end of its most recently completed fiscal year
 - has engaged a transfer agent registered with the SEC

Regulation Crowdfunding (Cont)

- Transactions must be conducted through an Intermediary
 - Offerings under Section 4(a)(6) must be conducted through only one intermediary (broker-dealer or funding portal) exclusively on the intermediary's online platform
- Disclosure by Issuers
 - The disclosure requirements are set forth under Section 4A(b). A Form C (offering statement) must be filed with the SEC and to be provided to the relevant intermediary and investors

Regulation Crowdfunding (Cont)

– Financial Statement requirements

- Periods covered by the financial statements are the shorter of the two most recently completed fiscal years or the period since the issuer's inception
- For offerings of \$100,000 or less
 - Federal tax return information (total income, taxable income and total tax) certified by the principal executive officer and unaudited financial statements certified by the principal executive officer to be true and complete
- For offerings more than \$100,000 but no more than \$500,000
 - Financial statements reviewed by an independent public accountant

Regulation Crowdfunding (Cont)

- Financial Statement requirements (cont)
 - For offerings more than \$500,000
 - First time users of Regulation Crowdfunding must provide financial statements reviewed by an independent public accountant
 - Issuers that have previously sold under Regulation Crowdfunding must provide financial statements audited by an independent public accountant

Regulation Crowdfunding (Cont)

- Ongoing reporting requirements
 - Issuers that have sold securities in reliance on 4(a)(6) must file an annual report within 120 days of the fiscal year end
 - The annual report must be posted on the issuer's website
 - Financial statements only need to be unaudited and certified by the principal executive officer to be true and complete, unless audited or reviewed financial statements are available

Regulation Crowdfunding (Cont)

- Termination of ongoing reporting requirements
 - When the issuer has filed at least one annual report and has fewer than 300 holders of record
 - When the issuer has filed at least three annual reports and has total assets that do not exceed \$10 million
 - The issuer is required to file reports under the Exchange Act Sections 13(a) or 15(d)
 - The issuer or another party purchases or repurchases all securities issued under 4(a)(6)
 - The issuer liquidates or dissolves in accordance with state law

Business Combinations Under Section 3(a)(10) of the US Securities Act

- Section 3(a)(10) exempts from registration the offer and sale of securities issued in exchange for securities, claims, or property interests (not cash) where:
 - the terms and conditions of the issuance and exchange of such securities, claims, or property interests have been approved by any court or authorized governmental authority of competent jurisdiction,
 - after a hearing upon the fairness of the terms and conditions of the issuance and exchange at which all persons to whom the securities will be issued have the right to appear and receive timely notice thereof
- SEC has published guidance (CF Staff Legal Bulletin 3A)

Business Combinations Under Section 3(a)(10) of the US Securities Act (Cont)

- SEC might not recognize the jurisdiction of a foreign court if the target company is a US entity
- Securities issued will not be “restricted securities”
- However, if any party to the transaction is a shell company, any person who is, at the time the transaction is submitted for security holder consent, an affiliate of any party (other than the issuer), will be subject to U.S. resale restrictions
- Securities issued pursuant to section 3(a)(10) are not “covered securities” that are pre-empted from state registration requirements – need to conduct “blue sky” survey
- Issuer will be subject to Internal Revenue Service cost basis reporting requirements under Code Section 6045B if securities are issued to U.S. taxpayers

Exchange Act Registration

– Exchange Act Registration Requirement

- issuer with “total assets” in excess of US\$10 million and whose outstanding equity securities are held by 2,000 or more persons, or 500 or more persons who are not “accredited investors”, must register such securities as a class under the Exchange Act
- Exchange Act Rule 12g3-2(a) exempts an FPI if the equity securities are held by less than 300 persons resident in the US

Exchange Act Registration

- Exchange Act Registration Requirement
 - FPI must file an Exchange Act registration statement within 120 days after the end of the fiscal year in which it exceeds the foregoing thresholds for assets and numbers of shareholders, unless the exemption under Exchange Act Rule 12g3-2(b) is available
 - Issuer may voluntarily register under the Exchange Act (e.g., to make shares eligible for quotation on the OTCQB or OTCQX)

Exchange Act Registration (Cont)

- Exemption Under Exchange Act Rule 12g3-2(b)
 - SEC adopted amendments effective October 10, 2008 which makes the Rule 12g3-2(b) exemption self-executing if the FPI:
 - maintains a listing of the subject class of securities on one or more exchanges in its “primary trading market”;
 - is not required to file or furnish reports under Exchange Act Section 13(a) or 15(d); and
 - has published in English specified non-U.S. disclosure documents, from the first day of its most recently completed fiscal year, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market [e.g. SEDAR]

Exchange Act Registration (Cont)

- Exemptions Under Exchange Act Rules 12g3-2(a) and 12g3-2(b) will be lost if issuer ceases to be an FPI

Exchange Act Registration (Cont)

- Cautionary Note On Revocation Orders
 - a reporting company that fails to remain current in its reporting obligations under the Exchange Act may be subject to administrative action by the SEC, leading to revocation of its Exchange Act registration pursuant to section 12(j) of the Act
 - all outstanding Exchange Act filings (e.g., Forms 20-F and 6-Ks for FPIs) would have to be made in order to avoid a revocation order
 - Enforcement Staff at the SEC have overturned accommodation that had been granted by Corporation Finance staff to the effect that a Canadian reporting issuer that had undergone an RTO did not have to complete delinquent Form 20-F filings due prior to the completion of the transaction

Exchange Act Registration (Cont)

- Cautionary Note On Revocation Orders (Cont)
 - section 12(j) of the Exchange Act makes it illegal for a member of a U.S. national securities exchange, broker or dealer to effect any transaction in, or to induce the purchase or sale of, any security that has been subject to a revocation order



Questions?

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