

Continuing a Company from One Country to Another Country Without U.S. Registration or Exemption Triggers Shareholder Rescission Rights

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In Canada it's considered no big deal to ask shareholders to approve a continuance or redomicile of a company from one province to another, or between Canadian provincial and federal jurisdictions. That's also largely true from a U.S. securities perspective, but **only** because the continuance is being made within the same country. If a continuance or redomicile is made from one country to a different country, it's a completely different story. Canadian counsel and their clients are sometimes surprised to hear that if a company continues from Canada to another country, or if a company continues into Canada, the failure to comply with U.S. securities laws may subject the company to rescission rights by all U.S. securityholders.

The SEC takes the position that if a company subject to the jurisdiction of one country asks its shareholders to approve a continuance or redomicile into another country, the transaction involves the offer and sale of securities by the continued company to all of the existing shareholders. Under Section 5 of the U.S. Securities Act, these offers and sales must be made pursuant to an effective registration statement, filed and cleared with the SEC, unless an exemption is available. Regulation S may exempt the sales to persons outside the U.S. For U.S. securityholders, certain exemptions such as Section 3(a)(10) or Rule 802 may be available, but these exemptions require U.S. legal and structuring advice during the course of the transaction, because they require specific procedures, disclosures and filings that cannot be completed after the fact. Other, less demanding, exemptions may not be available if the company is publicly traded.

If no exemption is complied with or available, then generally speaking, all U.S. securityholders will have an automatic right of rescission under the U.S. Securities Act for a period of one year. For a public company, this can raise meaningful disclosure considerations even if no U.S. securityholder makes a claim. The company may also be subject to enforcement actions by U.S. securities regulators.

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