FASKEN MARTINEAU

Corporate Law

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Amendment of your articles of incorporation: the date is approaching!

*Special Collaboration**

We would like to remind you of several changes[1] to the Quebec *Securities Act* which came into force in September 2005. The consequences of these changes are being felt more keenly in 2007. For many companies, the change requires that they amend their articles of incorporation. The Autorité des marchés financiers has issued a moratorium to give companies time to comply with this change. The moratorium will end on October 12, 2007. As this date is quickly approaching, we would like to tell you what action should be taken to ensure that you comply with this change.

Here is further information explaining the regulatory change and the steps our firm suggests you take to comply with it.

1) What is the regulatory change about?

Previously, the Quebec *Securities Act* [2] (the "Act") included provisions respecting "closed companies". "Closed companies", commonly referred to as private companies, were generally exempt from the application of the Act. The Act imposes a prospectus-based disclosure policy that can be quite costly and complex.

On September 14, 2005, the Act was amended by the coming into force of *Regulation 45-106 respecting Prospectus and Registration Exemptions* ("Regulation 45-106"), which did away with the notion of "closed company" and replaced it with a new series of exemptions, including that of "private issuer".

Because of this change, the Autorité des marchés financiers ("AMF") has issued a grace period by which companies qualifying as a "closed company" as of September 14, 2005 have until October 12, 2007 to amend their articles of incorporation to qualify as a "private issuer".

2) What is the difference between a "closed company" and a "private issuer"?

A company is considered a "closed company" when its articles of incorporation contain the following three clauses:

- a prohibition against distributing its securities to the public;
- the number of shareholders is limited to 50, excluding employees; and
- a restriction on the transfer of its shares.

From now on, for a company to qualify as a "private issuer", its articles of incorporation must only contain a restriction on the transfer of securities, other than non-convertible debt securities. Other conditions relating to the use of the exemption respecting the identity and number of securityholders still in fact apply, but they do not need to be reflected in the articles of incorporation.

The main difference between the clauses which make a company a "closed company" and a "private issuer" is the broadening of the restriction on the transfer of securities, which henceforth covers not only shares, but all a company's securities (other than non-convertible debt securities).

3) Why be a "private issuer"?

For the same reasons your company was a "closed company":

- to benefit from an exemption from the prospectus and dealer registration requirements under the Act when your company issues securities;

- to avoid having to prepare and file with the AMF a notice containing prescribed information following an issuance of securities; and

- to avoid paying fees to the AMF following the issuance of securities.

4) What do you have to do to become a "private issuer"?

If you were a "closed company" as of September 14, 2005, all you have to do is amend your articles of incorporation to include a restriction on the transfer of any security your company may issue, other than non-convertible debt securities, which are not covered by this change.

By amending your articles of incorporation, we will remove the prohibition against distributing securities to the public and the limitation on the number of shareholders.

5) Why should I amend my articles of incorporation now?

Because the AMF has given companies which qualified as "closed companies" as of September 14, 2005 until October 12, 2007 to amend their articles of incorporation to take advantage of status as a "private issuer".

6) Does amending my company's articles of incorporation guarantee that it will be a "private issuer"?

If your company qualified as a "closed company" as of September 14, 2005 and you complied with the clauses of your articles of incorporation when issuing any securities, particularly with respect to the restrictions on the issuance and transfer of securities, then the answer is yes.

7) What happens if you do not make the change before October 12, 2007 and you want to do so subsequently?

Some claim that your company could no longer qualify as a "private issuer" after this date, but the Act is not clear about this. Under the circumstances, we recommend that you amend your articles of incorporation **before** October 12, 2007 to preserve your rights. This will also simplify any future

issuance of securities due to the fact that a limited number of questions will be examined before such securities are issued. By reducing the number of questions, you will save time and certain costs when carrying out a transaction.

For more information, please do not hesitate to contact one of the lawyers listed below:

From the Corporate and Securities Group, ***Diane Bertrand****'s practice focuses mainly on the acquisition or sale of private companies and operative assets.*

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******* *The authors wish to underline Jocelyn Lafond's special contribution to the text.*

1) See: "New Game Rules for 'Closed Companies'!", J. Lafond, *Beyond Results* Newsletter, Spring 2006;

2) R.S.Q. c. V-1.