April 16, 2013

First Quarter 2013 U.S. Legal and Regulatory Developments

The following is a summary of significant U.S. legal and regulatory developments during the first quarter of 2013 of interest to Canadian companies and their advisors.

1. SEC Clarifies Position on Corporate Communications through Social Media.

On April 2, 2013, the Securities and Exchange Commission (the "SEC") issued a Report of Investigation (the "Report") in connection with an SEC enforcement inquiry into potential violations of Regulation Fair Disclosure ("Regulation FD") by Netflix CEO Reed Hastings. Hastings posted on his personal Facebook page a congratulations to the company's content licensing team for exceeding one billion monthly viewing hours for the first time ever. At the time of the post, Netflix had not filed a Form 8-K or issued a press release disclosing this information. In the Report, the SEC Staff (the "Staff") noted that issuer communications through social media channels require careful Regulation FD analysis comparable to communications through more traditional channels. In light of the direct and immediate communication from issuers to investors that is now possible through social media channels such as Facebook and Twitter, the Staff indicated that it expects issuers to examine rigorously the factors indicating whether a particular channel is a "recognized channel of distribution" for communicating with their investors. We note that Regulation FD does not apply to Canadian issuers that are "foreign private issuers," and we have been advised that dissemination of material information through social media would not satisfy Canadian requirements regarding selective disclosure.

For a more detailed summary of the SEC's Report, see the Paul, Weiss memorandum at:
http://www.paulweiss.com/media/1572841/3-apr-13_sec.pdf

For the SEC's Report, see: http://www.sec.gov/litigation/investreport/34-69279.pdf

2. NYSE and Nasdaq Adopt New Compensation Committee Rule Amendments.

As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and related SEC rules, the NYSE and Nasdaq have adopted new listing standards related to compensation committee independence and responsibilities. Both sets of rules were adopted substantially as proposed. Most notably, while the NYSE did not add any mandatory independence conditions for compensation committee members, but rather specified factors that boards must consider in determining compensation committee independence, Nasdaq's corresponding independence requirements do impose a new mandatory standard. Foreign private issuers that follow their home country practice will be exempt from both the NYSE and Nasdaq compensation committee independence requirements but, if applicable, will be required to disclose the reasons why they do not meet the applicable exchange's independence requirements. A Canadian issuer that files an annual report on Form 40-F or 10-K with the SEC may include such disclosure in its annual report or on its

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website. A Canadian issuer that files an annual report on Form 20-F must include the disclosure in its annual report. Companies have until the earlier of (i) their first annual meeting after January 15, 2014 and (ii) October 31, 2014 to comply with the new compensation committee member independence requirements of both exchanges.

For a more detailed summary of the NYSE's and Nasdaq's new compensation committee rules see the Paul, Weiss memoranda at: http://www.paulweiss.com/media/1430123/28-jan-13-nyse.pdf and http://www.paulweiss.com/media/1430126/28-jan-13-nas.pdf respectively.

For NYSE's new compensation committee rules, see http://www.nyse.com/nysenotices/nyse/rule-filings/pdf;jsessionid=108F2B636ECC5053FBC4A93725506F1F?file_no=SR-NYSE-2012-49&seqnum=5 and for Nasdaq's new rules see: http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2012/SR-NASDAQ-2012-109_Amendment_2.pdf

3. Nasdaq Proposes New Listing Standard on Internal Audit Function.

The SEC has issued a notice of a proposed new listing standard filed by Nasdaq that would require that all companies listed on Nasdaq establish and maintain an internal audit function. The role of the new internal audit function would be to provide management and the audit committee with ongoing assessments of the company's risk management processes and system of internal control. The proposal allows for the outsourcing of the internal audit function to any third-party service provider other than the company's independent auditor. The audit committee would have sole responsibility to oversee the internal audit function, which responsibility could not be delegated to any other committee of the board. The audit committee would be required to meet periodically to review the performance of the function, and it would also be required to discuss with the outside auditor the internal audit function's responsibilities, budget and staffing. The New York Stock Exchange's ("NYSE") Listed Company Manual already includes a comparable listing standard. Under both the NYSE and Nasdaq listing standards, foreign private issuers may follow their home country practices regarding the internal audit function in lieu of complying with the listing standard, though they must disclose significant differences between their corporate governance practices and those followed by U.S. companies in the same manner as discussed above. Companies listed on Nasdaq on or before June 30, 2013, including foreign private issuers who might choose to comply, would be required to comply with the proposed listing standard by no later than December 31, 2013.

For a more detailed summary of the Nasdaq proposed new listing standard, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1548626/18mar13sec.pdf

For the SEC release on the Nasdaq proposed new listing standard see: http://www.sec.gov/rules/sro/nasdaq/2013/34-69030.pdf

4. FTC Announces New Antitrust Thresholds.

On January 24, 2012, the Federal Trade Commission ("FTC") announced revised thresholds for determining when companies must notify federal antitrust authorities about a transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The HSR Act ensures that the FTC receives notice of significant transactions before they occur for purposes of antitrust review under the Clayton Antitrust Act of 1916, as amended (the "Clayton Act"). For 2013, the threshold for reporting proposed mergers and acquisitions subject to enforcement under Section 7A of the Clayton Act has increased from US$68.2 million to US$70.9 million.

For more information on the FTC's new thresholds, see: http://ftc.gov/opa/2012/01/hsr.shtm

5. U.S. Supreme Court Clarifies Scope of 5-Year Statute of Limitations in SEC Enforcement Proceedings.

In *Gabelli* v. *Securities and Exchange Commission*, the United States Supreme Court clarified that the 5-year statute of limitations applicable to SEC enforcement actions that seek financial penalties begins to "accrue" when the alleged violation occurs, not when the SEC discovers the violation. The Supreme Court observed that the most natural and historically accepted reading of the term "accrued" is based on when the violation occurred, not when it is discovered and that government enforcement efforts ought to have a "fixed date" when exposure must end. *Gabelli* provides a significant safeguard against the possibility of open-ended SEC enforcement actions seeking a civil fine, penalty or forfeiture more than five years after the relevant conduct occurred. However, *Gabelli* does not directly govern claims for disgorgement or injunctions and leaves unsettled whether proceedings seeking equitable relief will be subject to the 5-year limitations period. *Gabelli* also does not apply to securities actions brought by private plaintiffs.

For a more detailed summary of *Gabelli*, see the Paul, Weiss memorandum at:
http://www.paulweiss.com/media/1521307/28feb13_gabelli.pdf

6. Board Enjoined from Impeding Consent Solicitation Until It Approves Insurgent Slate for Purposes of Credit Agreement.

In *Kallick* v. *SandRidge Energy, Inc.*, the Delaware Court of Chancery enjoined the incumbent board of SandRidge Energy (which faced a consent solicitation initiated by a large stockholder seeking to de-stagger and replace the board) from, among other things, soliciting against or otherwise impeding the consent solicitation until the board approved the rival slate. The incumbent board resisted the consent solicitation, claiming that the rival slate was less qualified than the incumbents to run the company and warning stockholders that, because the slate had not been approved by the incumbent board, the election of the rival slate would constitute a change-of-control for purposes of SandRidge's credit agreements and would trigger the lenders' right to put $4.3 billion worth of notes back to the company (the "Proxy Put"). However, the court determined that because the incumbent board could not identify a specific and substantial risk to the corporation or its creditors posed by the rival slate, the board was required by its duty of loyalty to approve the proposed slate (and thereby avoid the

Proxy Put), even if it believed itself to be better qualified and to have better plans for the corporation. The *Kallick* decision, along with the Court of Chancery's earlier decision in *San Antonio Fire & Police Pension Fund* v. *Amylin Pharmaceuticals*, confirm that corporations, as a matter of process, should carefully consider and review whether proxy put and other similar change-of-control provisions in credit agreements and indentures are truly in the best interests of the stockholders.

For a more detailed summary of *Kallick* v. *SandRidge Energy, Inc.*, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1541583/11mar13del.pdf

7. Paul, Weiss Attorneys Argue Historic Same-Sex Marriage Case Before the United States Supreme Court.

On March 26 and 27, 2013, the United States Supreme Court heard oral arguments in *Perry* v. *Brown*, challenging the constitutionality of a 2008 California ballot proposition ("Proposition 8") which amended the California Constitution to provide that "only marriage between a man and a woman is valid or recognized in California" and in *U.S.* v. *Windsor*, challenging the definition of marriage in the federal Defense of Marriage Act ("DOMA") as "a legal union between one man and one woman as husband and wife." In the Second and Ninth Circuit Courts of Appeals respectively, both Proposition 8 and DOMA were found unconstitutional under the Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The cases were subsequently appealed to the Supreme Court. Paul, Weiss partner Roberta Kaplan argued the DOMA case on behalf of Edith Windsor who, on account of the definition of marriage in DOMA, was obligated to pay substantial estate taxes following the death of her spouse, Thea Speyer, solely because Ms. Speyer was a woman and not a man. Ms. Windsor married Ms. Speyer in Toronto at a time when same-sex couples could not be wed in New York. The Supreme Court is expected to issue its decision in both *Perry* v. *Brown* and *U.S.* v. *Windsor* in the coming months. Continuing in the firm's fine tradition of pathbreaking pro bono work, Paul, Weiss is very proud to represent Ms. Windsor in this matter of historic social and legal importance.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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