OPINION

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Travelling in securities

By Neill May

Not being shy about demonstrating my stunning command of the blindingly obvious, I will share with you the startling insight that cross-border trading and ownership of securities will only continue to increase as markets globalize. The world keeps getting smaller. As comedian Steven Wright observed, everything is within walking distance if you have the time.

This is reflected in the challenges to the regulation of international securities transactions in dynamically changing markets. When activities appear to be unregulated, the regulators can take heat, and when they get involved and try to direct matters, they can be faulted for getting in the way and adding costs. It is like the classic question — is it better to ask permission or seek forgiveness, and why in marriage the answer is usually both.

Addressing these challenges, two recent regulatory developments provide some clarity in steering securities transactions across international borders. The first, Ontario Securities Commission Rule 72-503, deals with distributions of securities to non-local investors. Prior to the adoption of the new rule, the principal source of guidance was a regulatory interpretation note. That note expressed the regulators' views that there is no benefit to Canadian regulators becoming overly involved in foreign capital raises. That meant our laws would generally not be applied so long as "reasonable precautions" were taken to ensure that the securities "came to rest" out of the province. These objectives are understandable. It is unlikely that foreign investors would expect Canadian laws to protect them. Nevertheless, they were often difficult to apply. For example, it was challenging to know when things "come to rest," the only certainty being that after considering the question I myself would need to rest.

Under the new rule, distributions of securities to non-Canadians can be completed on a prospectus exempt basis if certain black and white conditions apply, specifically if the offering is qualified in the United States or another specified foreign jurisdiction, if the distribution is part of an offering concurrently qualified by prospectus in Ontario or if the distribution is being made to a non-Canadian (or, if through an impersonal stock exchange, if the issuer/seller has no reason to believe that the purchaser is Canadian) and there are restrictions on resale.

There are still some judgment calls to be made. The "come to rest" test, for example, will apply to determine if there is a distribution in Canada in the first place. Ultimately, however, there are generally clear exemptions on which reliance can be placed.

The other regulatory development is the initiative to reform (by amending National Instrument 45-102) the principles that determine when Canadian securities laws apply to resales of securities. The policy rationale for these rules is clear: There is no reason for Canadian rules and regulators to be involved in trades where there is minimal connection to Canada and little or no likelihood of a market for the securities here. Under the current rules, securities that are not freely tradable can be resold if, among other things, the trade is made outside Canada and Canadians do not own more than 10 per cent of the securities or constitute more than 10 per cent of the security holders of the issuer. The principal problem with this standard is that often issuers themselves do not have great visibility on their security holders, so it is burdensome at best to expect security holders to know when they can rely on the exemption — not to mention that the availability of the exemption could change back and forth, complicating any sales efforts.

> **IN CONTEMPORARY TIMES, IT IS IMPORTANT THAT WE HAVE COHERENT AND PRACTICAL RULES FOR SECURITIES TO CROSS BORDERS, AS ONE BAD REVIEW ON TRIPADVISOR AND TRAVELLING SECURITIES MAY CHOOSE TO GO ELSEWHERE.**

If adopted, the proposed amendments would create an exemption for resales of shares of non-reporting issuers if, among other things, the trade is made to a person or on a market outside Canada and if at the time of the original distribution the issuer was a "foreign issuer" (essentially an entity organized under foreign laws that does not have its head office or a majority of its assets in Canada or for which Canadian residents are a majority of the board or the executive suite).

In contemporary times, it is important that we have coherent and practical rules for securities to cross borders, as one bad review on TripAdvisor and travelling securities may choose to go elsewhere. CL

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