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SPECIAL BULLETIN: New Notice for Regulation 45-106

A new notice was published May 29, 2007, by the Quebec "Autorité des marchés financiers" ("AMF"). The document contains opinions by the AMF concerning the *Regulation 45-106 respecting prospectus and registration exemptions* (hereinafter "the Regulation").

Among other things, the AMF's notice attempts to clarify what it considers misconceptions surrounding the requirements and impact of the Regulation, in particular on the issues of retroactive effect and filing articles of amendments.

Retroactivity

On the subject of the alleged retroactive impact of the Regulation on entities existing prior to September 14, 2005, the AMF is of the opinion that it is not so much a matter of retroactivity as a matter of respecting previous requirements for retaining "closed company" status. According to the AMF, it is a misconception to have assumed that in the past, a company remained a closed company merely by including the standard restrictions in its articles (i.e. 1- restrictions on the transfer of shares; 2- the number of shareholders limited to 50; and 3- the prohibition of public distribution). There was also a *de facto* control that had to be exercised especially regarding the notion of public distributions. What constituted a "public distribution" was a matter of interpretation that the courts defined over the years. According to the AMF, section 2.4 of Regulation 45-106 actually covers a broader range of persons considered "not of the public" than the courts had determined up to then. For this reason the AMF is of the view that if a company was able to maintain its status as "closed company" prior to September 14, 2005, then it should not have difficulty retaining its "private issuer" exemption under the new rules. Conversely, if a company did for example, issue shares in 2001 to someone in the public this constituted a breach of its closed company status. As a result, it cannot now claim the "private issuer" exemption under Regulation 45-106. It must seek another type of exemption under 45-106 or request a discretionary exemption from the AMF.

The AMF obviously assumes the above explanation to have been common knowledge among corporate law practitioners in Quebec, both before and after Regulation 45-106 entered into force.

FOOD FOR THOUGHT

"If we did everything we were really supposed to do before going on holidays, they'd be over before having even started."

Beryl Pfizer

The Info-CRAC is taking time off this year!

A rare occasion indeed, our newsletter will break for the month of August and will return to us rested up and ready to go in September. Have a nice vacation and a great summer!

IncoWeb[®] Training

You are interested to learn more about our online IncoWeb[®] services?

Whether you are already a user of our online IncoWeb[®] service or not, you probably will enjoy a one-hour free training session. For more

Amending Articles of Amendments

The position of the AMF on this issue is meant to clarify the upcoming deadline of October 12th 2007. The AMF considers that it is incorrect to state that a company will lose its status as a "private issuer" if it fails to amend its articles prior to October 12th, 2007.

Most companies that existed prior to September 14, 2005, already had restrictions to the transfer of shares in their articles of incorporation. The only securities these companies ever deal in are shares. So until such time as these companies intend to issue other forms of securities, they are not required to file articles of amendment to retain their "private issuer" status. All other companies that are contemplating issuance of securities other than shares must make the changes but only prior to the date of issuance of said securities. So the date of October 12th 2007 is only a deadline for companies that have already issued securities since September 14, 2005. If these companies fail to amend their articles before October 12th, 2007, they will permanently lose their "private issuer" exemption retroactively for any issuance performed since September 14, 2005.

The AMF also reminds us that when required, an alternative to filing articles of amendment is to introduce the new requirements in a security holders/shareholders agreement.

Our Comments

The AMF seems intent on clearing the confusion generated by Regulation 45-106 for corporate practitioners and their clients. Their recent notice may be helpful for this purpose. Where it is weak is that it does not tell practitioners how to best manage and monitor compliance by their clients so they do not lose their "private issuer" status in the future. Everyone agrees this issue is not a simple one. The rules and exceptions are numerous and not at all self-evident even for seasoned practitioners. Try explaining all this to a business person who has little time and no interest and it becomes clear that a short and simple answer is needed. There are also professional liability concerns. So, when asked by a client if filing articles of amendment is mandatory, there is a reason why the short and simple answer is "it should be done". Although the deadline may not apply to everyone, the requirements will hang over any future transaction with the real possibility of an oversight, resulting in needless and costly complications. Putting off doing something like this, even when properly documented, is often counter-productive for everyone. Regrettably, the AMF does not give this practical point consideration.

This being said, proper written notice to clients is certainly part of the solution. After this, it becomes a matter of the level of closeness and trust that exists between attorney and client to determine the best "rules of governance" to adopt for the purpose of complying with Regulation 45-106 in the future.

Note: A link to the complete notice on the MF web site appears below. Only a French version of the notice was available at the time of writing this article.

AMF notice link:

<http://www.lautorite.qc.ca/pdf/45-106-document-explicatif-25mai2007.pdf>

What are your views on 45-106?

We welcome any comments, questions or testimonies on this article or its topic. Please address them with your name and firm name by fax (514-861-2751) or email crac@crac.com

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information or to schedule a training session, please call Annie Fredette at 514-861-2799, ext. 355, or contact her by email at afredette@crac.com



Difficulties at the REQ: Hope in sight?

Since April 1st 2007, the Enterprise Registrar (REQ) has been reporting to the *Ministère du Revenu* whereas services report to *Services Québec*. Anyone who has had recent dealings with the Enterprise Registrar (REQ) or *Services Québec* has noticed a notable slowdown in the response time. As of June 1, we do not see the light at the end of the tunnel. In fact, the turnaround time in processing files may increase because of an important number of amendments requests pursuant to *Regulation 45-106 respecting prospectus and registration exemptions* to be expected.

Please be assured that we are aware of the problems unreasonable delays have been causing you and your clients. We have paid attention to this and have not hesitated to act as the liaison between you and government services. Thus, CRAC has brought these problems to the attention with those concerned of higher levels and has taken this opportunity to propose solutions to improve several services. We will continue to closely monitor how the situation evolves. Stay tuned.

Your complaints are certainly valid, however...

Your fingers are twitching and you would love to just let them run freely across your keyboard to send the REQ's information personnel an email expressing all your frustration? Communicating your complaints is one thing, but doing so acrimoniously is another. Be aware that the REQ reserves the right to forward any threatening messages to competent authorities. The clerk at the other end of the line does not have the power to change anything except to transfer messages to whoever it concerns: it would be a shame to waste so much effort on a whim, especially if it turns against you!

Order your certificate of attestation in advance

Due to the current delays, if you want a specific date to appear on your certificate of attestation, it would be wise to order it several days in advance.

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Family name and corporate name

Since March 30, 2007, Corporations Canada has changed the way it applies section 26 of the *Canada Business Corporation Regulations (2001)* (hereinafter the "Regulation"). The text has not been changed and still reads as follows:

For the purpose of paragraph 12(1) (a) of the Act, a corporate name is prohibited if an element of the name is the family name of an individual, whether or not preceded by their given name or initials, unless the individual or their heir or legal representative consents in writing to the use of their name and the individual has or had a material interest in the corporation.

Until recently, when the family name of an individual was part of the corporate name of a federal corporation and that this same individual was the incorporator or simply his name appeared in the list of members of the Board of directors, no consent in writing was required of this individual. Since

March 30, 2007, the application of this Regulation has changed. For example, simply being a director is not sufficient. To summarize this new interpretation of section 26 of the Regulations, from now on, **consent in writing by the individual** will be required to use his family name in a corporate name, except in the following cases:

- When the articles of incorporation are filed, the incorporator has that family name;
- When the articles of amendment change the corporate name but keep the same individual's name, said individual must sign the articles or must give consent;
- The person who signs the articles has that family name;
- If it relates to an individual who has been deceased for more than 30 years, a simple mention of this is sufficient;
- If it relates to a fictitious family name, an affidavit must be produced which declares that the name appearing in the corporate name is fictitious and is not that of a well known individual or that of a personal acquaintance;
- If it relates to a corporate revival;
- If there exists another trade name, trade-mark or official mark in which the same family name appears and can lead to confusion with the company's corporate name (section 29 of the Regulation), it is mandatory to obtain consent in writing from their owner to use the name. Once you have obtained this consent, it is no longer necessary to obtain a written consent from the individual whose family name is being used.

Here are other situations whereby consent in writing is not required, this being when the family name is also:

- A word that can be found in the dictionary;
- A historical or literary figure;
- The name of the street where the company is located;
- A name commonly used as a first name (e.g.: Rose, Peter, etc.).

All requests for pre-approval of either a corporate name or articles of incorporation accompanied by a *Nuans*^{MD} report that are dated prior to March 30, 2007, but that were filed at Corporations Canada after this date will be subject to this new policy.

Since the entering into force of this new policy, CRAC has filed consent forms that have been accepted by Corporations Canada. Therefore, we are glad to propose and share with our regular clients the attached consent models both in English and in French. To view them, simply click on the following links:

[Consent English](#) - [Consent French](#)

If you wish to have more information, please contact Mr. Denis Livernoche at (514) 861-2799 ext. 335 or send an email to dlivernoche@crac.com.

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Unsolicited invoices or cases of fraud against Canadian companies

You have recently received a substantial invoice for listing your company in a

business directory. The invoice's letterhead carries a title that seems quite official along with a logo of the Canadian flag. You flare up against the government for taxing you at every turn! Well, this time, the government is innocent!

Scam no 1: "Canadian Companies Directory for Industry, Commerce and Trade"

Competition Bureau Canada published a press release last March warning Canadian companies not to pay an invoice in the amount of \$749.00 for a directory they have supposedly ordered. This fraud is conducted out of Switzerland and Swiss authorities have been notified. If you have been solicited for payment of such an invoice, Competition Bureau Canada asks that you file a complaint; it will see to it that your complaint is forwarded to Swiss authorities: www.competitionbureau.gc.ca/fraude.

Competition Bureau Canada also provides a few tips to prevent future victims of fraud:

- The government of Canada does not market business directories;
- If the signature seems quite official, you can check it on the Canadian government website: www.gc.ca;
- Finally, never pay for products you have not ordered.

Scam no 2: "Companies Directory for Commerce, Trade and Industry"

The same tactic is repeated, this time, the cheque must be made out to a company called CD-CTI located in Toronto. The amount owed totals \$800.00. An example of the invoice sent to companies is provided below:

[View image](#)

Scam no 3: Trade-Marks

We wish to raise awareness about another scam that seems to reoccur periodically and that is aimed at owners of trade-marks. If you have filed a trade-mark application or own registered trade-marks, you may one day receive a letter asking you to list your trade-marks in an international directory or in the same way, to pay for a service that would monitor them. Firstly, be aware that these directories offer no additional rights in protecting your trade-marks. Secondly, while a monitoring service for your marks may seem interesting as a preventive measure, oftentimes the amount invoiced is substantial. Legitimate companies exist that offer the same service at lower cost. Before paying such invoices, contact your trade-mark agent; he can give you the proper advice for such issues

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Announcing New Minute Books

To better meet the needs of our clients, we have completely redesigned the indexes of our minute books. Firstly, the number of tabs has increased from 10 to 15. The tab name "Notices and Declarations" has been divided into two separate sections. We have also added four new tabs: Synopsis, Officers, Dividends and Other Documents. Each divider of the index is made of strong white cardboard. The tabs are plasticized and the perforated holes are strengthened with a protective transparent plastic lining. These new indexes

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Notice: The information contained

are available for the same price as the former ones.

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