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STRUCTURING A CROSS-BORDER SECURITIES OFFERING: COMMON U.S. EXEMPTIONS FROM REGISTRATION

Smarter Way to Cross Blog Archives
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Due to the size and scope of the U.S. capital markets, U.S. investors can form a meaningful add-on tranche to both public and private Canadian securities offerings. However, the legal mechanics of structuring a cross-border offering may seem daunting to Canadian issuers and their advisors. A Canadian issuer seeking access to the U.S. capital markets faces a largely binary choice between:

1. Conducting an SEC-registered offering and immediately becoming subject to ongoing and costly reporting requirements under the U.S. Securities Exchange Act of 1934, or
2. Using a targeted financing under an established legal exemption from registration.

If option two is the desired outcome, my recent client alert provides a road map to structure the U.S. tranche under an exemption from SEC registration. This blog post is an outline of basic terminology from the U.S. Securities Act of 1933 (the Securities Act) applicable to cross-border offerings. Please consult the client alert for greater detail.

Regulation S. The tranche of securities being placed in Canada (whether on a public or private basis pursuant to Canadian law) or another offshore destination, is exempt from U.S. registration provided that the requirements of Regulation S under the Securities Act are met. To qualify, 1) the offer or sale must be made in an offshore transaction, and 2) there must be no directed selling efforts in the United States. For example, a transaction that is executed on a foreign securities exchange located outside the United States (e.g. TSX, TSX –V) to a non-U.S. buyer will be considered an offshore transaction for purposes of this rule.

Private Placement. A private placement under Section 4(a)(2) of the Securities Act generally requires that an offering be made to a limited number of sophisticated investors who are buying for investment and without the use of general solicitation or advertising. All privately placed securities are restricted from further transfer under U.S. securities law absent registration or another exemption therefrom.

Regulation D. As it is not possible to map the borders of Section 4(a)(2) of the Securities Act with absolute precision, a "safe harbor" is provided by Rule 506 of Regulation D which requires sales be made to investors that fall into certain recognized categories of "accredited investors" (AIs) deemed by statute to possess the requisite resources and sophistication to enter into a Regulation D placement. AI categories include both institutions and certain high-income/high-net-worth individuals. If the offering is to be made with general solicitation or advertising, the issuer faces additional obligations to verify the AI status of its investors. Securities sold pursuant to Regulation D continue to be legended and restricted from further transfer.

Rule 144A. Rule 144A of the Securities Act provides an exemption for the resale of privately-placed restricted securities only to certain Qualified Institutional Buyers (QIBs), that are deemed to be sophisticated investors. QIBs include U.S.-regulated insurance companies, investment companies, certain employee benefit plans, trusts, broker-dealers, and banks that in the aggregate own and invest on a discretionary basis at least US$100 million in securities of issuers that are not affiliated with the QIB. Rule 144A is often used in connection with fully underwritten offerings by an issuer that first privately places its securities to an initial syndicate of investment banks or "initial purchasers," who in turn resell these restricted securities to QIB investors.

Additional Considerations

In addition to the exemptions from federal registration discussed herein, issuers must also abide by state securities laws, known colloquially as "blue sky laws." Additionally, issuers selling securities in the United States must always bear in mind the general anti-fraud provisions of both federal and state securities laws.