

Are Your Private Placement Documents Up To Date?

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Over the last few years, many Canadian junior resource companies and startup companies have cut back on their legal spend, not necessarily undertaking a legal review of each new private placement of securities, or limiting their review to a Canadian one. Yet over this same time frame, the applicable U.S. rules and relevant interpretations have changed, and previously vetted forms may not be current.

Indications that your U.S. law compliance practices in offering and selling securities could use a good scrub include the following:

- You don't know the definition of a "foreign private issuer" or whether your company is one;
- You don't know if your company has a "substantial U.S. market interest" in the class of securities you are offering;
- You don't know what "bad boy disqualifications" are or who they apply to, or you can't remember the last time the company's insiders completed disqualification questionnaires;
- Your U.S. subscription agreements refer to Rule 506 and not Rule 506(b);
- Your U.S. subscription agreements treat an investor with a net worth of \$1 million as an accredited investor, without subtracting certain items relating to the investor's principal residence;
- Your warrant exercise forms don't require all warrant holders to check an appropriate box to help you determine whether U.S. law applies to the exercise and confirm compliance with a U.S. exemption where required;
- Your offering includes warrants, but your subscription agreements don't include U.S. provisions relating specifically to the warrants; or
- You aren't checking the U.S. legal requirements when you draft your equity compensation plans or when you grant stock options, RSUs, PSUs, ESPP participation, or other types of compensatory equity to a U.S. resident.

The risk of non-compliance includes rescission rights for investors, restatement of financial statements, and civil or criminal enforcement actions by regulators, so it's important to regularly review your forms to ensure they are up to date.

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