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Regional: Trade

Emerging Issues in Trade Litigation Between Canada and the United States

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Canada and the United States continue to enjoy one of the most enduring trade relationships in existence today. However, even this close relationship is not bereft of its share of trade-related concerns. This article discusses issues that are likely to dominate trade litigation between Canada and the U.S. in the coming years.

Introduction

The trade relationship between Canada and the U.S. is one of the most robust in existence. Over \$1.9 billion worth of goods and

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United States: Taxation

U.S. SEC Proposes to Eliminate Reconciliation for IFRS Filers: Substantial Benefits Anticipated

By Joel A. Adler (Carreras, Barsikian, Robertson & Asociés)

The United States Securities and Exchange Commission (SEC or Commission) has published for public comment, as required by U.S. law, proposed rules (Proposed Rules) which, if adopted as anticipated, will eliminate the requirement to reconcile to U.S. GAAP for foreign (meaning, non-U.S.) private issuers that file periodic reports and make certain other filings with the Commission that include financial statements. If adopted, the rules will represent a sea change in SEC requirements relating to financial statements.

From its earliest days, the SEC insisted, as a practical matter, that financial statements included in filings with the Commission be pre-

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HIGHLIGHTS

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The U.S. SEC has published for public comment proposed rules that could eliminate the requirement of foreign private issuers to reconcile from IFRS to U.S. GAAP.

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Over \$1.9 billion worth of goods and services cross the Canada/U.S. border every day – the most between any two countries in the world. However, the relationship between Canada and the U.S. is not void of conflict. *NAFTIR* discusses issues that are likely to dominate trade litigation between Canada and the U.S. in the coming years.

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ANAFTIR commentator discusses ways to challenge the 2007 rules on thin capitalization in Mexico.

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China blocked the United States' and Mexico's World Trade Organization (WTO) dispute panel requests to determine whether China's subsidies violate WTO rules.

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The Canadian government announced the creation of a Competition Policy Review Panel tasked with reviewing key elements of Canada's competition and investment policies.

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pared in accordance with U.S. GAAP. This was not out of sheer arrogance; the lack of uniformity in the various forms of non-U.S. GAAP made it difficult for U.S. investors to understand these disparate accounting principles. At the same time, this requirement caused foreign issuers not to offer their securities in the United States making it difficult and expensive for U.S. investors to acquire securities of foreign issuers and thereby limiting their investment options.

In 1982, the SEC came to realize that its insistence on U.S. GAAP financial statements was impeding the free flow of capital across U.S. borders. It modified its rules to allow the use of non-U.S. GAAP financial statements provided that the same included a reconciliation to U.S. GAAP thereby permitting investors to understand the differences between U.S. GAAP and the foreign issuer's GAAP. This was the first chink in the SEC's financial statements armor.

In a reconciliation, a foreign private issuer that files its financial statements prepared in accordance with a basis of accounting other than U.S. GAAP must identify and quantify the material differences from the requirements of U.S. GAAP and the SEC's accounting rule, Regulation S-X.

The SEC has come to realize that the use of IFRS is increasingly widespread through the world. Nearly 100 countries now require or permit the use of IFRS and many other countries are replacing their national standards with IFRS. The European Union, for example, under a regulation adopted in 2002, has required companies incorporated in a Member State and whose securities are listed on an EU regulated market to report their consolidated financial statements using IFRS as adopted by the International Accounting Standards Board (IASB). In addition to issuers in the 27 EU Member States, these IFRS requirements also apply in the European Economic Area. Other countries have adopted similar requirements mandating the use of IFRS by publicly traded companies.

Under the Proposed Rules, in order to be eligible to omit the reconciliation, an issuer would be required, in a prominent footnote to its financial statements, to state unreservedly and explicitly that its financial statements are in compliance with the English language version of IFRS as published by the IASB. The independent auditor's report on the financial statements must also contain a statement to the foregoing effect.

Under the Proposed Rules, foreign private issuers that are eligible to omit the U.S. GAAP reconciliation in their audited annual financial statements would also be able to omit a reconciliation from their unaudited in-

terim period financial statements. To the extent a foreign private issuer is required to provide interim period financial statements, the financial statements would have to be prepared in accordance with the English language IFRS as published by the IASB.

The Proposed Rules are expected to benefit investors and issuers to the extent that they facilitate capital formation by foreign companies in the U.S. capital markets. The Proposed Rules to accept IFRS financial statements without reconciliation to U.S. GAAP would reduce regulatory burdens for foreign private issuers that rely on them, thereby lowering the information disclosure preparation cost of raising capital in the United States. Foreign private issuers may thus be more likely to enter the U.S. capital markets. Assuming they do so, investors would benefit from having more investment opportunities in the United States and generally would incur lower transaction costs when trading a foreign company's securities in the United States relative to a foreign market. To the extent acceptance of IFRS financial statements without reconciliation encourages foreign private issuers to enter or remain in the U.S. capital markets, investors also will benefit from the protections of the U.S. regulatory and disclosure system relative to the protections they may receive if purchasing those securities overseas. Investors also are expected to benefit from potential reduction in the cost of capital to issuers.

If the Proposed Rules are adopted, the SEC believes that the elimination of the reconciliation requirement will save foreign private issuers thousands of hours and millions of dollars in preparing the financial statements that need to be filed with the Commission. The author believes that complete convergence of U.S. GAAP and IFRS is almost on the Commission's doorstep. It may take some time, but it is going to happen.

The full text of the release containing the Proposed Rules is available on the SEC's website which is www.sec.gov, click on proposed rules. The SEC would certainly appreciate comments from European and other issuers, investment banks and their advisors; comments should be submitted before September 24, 2007. Comments may be submitted electronically to the following address: rule-comments@sec.gov. In the subject line, type "File No. S7-1307."

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