

When Canadian Investors Must Report Investments (including those in Canada!) to the SEC

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On September 17, 2019, the *Financial Post* reported that British Columbia Investment Management Corporation (BCIMC), one of Canada's largest pension funds, inadvertently failed to report to the U.S. Securities and Exchange Commission (SEC) \$2.46 billion of its holdings in 98 Canadian companies, accounting for more than 20 percent of the investments required to be reported to the SEC. The reason – it appears that BCIMC's investments in Canadian companies that report with the SEC (often referred to as “cross-listed” companies) were inadvertently omitted. The *Financial Post* reported that this was not the first time BCIMC had made errors in its SEC filings, citing a series of prior amendments filed to correct data from 2010 to 2015. The ramifications for BCIMC are currently uncertain.

The first step in avoiding this type of mistake is being aware that a Canadian investor may be required to file reports with the SEC regarding certain of its investments – not just investments in U.S. public companies, but also investments in Canadian securities that are listed on a U.S. national securities exchange, such as the NYSE, the NYSE American, or Nasdaq, or that are otherwise subject to ongoing SEC reporting requirements.

The second step is to learn about investor-side SEC reports and their different triggers. For example, a Canadian investor may be required to file with the SEC, among other things:

- **Form 13F.** Any institutional investment manager (including both an entity that invests for its own account, and an individual or entity that exercises investment discretion over others' accounts) that exercises investment discretion over US\$100 million or more in equity securities that are registered with the SEC under Section 12 of the Securities Exchange Act of 1934, equity securities of closed-end investment companies and certain other equity securities (collectively referred to as Section 13(f) Securities), and that uses any instrumentality of U.S. commerce in the course of its business, must file quarterly reports with the SEC on Form 13F, reporting its holdings in all Section 13(f) Securities. Section 13(f) Securities include securities of Canadian companies that are cross-listed on the NYSE, the NYSE American or Nasdaq, or that

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are otherwise the subject of SEC reporting obligations. Therefore, a Canadian investment manager may become subject to Form 13F filing requirements even if it invests exclusively in securities of Canadian companies.

- **Schedules 13D or 13G.** Any person, wherever located, that beneficially owns more than 5% of a class of Section 13(f) Securities, including any class of Canadian securities that is a Section 13(f) Security, must file beneficial ownership reports on either Schedule 13D or 13G regarding this specific holding. In determining whether a person beneficially owns more than 5% of a class, the person's ownership must be calculated as if the person had exercised any options, warrants and other rights that the person is permitted to exercise within the next 60 days.
- **Form 13H.** Any person that is a large trader of NMS securities must periodically file a Form 13H with the SEC. NMS securities include securities listed on a U.S. national securities exchange, such as NYSE, the NYSE American or Nasdaq, and certain related securities. A large trader is a person that effects transactions in NMS securities, as principal or as agent, using any instrumentality of U.S. commerce or the facilities of any U.S. national securities exchange, in an aggregate amount equal to or greater than (i) during one day, either two million shares or shares with a fair market value of US\$20 million, or (ii) during one month, either twenty million shares or shares with a fair market value of US\$200 million.
- **Forms 3, 4 and 5.** Any person, wherever located, that is a director or executive officer, or the beneficial owner of more than 10% of any class of equity securities, of a "domestic issuer" that is registered with the SEC pursuant to Section 12 of the Securities Exchange Act, but excepting certain passive institutional investors, must file beneficial ownership and trading reports on these forms. While most Canadian cross-listed issuers are not considered "domestic issuers," some Canadian companies (typically those that file SEC reports on Forms 10-K, 10-Q and 8-K) are, due to their level of U.S. ownership and other U.S. ties.

The third step is to work with counsel to understand, in greater depth than this post can provide, whether the investor may be required to file any of these forms. Counsel can discuss with you corporate and decision-making structures and investment limits that can help restrict the circumstances requiring a report, as well as the information required to be included in reports, and how best to ensure the required information is gathered, processed, and filed on a timely basis. Investment managers with large and diverse portfolios often have the most significant work to do, due to the number of their public investments.