July 10, 2013

Second Quarter 2013 U.S. Legal and Regulatory Developments

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

1. U.S. District Court Vacates SEC Rule 13q-1 Requiring Disclosure of Government Payments by Resource Extraction Issuers

On July 2, 2013, the U.S. District Court for the District of Columbia vacated Rule 13q-1 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which required resource extraction issuers, including foreign private issuers and MJDS-eligible Canadian issuers, to disclose payments made to the U.S. Federal government and foreign governments. The District Court found that the Securities and Exchange Commission (the "SEC") incorrectly interpreted Section 13(q) of the Exchange Act, which mandated the promulgation of Rule 13q-1.

Without reaching many of the plaintiffs' arguments, the District Court vacated Rule 13q-1 on two grounds. First, the District Court found that Congress did not specifically intend that reports filed under Section 13(q) be publicly disclosed. Second, the District Court held that the SEC's denial of an exemption from disclosing payments to governments that prohibited such disclosure was arbitrary and capricious.

Before the rule was vacated, the SEC's Division of Corporation Finance issued FAQs on May 30, 2013 to provide guidance on various aspects of Section 13(q). Due to the District Court's decision, these FAQs will not be pertinent to issuers for the time being, but they may become significant in the future if the rule is reinstated.

Upon vacating Rule 13q-1, the District Court ordered the SEC to conduct further proceedings before enacting a new rule under Section 13(q). It is not clear yet whether the SEC will appeal the decision. While the result of the decision is that Rule 13q-1 is no longer effective, a rule in some form must be promulgated by the SEC to implement Section 13(q), and such rule will require resource extraction issuers to collect and report to the SEC payments made to the U.S. Federal government and foreign governments.

For a more detailed summary of the District Court's decision, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1702640/2-jul-13.pdf

2. SEC Issues FAQs on Conflict Minerals Disclosure as Litigation Contesting Rule 13p-1 Continues

On August 22, 2012, the SEC adopted Rule 13p-1 under Section 13(p) of the Exchange Act, which requires reporting issuers, including foreign private issuers and MJDS-eligible Canadian issuers, to disclose the use of conflict minerals (tantalum, tin, tungsten and gold derived from the Democratic Republic of the Congo or an adjoining country) in manufacturing their products. To provide further guidance on Rule 13p-1, the SEC Staff released twelve FAQs on May 30, 2013. Notably, the FAQs clarified that even voluntary filers are required to comply with Rule 13p-1 and the exception from the rule for issuers that mine conflict minerals broadly applies to any issuer engaged in an activity customarily associated with mining. Further, the FAQs explained that issuers need not disclose the presence of conflict minerals in a product's packaging or container or in objects employed in the course of the issuer's business but not sold in the stream of commerce.

The National Association of Manufacturers ¬and other plaintiffs have sued the SEC in the District Court for the District of Columbia and are seeking to have Rule 13p-1 vacated. Oral arguments were held on July 1, 2013 and a ruling is expected in the coming months.

For a more detailed summary of the SEC disclosure requirements regarding the use of conflict minerals and a link to the SEC's FAQs, see the Paul, Weiss memorandum at:
http://www.paulweiss.com/media/1153118/27-aug-12_sec.pdf

3. Recent Amendments to Delaware General Corporate Law and Limited Liability Company Act

The Delaware General Assembly has adopted important amendments to the Delaware General Corporate Law and Limited Liability Act, that, if signed into law, would largely become effective as of August 1, 2013. The proposed amendments include:

- Subsection 251(h) of the General Corporate Law would permit an immediate second-step merger, without a stockholder vote or proxy statement, immediately following any negotiated tender offer or exchange offer for a public company's shares that results in the bidder owning at least the number of shares necessary to effect the merger (typically, a majority of the outstanding shares); and

- Section 18-1104 of the Limited Liability Company Act would impose default fiduciary duties on managers, and possibly officers and members, of limited liability companies unless otherwise provided for in an LLC's operating agreement.

For a more detailed summary of the amendments, see the Paul, Weiss Delaware M&A Quarterly at:
http://www.paulweiss.com/media/1700370/1-july-13_de.pdf

4. Delaware Court of Chancery Provides Roadmap to Avoid "Entire Fairness" Review for Mergers with Controlling Stockholders in *In Re MFW Shareholders Litigation*

In an important and thoughtful decision that will influence the structure of future going-private transactions by controlling stockholders, Chancellor Strine of the Delaware Court of Chancery applied the business judgment rule—instead of the more onerous entire fairness review—to a going-private merger by a controlling stockholder because the merger was structured to adequately protect minority stockholders. The decision is likely to be appealed, but if affirmed by the Delaware Supreme Court on appeal, the case should provide certainty in an area of the law that has been a source of debate and uncertainty for two decades. The decision provides a detailed roadmap to obtaining the more favorable business judgment rule review and reducing the considerable litigation costs and risks associated with entire fairness review.

For a more detailed summary of the *MFW* case, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1654037/29-may-13de.pdf

5. ISDA Issues New Protocol on Swap-Trading Regulations

ISDA issued its March 2013 Dodd-Frank Protocol (the "March Protocol") outlining coverage and adherence mechanisms for the Dodd-Frank Wall Street Reform and Consumer Protection Act's newly finalized regulations. The regulations come into effect in July 2013 and govern mandatory documentation of swap-trading relationships, portfolio reconciliation and representations related to the End-User Exception. Market participants adhering to the March Protocol will be required to submit an adherence letter to ISDA and exchange protocol-related information by submitting a questionnaire reflecting relevant agreements and representations to their Swap Dealer and Major Swap Participant counterparties.

For a more detailed summary of the March Protocol, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1659079/31may13_alert.pdf

6. Edith Windsor Wins Historic Same-Sex Marriage Case Argued by Paul, Weiss Before the Supreme Court

On June 26, 2013, the Supreme Court by a 5-4 majority struck down section three of the Defense of Marriage Act (DOMA) as unconstitutional in *U.S.* v. *Windsor*. The plaintiff, Edith Windsor, had spent 44 years together with her late spouse, Thea Spyer, and married in Toronto in 2007. However, because of DOMA's definition of marriage as "a legal union between one man and one woman as husband and wife," Windsor was obligated to pay more than $360,000 in federal estate taxes following Spyer's death, solely because her spouse was a woman and not a man. Section three of DOMA was held to be unconstitutional in the majority opinion written by Justice Kennedy due to its "deprivation of the equal liberty of persons that is protected by the Fifth Amendment."

Continuing in the firm's tradition of pathbreaking pro bono work, Paul, Weiss is proud to have represented Edith Windsor in this case of historic, social and legal importance.

Additional developments subsequent to June 30, 2013:

7. House Passes Bill Prohibiting the Public Company Accounting and Oversight Board from Issuing Audit Firm Rotation Requirement

On July 8, 2013, the House of Representatives passed the Audit Integrity and Job Protection Act with an overwhelming majority. The bipartisan bill prohibits the Public Company Accounting and Oversight Board (PCAOB) from mandating the automatic rotation of a public company's independent external auditor. The bill was introduced by Republican Congressman Robert Hurt of Virginia in response to the PCAOB's Concept Release issued on August 16, 2011 proposing the requirement that independent external auditors be rotated automatically. According to Rep. Hurt, the House's support for the bill is a step towards "removing the roadblocks posed by excessive federal regulations" on job-creating businesses in the U.S.

For the House's press release on the new Audit Integrity and Job Protection Act, see: http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=341737

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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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