OPINION

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Ch-ch-ch-ch-changes

The securities world is moving toward new regulation but the timing is unclear.

By Neill May

Change is in the air. Another year full of resolutions for change. Plus it's an election year, and politicians always promise to effect change. Everybody thinks they like change, because it implies change for the better, and it's certainly better than stagnancy. But change can be difficult. This is probably why I still have most of the clothes I wore in high school, and why (given my family's familiarity with those sensitivities) those treasured items that I would never touch go missing from the closet one at a time in staggered intervals when I'm out of town.

Change is one thing for New Year's resolutions and fashion trends; it's another thing entirely for securities law. An element of potential change in the offing in the securities world is the movement toward a co-operative securities commission between some of Canada's many jurisdictions. The current initiative is a unique product of Canadian constitutional and historical quirks, made clear by the Supreme Court of Canada, which held that the federal government did not have the constitutional authority to regulate securities law in the provinces.

Five provinces have signed on to a "memorandum of understanding" committing to join the Cooperative Capital Markets Regulatory System (consisting of a provincial Capital Markets Act (the PCMA), to be adopted in each participating province, and a federal Capital Markets Stability Act, which covers the items the Supreme Court advised would fall within the feds' constitutional authority, each to be administered by a single regulatory authority, the Capital Markets Regulatory Authority).

The PCMA is different than the current Ontario Securities Act in several ways. Just how different has been the subject of enthusiastic debate, but it is indisputably different. One of the more notable differences is the power that would be meaningfully delegated to the regulators to prescribe securities rules. In many respects, the PCMA is structured as a "platform," providing a framework onto which securities regulators may affix the regulatory detail through broadly cast rule-making powers. In other places, the PCMA provides regulators with wide berth to give meaning to the requirements and principles of the statute.

For instance, the PCMA establishes and prohibits a concept called an "unfair practice" (the identical concept does not exist in Ontario, though it does in other jurisdictions); however, it leaves to the Capital Markets Regulatory Authority to define the scope of what constitutes an "unfair practice." Similarly, the PCMA allows what are commonly known as "blanket orders," which while allowed in other jurisdictions are prohibited in Ontario. Blanket orders are orders of general application intended to allow the regulator to apply an exemption to an entire class of persons, which were eliminated in Ontario because they effectively allowed the regulator to vary the law.

The benefits of such platform-style laws are apparent. In specialized fields such as securities regulation, regulatory experts are well positioned to design rules for the marketplace. Additionally, regulators can often respond more efficiently and nimbly than governments; the background materials provided with the draft PCMA state that the platform approach "promotes regulatory flexibility, allowing the Authority to respond to market developments in a timely manner and appropriately tailor its regulatory treatment of various entities and activities." However, securities rules have material impacts on the conduct of business (including, among other things, quasi-criminal sanctions and significant economic penalties), which suggests that there should be political accountability. Additionally, platform-based systems may be thought to lack the stability and predictability of statutory systems.

The regulations for the proposed PCMA have not yet been published. In part, this highlights a concern about a platform-style approach: changes seem to be coming with limited visibility and stability (part of the reaction to the proposals is based on the suggestion the transition to a co-operative system is enough of a game-changer in its own right and should not be the occasion to significantly vary the law itself). On the other hand, it may help illustrate resistance to change itself: speaking for myself, the prospect of reading detailed new regulations can be intimidating.

As a younger securities lawyer I used to hear frequently from more senior lawyers when rules changed that it was up to younger lawyers to absorb and fully digest the details. As I "mature" and seem to have less and less mental disk space I think the issue is not so much the task of reading a whole new securities law but concern about remembering any of it (my cranial storage is cluttered with lyrics of songs popular when I was in high school, in files immune to intentional deletion).

When the new system will be implemented is not quite clear yet. There have been requests for more time for consideration. So there is no guarantee of timing. There is equally no guarantee that when it does come into force, I won't be cowering in my closet in a pile of Benetton rugger shirts, army pants, and my original Air Jordans. **CL**

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