

Corporate Securities Law

September 23, 2004

Amendments to the *Criminal Code*: Insider Trading, Tipping, Whistle-Blowing And Fraud

Certain sections of Bill C-13 amending the *Criminal Code* were proclaimed into force on September 15, 2004. The amendments are a Canadian response to the recent flurry of corporate scandals which have weakened investor confidence in capital markets around the world. C-13 creates three new offences under the *Criminal Code* (insider trading, tipping and retaliation against whistle-blowers) and increases the maximum penalties for certain existing offences related to fraud.

The following is a brief outline of the principal amendments.

1. Insider Trading

Insider trading is now an indictable offence under the *Criminal Code*. A person is guilty of insider trading if he or she directly or indirectly buys or sells a security, knowingly using inside information that they:

- possess by virtue of being a shareholder of the issuer of that security;
- possess by virtue of, or obtained in the course of, their business or professional relationship with that issuer;
- possess by virtue of, or obtained in the course of, a proposed takeover or reorganization of, or amalgamation, merger or similar business combination with, that issuer;
- possess by virtue of, or obtained in the course of, their employment, office, duties or occupation with that issuer or with a person referred to above; or

- obtained from a person who possesses or obtained the information in a manner referred to above.

“Inside information” is defined as information relating to or affecting the issuer of a security or a security that they have issued, or are about to issue, that has not been generally disclosed and could reasonably be expected to significantly affect the market price or value of a security of the issuer. Insider trading under the *Criminal Code* carries a maximum penalty of ten years of imprisonment.

Although prohibitions against insider trading already exist under the *Canada Business Corporations Act* (the “CBCA”) and under provincial securities laws, the new offence under the *Criminal Code* is intended to deal with the most serious cases that merit stiff criminal penalties. The scope of conduct prohibited under the *Criminal Code* is narrower than conduct prohibited by the CBCA and the *Securities Act* (Ontario) (the “OSA”). The *Criminal Code* requires that for a person to be guilty of insider trading, it must be proven that he or she bought or sold securities of an issuer while knowingly using the inside information. While Bill C-13 was under consideration, the Ontario Securities Commission unsuccessfully submitted that trading “with knowledge of” inside information should be sufficient to constitute the *Criminal Code* offence. It remains to be seen how the Courts handle the “knowingly using” requirement.

2. Tipping

Tipping is now also an offence under the *Criminal Code*. Knowingly conveying inside information to another person while knowing that there is a risk that the person may use the information to buy or sell a security or may convey the information to another person who will trade in the security is an offence that can be treated as an indictable or a summary conviction offence. As an indictable offence, the maximum prison term is five years.

As with insider trading, the prosecution’s burden is higher under the *Criminal Code* than for the offence of tipping under the OSA. The OSA does not require that the “tipper” know of the risk that the “tippee” will use the information while buying or selling securities.

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3. Whistle-blowing

The *Criminal Code* has been amended to create whistle-blowing protection laws to protect employees from acts of reprisal by their employers for providing information with respect to the violation of any federal or provincial laws. The amendment makes it a criminal offence for an employer, anyone acting on behalf of an employer, or a person in a position of authority over an employee to take or to threaten the employee with disciplinary action, demotion or termination or to adversely affect the employee's employment with the intent to compel the employee to abstain from providing information to law enforcement officials respecting an offence that the employee believes has been, or is being, committed contrary to federal or provincial law by his or her employer or by an officer, director or employee of the employer. It is also an offence to threaten or retaliate against an employee who has already provided such information. This offence can be treated as an indictable or summary conviction offence. As an indictable offence, the offence carries a maximum prison term of five years.

This new offence does not consider the employee's reasons or basis for disclosing information to the authorities. The employee is protected from providing information about an offence that he or she "believes has been or is being committed". The absence of "reasonably believes" wording suggests that an employer who retaliates against an employee who unreasonably believes there is an offence would still be guilty under the new provision.

4. Fraud

The maximum prison sentences for the existing offences of fraud and fraud affecting the public market have been increased from ten to 14 years. The maximum prison term for market manipulation offences (such as wash trading) has been increased from five to ten years.

We invite you to contact a member of the Goodmans securities team to discuss any questions you may have regarding the amendments to the *Criminal Code*.

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