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Progressive changes in a historic year for capital markets activity

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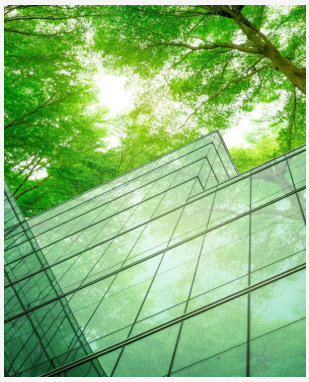

Related Expertise

- Capital Markets

Authors: James R. Brown, Rosalind Hunter, Michael Innes, Desmond Lee, Amelia Miao, François Paradis, Trevor R. Scott, Andrea Whyte, KC

There was continued progression in securities law in Canada through 2021. A number of changes were implemented or proposed to reduce uncertainty, create greater efficiency or harmonize rules or the interpretation of those rules, with a view to enhancing the efficacy of the Canadian capital markets. The term "historic" was often used to describe capital markets activity levels in 2021. Transaction volumes for IPOs and follow-on offerings continued at levels not seen since before the global financial crisis, notwithstanding the continued headwinds from the COVID-19 pandemic. As noted in our article People, planet and performance: Embracing ESG, environmental, social and governance (ESG) issues stepped into the limelight and attracted significant interest from the investment community and from securities regulatory authorities. We expect ESG matters will continue to grow in importance in 2022 and in the coming years.

The final report of the Ontario Capital Markets Modernization Taskforce (the Taskforce) was presented to the Government of Ontario in January 2021 and proposed a number of significant recommendations. In October 2021, the Ontario government followed through with its commitment to enact new legislation to implement the recommendations in the report and released for comment a draft of a new *Capital Markets Act*. The report was met with a mixture of praise and pushback and it remains to be seen how the Taskforce recommendations and a number of other proposed and ongoing policy initiatives will be addressed by the Ontario government and Canadian Securities Administrators (CSA) in the year ahead.

We discuss below the year's most notable capital markets regulatory developments. Additional related developments are included in our M&A: Lookback and forward look, Corporate governance in transition and Decoding crypto – Providing regulatory clarity to cryptoasset businesses articles.

Securities law and regulation

1. The impact of COVID-19 on capital markets

As pandemic-related restrictions began to ease and people began slowly returning to the

way things were at the start of 2020, Canadian securities regulators continued to monitor the impact of the COVID-19 pandemic on issuers and investors. Filing deadline extensions granted by both securities regulatory authorities and stock exchanges in the early days of the pandemic in 2020 expired and issuers were required to make ordinary course filings on schedule. Regulatory authorities focused on the need for specific disclosures from issuers about the impact of the pandemic on their business, operations and capital, as well as clear disclosure of potential risks to the issuer from the continuation of the pandemic.

In February 2021, the CSA published the results of their targeted review of the impact of COVID-19 on issuers' businesses, finding that a majority of issuers had provided detailed, quality disclosure. The CSA further highlighted their expectation that issuers will tailor their disclosure to the specific challenges, risks and financial impacts that they are experiencing due to the COVID-19 pandemic. An OSC study also discussed the significant impact on retail investors from the pandemic.

2. Capital markets changes on the horizon? The Ontario Capital Markets Modernization Taskforce reports

On January 22, 2021, the Taskforce published its final report (the Final Report). The Final Report outlined a broad range of recommendations in response to the Taskforce's mandate to "review the current status of Ontario's capital markets" that are intended to modernize and enhance the efficiency and competitiveness of Ontario's capital markets. The publication of the Final Report followed the release of the July 9, 2020 consultation report, on which the Taskforce sought public comment during the summer of 2020.

It remains to be seen how broadly the recommendations will be implemented and we expect relatively slow progress over the coming years as the Ontario government works with regulators in the other Canadian jurisdictions. Shortly after its publication, the other CSA jurisdictions published their response to the Final Report, suggesting that policy work should be developed and implemented only following national consultation and encouraging Ontario to adopt the Passport System.

For more details on the Final Report, refer to our blog post on osler.com, Ontario Capital Markets Modernization Taskforce Final Report: A set of thoughtful ideas or a blueprint for change?

On October 2, 2021, the Ontario government proposed a new draft *Capital Markets Act* as a next step in its commitment to modernize Ontario's capital markets. The draft legislation, commentary and table of concordance are open for comment until January 21, 2022.

3. ESG issues take centre stage

As noted in the article People, planet and performance: Embracing ESG, ESG issues attracted significant attention in 2021, drawing increased focus from politicians, securities regulators and investors. The CSA continued advancing these issues through their reporting on gender diversity on boards and in executive officer positions (following our own market-leading Diversity Disclosure Practice report – the most recent edition having been published on October 13, 2021).

The CSA has also proposed mandatory climate-related disclosure requirements, seeking more consistent and comparable information to assist investment decisions.
Proposed National Instrument 51-107 – Disclosure of Climate-related Matters would require disclosure relating to the four core elements identified by the Task Force on Climate-related

Financial Disclosures – governance, strategy, risk management, and metrics and targets. The proposed instrument is open for comment until January 17, 2022.

4. Prospectus clearance affected by significant volumes

The adoption by the CSA of a Staff Notice in 2020 establishing a nationally harmonized process for the confidential pre-filing and review of prospectuses was well-received. This process has since been widely used for initial public offerings and certain follow-on offerings. However, what most regulatory authorities could not predict was the volume of confidential filings they would encounter in the face of booming Canadian capital markets deal activity.

As a result, certain jurisdictions have adopted best practice guidance for confidential prospectus pre-filings. The guidance is intended to streamline the review process and ensure that confidentially pre-filed prospectuses meet the standard of a publicly filed prospectus. The Ontario guidance notes that OSC staff will triage all filings and prioritize the most urgent and time sensitive filings, such as bought deals and overnight marketed offerings. This has resulted in some confidential pre-filing reviews taking longer than the originally anticipated 10 working days.

Further, the OSC has also updated its service standards generally. The prospectus review standard contemplates the provision of a first comment letter within 10 working days for a long form prospectus and within three working days for a short form prospectus for "80% or more of all filings received."

Issuers and underwriters should continue to take into account potential review and clearance delays when planning their offering timelines (for both confidential and public filings).

5. Streamlining continuous disclosure

In line with the CSA's efforts to reduce regulatory burdens, in May 2021 the CSA proposed changes to the continuous disclosure requirements for non-investment fund reporting issuers. The proposal seeks to (i) streamline and clarify certain disclosure requirements in the management's discussion and analysis (MD&A) and the annual information form (AIF) for non-investment fund reporting issuers, (ii) eliminate certain requirements that are redundant or no longer applicable, (iii) combine the financial statements, MD&A and, where applicable, AIF into one reporting document called the annual disclosure statement for annual reporting purposes, and the interim disclosure statement for interim reporting purposes, and (iv) introduce a small number of new requirements to address gaps in disclosure.

The proposed revisions to National Instrument 51-102 were the subject of a comment period that closed in September. Subject to the completion of the comment process and the receipt of required approvals, the final amendments are expected to be published in September 2023 and to become effective on December 15, 2023.

6. Non-IFRS (Non-GAAP) disclosure – New rule finally takes effect

Following more than two and a half years of proposals and comments with respect to the adoption of a proposed rule regarding the use of non-GAAP measures, on May 27, 2021, the CSA published new disclosure requirements for the use of non-GAAP and other financial measures. New National Instrument 52-112 – Non-GAAP and Other Financial Measures Disclosure (NI 52-112) came into effect in August 2021 for reporting issuers starting with their documents filed for a financial year ending on or after October 15, 2021.

NI 52-112 has changed the approach to non-GAAP measures by replacing non-binding guidance (previously set out in CSA Staff Notice 52-306) with a formal instrument having the force of law. While the instrument is generally consistent with the guidance, there are clarifications and expansions on the guidance that issuers are well advised to consider in their continuous disclosure. For instance, the CSA has clarified in the companion policy that NI 52-112 applies to a reporting issuer in respect of its disclosure contained on both websites and social media. Also, NI 52-112 will permit reporting issuers to incorporate by reference certain reconciliation and other disclosures from their annual and interim MD&A where they choose not to include the required reconciliation and other disclosure in the actual document containing non-GAAP measures (such as a press release).

For more details regarding NI 52-112, refer to our Osler Update on osler.com, Understanding recent changes to non-GAAP and other financial measures disclosure.

7. A match made in heaven? Regulators move to combine SROs

Following the release of the 2020 CSA consultation paper seeking feedback on the framework for self-regulatory organizations (SROs) in Canada, the CSA announced its plan to create a new, single SRO that will consolidate the functions of the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA). The CSA has created an integrated working committee to determine the new corporate structure for the combined SRO and will oversee a new governance structure.

The CSA has indicated its expectations that the new SRO will facilitate easier and more cost-effective access to a broader range of investment products and services for the public. The combined SRO is also generally expected to result in cost savings for dealers. We expect the implementation of the combined SRO will require significant time and effort.

8. Making capital raising easier ... potentially

In 2021, we saw continued progress in the CSA's efforts to make capital raising more efficient for small and mid-sized issuers.

After proposing new crowdfunding rules in 2020 that were intended to harmonize and replace a number of local rules in force in certain provinces, the CSA adopted a new nationally harmonized rule – National Instrument 45-110 – Start-up Crowdfunding Registration and Prospectus Exemptions. The new instrument builds upon the existing patchwork framework created by a multilateral instrument, together with blanket orders, that was previously in effect. The instrument also increases the maximum amount that can be raised in a 12-month period to $1.5 million (from $500,000 previously) and increases the maximum individual amounts a purchaser can subscribe for to $2,500 per offering, or $10,000 if the purchaser obtains advice from a registered dealer that the investment is suitable.

In July 2021, the CSA also proposed a new prospectus exemption for issuers listed on a Canadian stock exchange. The new exemption would allow issuers who have been a reporting issuer for at least 12 months to file a short offering document to supplement its disclosure record. It would also permit the issuer to raise up to the greater of $5 million or 10% of the issuer's market capitalization, to a maximum of $10 million, annually. Shares distributed under the exemption would be freely tradeable. Although changes to National Instrument 45-106 – Prospectus Exemptions have been proposed and a comment period has concluded, it is not clear that changes implementing the new exemption will be adopted.

In an effort to provide more flexibility for capital raising, securities regulators in Alberta and

Saskatchewan have introduced two new prospectus exemptions. The first exemption permits sales to investors who certify that they possess certain financial or investment knowledge and who acknowledge that they understand the risks of investing. Subject to certain exceptions for investments in issuers listed on a Canadian stock exchange, self-certified investors are limited to investments of $10,000 in any one issuer and $30,000 across multiple businesses annually.

The second exemption has been proposed to provide greater access to capital by start-ups and other small businesses. It will allow these businesses to raise up to $5 million using a streamlined offering document from investors in these provinces who wouldn't otherwise qualify under other prospectus exemptions.

9. Is it significant? Or primary? CSA seek to harmonize their approach for IPO issuers

In August 2021, the CSA proposed clarifications to Companion Policy 41-101 that are intended to harmonize the interpretation of financial statement requirements for long form prospectuses. Inconsistent interpretations between CSA jurisdictions with respect to the application of the rules relating to the treatment of acquired businesses (whether they would be treated as a "significant acquisition" or regarded as the "primary business" of the issuer) has led to issuers facing increased time, cost and uncertainty to clear a prospectus. In particular, acquisitive issuers have been required to either provide a full three years of audited financial statements for an acquired business, together with MD&A for the acquired business, or obtain exemptive relief, which is not always possible to obtain.

The new proposal provides additional guidance on what constitutes a primary business and what constitutes a predecessor entity for purposes of the financial statement requirements. If adopted, we expect the proposed changes to result in fewer requests for exemptive relief with respect to financial statements of an acquired business in the context of a Canadian initial public offering. In our comment letter to the CSA, we applauded the CSA for the progress made in seeking to harmonize the approach nationally and encouraged the CSA to adopt the revisions quickly.

10. British Columbia Securities Commission proposes to regulate promotional activity

On May 26, 2021, the British Columbia Securities Commission (BCSC) published proposed British Columbia Instrument 51-519 – Promotional Activity Disclosure Requirements, which would establish a framework for promotional activity disclosure. The proposed rules are intended to improve the transparency of information available to investors, while helping the BCSC "identify and hold responsible those issuers and persons who conduct problematic promotional activity."

The proposed rules would apply to "promotional activity," which would capture a broad range of actions, including a promoter making oral statements at a sales event or investor meeting, publishing written materials such as emails or newsletters, and posting on social media. If adopted, the new rule would also require certain disclosure at the time of the promotional activity, including the name of the person retained to conduct the promotional activity, any compensation provided to the person for conducting the promotional activity, whether the person owns securities or related financial instruments that are the subject of the promotional activity and disclosure of any platform or other medium through which the promotional activity will occur. An issuer that has engaged another person to conduct promotional activities will be responsible for ensuring such promotional activity is conducted

in compliance with the proposed rule.

Venture issuers will be subject to an additional requirement to issue a press release announcing any engagement of a person to conduct promotional activities as well as certain details of that engagement. Venture issuers would also be required to disclose the components of their promotional activities in their interim and annual MD&A where the total expenditures on promotional activities exceeded 10% of their total operating expenses.

Certain persons are excluded from the proposed rules, including directors, officers and employees of an issuer where they are conducting promotional activities for that issuer. The proposed rules were subject to a comment period that has now passed and the BCSC has not yet indicated how they intend to proceed with the proposed rules.

Continued evolution anticipated

As the CSA continues to review the regulatory landscape and to propose ways to achieve efficiencies for issuers and for other capital markets participants, continued progress in the securities regulatory landscape is likely to occur in 2022. Many of these areas will be directly affected by the continuing push to modernize Canadian securities regulation and reduce regulatory burdens, particularly as the Ontario government continues to consider the Taskforce's recommendations.