

## Corporate Securities Law

August 11, 2010

### Securities Fraud Update

#### The United States Sweeping Wall Street Financial Reforms Signed Into Law on July 21, 2010 - Canadian Companies May Be Impacted

The Dodd-Frank Wall Street Reform and Consumer Protection Act, called the *Dodd-Frank Act*, was passed by the United States Senate on July 15, 2010 and signed into law by President Obama on July 21, 2010. Canadian companies may be impacted.

The *Dodd-Frank Act* was passed to remedy perceived weaknesses in the U.S. regulatory system that led to the near collapse of the U.S. financial markets in 2008 and scandals such as the Bernie Madoff Ponzi scheme. It contemplates the enactment of further regulations by the second quarter of 2011, so the full impact of this law on Canadian companies will not be clear until these regulations are passed. However, there are two important provisions that could impact Canadian companies.

One of the most interesting provisions of the *Dodd-Frank Act* is the introduction of a whistleblower bounty. It provides that whistleblowers are entitled to receive a bounty of between 10 and 30 per cent of the monetary recovery obtained from companies involved in securities fraud or violations of the U.S. anti-bribery laws if they provide a tip to the regulators and the tip leads to successful proceedings resulting in sanctions of \$1 million or more. This signals a strong commitment to increased enforcement of the United States' anti-fraud and anti-bribery laws. If these provisions had been in place when the Securities and Exchange Commission (the "SEC") reached its landmark settlement with Siemens AG for violation of its anti-bribery laws in 2008, a whistleblower could have received a bounty of up to \$240 million.

In addition to providing enticing incentives for whistleblowers to report corporate wrongdoing, the provisions also protect whistleblowers from retaliation from their employers by providing enhanced anonymity as well as harsh punishments against the company if it retaliates against the whistleblower.

The whistleblower provisions were introduced in the wake of the Bernie Madoff scandal in order to encourage more robust investigation and enforcement of securities fraud. When the U.S. Internal Revenue Service introduced a substantially similar whistleblower program in 2008, it saw the number of claims rise from 83 in 2007 to 1,890 in only one year. These provisions are a strong indication that the SEC expects to significantly increase its enforcement efforts in the coming years and will likely lead to more prosecutions for securities fraud and violations of the *Foreign Corrupt Practices Act* ("FCPA").

Canada's *Corruption of Foreign Public Officials* legislation is similar to the FCPA, but there have been very few prosecutions under this law in Canada. In Canada, anti-bribery offences are investigated by the RCMP and enforced by criminal prosecution only. They are not enforced by the various provincial securities regulators. In contrast, in the United States the SEC investigates and enforces their anti-bribery laws and it takes a very broad view of its jurisdiction over foreign parties and foreign conduct. This broad approach has been reinforced by one other important provision of the *Dodd-Frank Act*.

The *Dodd-Frank Act* provides for amendments to the *Securities Act*, the *Securities Exchange Act* and the *Investments Advisors Act* to provide that the United States district court has jurisdiction to hear cases initiated by the SEC involving securities fraud and its anti-bribery laws if the matter involves:

- (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
- (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

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These provisions were added to the bill following the release of the United States Supreme Court decision *Morrison v. National Australia Bank* on June 24, 2010. The U.S. Supreme Court concluded that the U.S. courts do not have jurisdiction over foreign shareholders who purchase from foreign issuers on foreign exchanges even if the conduct in question had an impact in the United States. Within 24 hours of this decision, the amendments in question were added to the Dodd-Frank bill.

In its current form, the extraterritorial provisions apply only to SEC proceedings and not to private actions against foreign parties. However, the Act calls for the SEC to conduct a study into the feasibility of allowing American investors to commence private actions involving foreign conduct. These results are expected to be released in 2011, when the regulations under the *Dodd-*

*Frank Act* are introduced. The scope and effectiveness of the SEC's extraterritorial jurisdiction will certainly be tested in court, but it signals the United States' commitment to aggressive enforcement of its anti-fraud and anti-bribery laws, even against foreign parties and foreign transactions.

Canadian companies should be aware that the *Dodd-Frank Act* may increase their exposure to SEC investigations and prosecutions for securities fraud and anti-bribery violations. The full impact of these sweeping reforms will be known in the coming months as the specific regulations are enacted and these new provisions are tested in the courts.

Please contact John Keefe in our Litigation Group or any member of Goodmans' Corporate Securities Group to discuss this legislation.