October 24, 2013

Third Quarter 2013 U.S. Legal and Regulatory Developments

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

1. SEC Elects Not To Appeal Court Decision Vacating Disclosure of Government Payments by Resource Companies

The Securities and Exchange Commission (the "SEC") has elected not to appeal the July 2, 2013 decision of the U.S. District Court for the District of Columbia vacating Rule 13q-1 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Rule 13q-1 was promulgated by the SEC under Section 13(q) of the Exchange Act, having been mandated by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The rule, which is no longer effective, would have required resource extraction issuers, including foreign private issuers and MJDS-eligible Canadian issuers, to disclose certain payments made to the U.S. federal government and foreign governments.

Although the SEC elected not to appeal the District Court's decision, the SEC has a statutory obligation to promulgate a revised rule in a form that complies with Section 13(q) of the Exchange Act, including the District Court's interpretation of that provision. Specifically, the District Court found that Congress did not intend that reports filed under Section 13(q) be publicly disclosed and that the SEC's denial of an exemption from disclosing payments to governments that prohibited such disclosure was arbitrary and capricious.

In the coming months, the SEC will begin the process of promulgating a revised rule responsive to the District Court's holdings. We expect that the new rule proposal will be subject to a process of public notice and comment, which generally takes several months to complete, and will not become effective until after the publication of a final revised rule.

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. District Court Upholds the SEC's Conflict Minerals Rule

On July 23, 2013, the District Court for the District of Columbia upheld Rule 13p-1 under the Exchange Act, which was promulgated by the SEC pursuant to Section 1502 of the Dodd-Frank Act. Rule 13p-1 requires issuers to disclose their use of coltan, cassiterite, gold and wolframite originating in the

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Democratic Republic of the Congo or an adjoining country ("Conflict Minerals") in their manufactured products.

While the plaintiffs may appeal the District Court's decision to the Court of Appeals for the District of Columbia, issuers should continue to prepare to comply with Rule 13p-1, as Rule 13p-1 remains in effect and will require initial reports to be filed with the SEC by May 31, 2014.

For a more detailed summary of the District Court ruling upholding the SEC disclosure requirements regarding the use of Conflict Minerals, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1745577/24july13.pdf

3. Elimination of the Prohibition Against General Solicitation and General Advertising

On July 10, 2013, the SEC adopted final rules under Section 201(a) of the Jumpstart Our Business Startups Act (the "JOBS Act") eliminating the prohibition against general solicitation and general advertising (collectively, "general solicitation") in private offerings made in reliance on Rule 144A and Rule 506 of Regulation D under the Securities Act of 1933, as amended (the "Securities Act"). The rules came into effect on September 23, 2013.

Rule 144A Offerings. The amendment to Rule 144A eliminates the requirement that offers be limited to "qualified institutional buyers" ("QIBs"). As amended, Rule 144A requires only that sales be limited to QIBs or to purchasers that the seller and any person acting on behalf of the seller reasonably believe are QIBs. The net effect of the change is that Rule 144A offering may be conducted using general solicitation.

The new rules also allow a private placement under Rule 144A to occur concurrently with or immediately following a public offering in a manner that would not otherwise be permitted. For example, an issuer that is considering an initial public offering would be free to file a registration statement without being precluded from discussing private investment opportunities with a potential investor, even if that investor became aware of the issuer only because of the filing.

Regulation D Offerings. Under the previously existing safe harbor exemptions of Regulation D, an issuer relying on Rule 506 could offer and sell securities to accredited investors, but could not engage in any general solicitation in doing so. The final rules create new Rule 506(c), which provides an additional exemption from registration for offerings marketed using general solicitation, provided that: (i) the issuer takes reasonable steps to verify that the purchasers of the securities are accredited investors; and (ii) all of the ultimate purchasers of the securities are accredited investors or the issuer reasonably believes that they are at the time of sale. The determination of the reasonableness of the steps taken to verify an accredited investor is a subjective assessment by an issuer. However, the final rules set forth a non-exclusive and non-mandatory list of methods that are deemed to satisfy the verification requirement for purchasers who are natural persons.

For a more detailed summary of the practical considerations of the elimination of the ban on general solicitation in Rule 144A and Rule 506 offerings by corporate issuers, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1754744/26july13_jobs.pdf

4. Disqualification of "Bad Actors" from Regulation D Safe Harbor

The SEC approved final rules to disqualify securities offerings involving certain felons and other "bad actors" from qualifying for the Regulation D safe harbor provided by Rule 506. The rules came into effect on September 23, 2013. If the issuer or other relevant persons, such as underwriters, placement agents and the directors, officers and significant shareholders of the issuer, have been convicted of, or are subject to, court or administrative sanctions for securities fraud or other violations of specified laws, then Rule 506 will not be available. An offering will not be disqualified for triggering events that occurred before September 23, 2013; however, under newly adopted Rule 506(e), matters that existed before such date that would otherwise be disqualifying must be disclosed to investors in an offering with "reasonable prominence."

For a more detailed discussion of the rules disqualifying felons and other "bad actors" from Rule 506 offerings, see the Paul, Weiss memorandum at:
http://www.paulweiss.com/media/1717486/17july13_sec.pdf

On September 19, 2013, SEC published a Small Entity Compliance Guide, *Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings and Related Disclosure Requirements*. This guide is designed as an outline to help issuers understand and comply with the "bad actor" disqualification and disclosure provisions of Rule 506 of Regulation D.

To access the SEC compliance guide, see the SEC website at:
http://www.sec.gov/info/smallbus/secg/bad-actor-small-entity-compliance-guide.htm

5. Proposed Regulation D and Form D Amendments

The SEC has proposed certain amendments to Regulation D and Form D under the Securities Act. The proposed amendments are intended to enhance the SEC's ability to evaluate changes in the market and to address the development of market practices in Rule 506 offerings. The SEC proposed amendments to Form D that would require additional information from issuers, i.e., the types of general solicitation used and the methods used to verify the accredited investor status of investors. An issuer relying on new Rule 506(c) would also be required to file a Form D with the SEC no later than 15 days prior to commencing a Rule 506(c) offering and an amended Form D within 30 days following the completion of the offering. The SEC also proposed disqualifying issuers from relying on Regulation D for one year if they fail to file Form D. Additional legends and disclosures would be required in all offering materials relying on Rule 506(c). In addition, the SEC is proposing on a temporary basis (expiring two years after the effective date of the

rule) that an issuer relying on Rule 506(c) would be required to file all general solicitation materials with the SEC. Due to the high level of public interest in the proposal regarding the proposed amendments, the SEC extended the comment period to November 4, 2013.

For a more detailed discussion of the proposed amendments to Regulation D and Form D, see the Paul, Weiss memorandum at:
http://www.paulweiss.com/media/1717486/17july13_sec.pdf

6. Chair of the SEC Suggests a Review of SEC Mining Disclosure May Be Appropriate

In October 2012, the Society for Mining, Metallurgy and Exploration (the "SME") petitioned the SEC to amend Industry Guide 7, which contains the SEC's supplemental disclosure requirements for mining companies. In its petition, the SME argued that Industry Guide 7 had become increasingly outdated, to the detriment of U.S. mining companies and investors alike. The SME's petition followed almost ten years of discussions and submissions in which the SME recommended the modernization, in some form, of Industry Guide 7 to no avail. In a recent speech to the National Association of Corporate Directors, Mary Jo White, the Chair of the SEC, suggested that the SEC should consider whether investors would benefit from disclosure that is more tailored to particular industries. She noted that the SEC industry guides which contain industry-specific disclosure requirements have not been revised at a pace to keep up with the changes in those industries. The Chair noted the update of the oil and gas disclosure requirements in 2008 and suggested other guides may also need updating. The Chair noted that many foreign jurisdictions use reserve and resource reporting standards developed by the international mining community and asked whether the SEC's rules regarding mining disclosure should be modeled on such international standards.

We will provide updates with any developments on this topic.

For the full text of Ms. White's, see the SEC website at:
http://www.sec.gov/News/Speech/Detail/Speech/1370539878806

7. U.S. Court of Appeals for the Second Circuit Holds that Section 10(b) of the Exchange Act Applies Only to Conduct in the United States, Regardless of Nature of Liability

In its 2010 decision in *Morrison* v. *National Australia Bank*, 130 S. Ct. 2869 (2010), the Supreme Court addressed whether Section 10(b) of the Exchange Act, applies to a securities transaction involving foreign investors, foreign issuers and/or securities traded on foreign exchanges. The *Morrison* decision curtailed the extraterritorial application of the federal securities laws by holding that Section 10(b) applies only to (a) transactions in securities listed on domestic exchanges or (b) domestic transactions in other securities.

On September 4, 2013, the U.S. Court of Appeals for the Second Circuit issued its latest interpretation of *Morrison*. The Court held that Section 10(b) of the Exchange Act and its implementing regulations apply only to conduct in the United States, regardless of whether liability is sought criminally or civilly. The decision came in *United States* v. *Vilar*, 10-521-cr, where the circuit was reviewing the criminal convictions of Alberto Vilar and Gary Alan Tanaka for a multi-million dollar fraud scheme that occurred both inside and outside of the United States.

For a summary of prior interpretations of *Morrison*, see the Paul, Weiss memorandum at:
http://www.paulweiss.com/media/103257/5Mar12Memo.pdf

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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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