January 7, 2014

2013 U.S. Legal and Regulatory Developments

The following is our annual summary of significant U.S. legal and regulatory developments during 2013 of interest to Canadian companies and their advisors.

1. Elimination of the Prohibition Against General Solicitation and General Advertising in Certain Private Offerings

On July 10, 2013, the Securities and Exchange Commission (the "SEC") adopted final rules under Section 201(a) of the Jumpstart Our Business Startups Act (the "JOBS Act") eliminating the longstanding prohibition against general solicitation and general advertising (collectively, "general solicitation") in private offerings of securities made in reliance on Rule 144A or 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 eliminated 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 effect of the change is that a Rule 144A offering may be conducted using general solicitation. As a practical matter, we do not expect that market participants will routinely use general solicitation in Rule 144A offerings, but the rule change means that an inadvertent general solicitation will not make the Rule 144A exemption unavailable as it may have in the past. Use of general solicitation is likely to be further limited by the fact that the use of general solicitation in Rule 144A offerings by issuers that do not file reports with the SEC could require registration or qualification under most state "blue sky" laws.

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

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the ultimate purchasers of the securities are accredited investors or the issuer reasonably believes that they are at the time of sale. The final rules did not include a bright line standard by which an issuer could verify that a prospective purchaser is an accredited investor. Instead, 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, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1754744/26july13_jobs.pdf

2. Disqualification of "Bad Actors" from the Regulation D Private Offering Safe Harbor

On July 10, 2013, the SEC adopted final rules to disqualify securities offerings involving certain felons and other "bad actors" from qualifying for the Regulation D private offering 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 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." As a practical matter, it may be difficult for large institutions such as banks acting as underwriters or placement agents to be confident they do not trip the "bad actor" provisions without engaging in extensive internal diligence exercises. As a result, we expect that some offerings that in the past would have been conducted as Regulation D offerings may now be structured as private placements outside of the Regulation D safe harbor.

For a more detailed discussion of the rules disqualifying "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, the 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

3. NYSE and Nasdaq Adopt New Compensation Committee Rules

As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") and related SEC rules, the NYSE and Nasdaq adopted new listing standards related to compensation committee independence and responsibilities. The standards adopted by both the NYSE

and Nasdaq specify factors that boards must consider in determining compensation committee independence, rather than imposing mandatory independence standards. Following SEC approval of an amendment to its proposed rules on December 11, 2013, Nasdaq adopted the same approach as the NYSE, requiring compensation committees to consider any compensation received by a compensation committee member, rather than adopting a strict prohibition on compensatory fees. Companies have until the earlier of (i) their first annual meeting of shareholders after January 15, 2014 and (ii) October 31, 2014 to comply with the new compensation committee member independence requirements of both exchanges. 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 website. A Canadian issuer that files an annual report on Form 20-F must include the disclosure in its annual report.

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

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/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_4_3_8_3&manual=%2FNASDAQ%2Fmain%2Fnasdaq-equityrules%2F

4. SEC Elects Not to Appeal Court Decision Vacating Rule Requiring Disclosure of Government Payments by Resource Companies

The SEC 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 in 2012, having been mandated by Section 1504 of 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 the Dodd-Frank Act, including the District Court's interpretation of Section 13(q) of the Exchange Act, under which Rule 13q-1 was promulgated. 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.

The SEC did not include the new Section 13(q) rule-making in its 2014 agenda. Consequently, it is unclear when the SEC will publish a new rule proposal. We expect that any 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 vacating Rule 13q-1, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1702640/2-jul-13.pdf

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

On August 13, 2013, the plaintiffs filed an appeal of the District Court's decision with the Court of Appeals for the District of Columbia. Under the briefing schedule set by the Court of Appeals, we do not expect a decision from that Court until the first quarter of 2014. Given that Rule 13p-1 remains in effect, issuers should continue to prepare to comply with the rule so that they can file their initial reports on Form SD with the SEC by May 31, 2014, as required by the rule.

The SEC Staff released twelve FAQs on May 30, 2013 to provide further guidance on Rule 13p-1. Notably, the FAQs clarified that even voluntary SEC filers are required to comply with Rule 13p-1, and the exception from the rule for issuers that mine conflict minerals applies broadly 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.

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

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

6. SEC Chair 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 the SEC's Industry Guide 7, which contains supplemental disclosure requirements for mining companies that report with the SEC on Form 10-K or, with some exceptions, on Form 20-F. 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. On October 15, 2013, in a speech to the National Association of Corporate Directors, SEC Chair Mary Jo White said 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.

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

7. ISDA Issues New Protocol on Swap-Trading Regulations

The International Swaps and Derivatives Association ("ISDA") issued its March 2013 Dodd-Frank Protocol (the "March Protocol") outlining coverage and adherence mechanisms for the Dodd-Frank Act's newly finalized swap-trading regulations. The regulations came 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 to submit exchange protocol-related information in the form of 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

8. Final "Volcker Rule" Adopted

On December 10, 2013, the Board of Governors of the Federal Reserve System (the "Fed Board"), the Federal Deposit Insurance Corporation (the "FDIC"), the Office of the Comptroller of the Currency, the SEC and the Commodities Futures Trading Commission jointly issued the final rule implementing Section 619 of the Dodd-Frank Act, also known as the "Volcker Rule." The final rule prohibits banking entities from (i) owning, sponsoring, or having certain relationships with hedge funds and private equity funds (referred to as "covered funds"); and (ii) engaging in short-term proprietary trading of securities, derivatives, commodity futures and options on these instruments for their own account.

The final rule regulates "banking entities," which are defined principally in terms of having certain relationships to a bank that receives FDIC deposit insurance, referred to as an "insured depository

institution." Covered banking entities include insured depository institutions themselves; bank holding companies and entities that control insured depository institutions; and affiliates or subsidiaries of the foregoing banking entities. Thus, the entire corporate organizational structure associated in these ways with an insured depository institution or bank holding company is subject to the final rule.

The final rule limits the category of non-U.S. funds that are considered "covered funds" to certain non-U.S. funds that are sponsored or owned, directly or indirectly, by U.S. banking entities (other than foreign public funds), and clarifies that non-U.S. banking entities engaged in trading activities outside the United States are allowed to conduct proprietary trades on U.S. exchanges and clearing facilities.

The final rule will become effective on April 1, 2014; however, the Fed Board has extended the general compliance deadline to July 21, 2015.

For a more detailed summary of the final Volcker rule, see the Paul, Weiss memorandum at:
http://www.paulweiss.com/media/2252387/23-dec-13vlckr.pdf

For the full text of the final rule, see:
http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20131210a1.pdf

9. 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 U.S. 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 important anti-fraud provisions of the U.S. 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 an important 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 Court was reviewing the criminal convictions of Alberto Vilar and Gary Alan Tanaka for a multimillion-dollar fraud scheme that occurred both inside and outside the United States.

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

10. SEC Clarifies Position on Corporate Communications through Social Media

On April 2, 2013, 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 Netflix content licensing team for exceeding one billion monthly viewing hours for the first time. At the time of his Facebook post, Netflix had not filed a Form 8-K or issued a press release disclosing this information. In the Report, the SEC 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 SEC 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 we have been advised that dissemination by a Canadian issuer 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

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

On June 26, 2013, the U.S. Supreme Court by a 5-4 majority struck down a key provision of the U.S. 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, whom she married in Toronto in 2007. However, because section three of DOMA defined marriage as "a legal union between one man and one woman as husband and wife," Windsor was obligated to pay more than US$360,000 in federal estate taxes following Spyer's death, solely because her spouse was a woman and not a man.

In the Court's majority opinion in *Windsor*, Justice Kennedy explained that the status of being a married gay person is "a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed … worthy of dignity in the community equal with all other marriages." The consequences of the *Windsor* decision have been both rapid and widespread. Lower courts throughout the United States, including in New Jersey, Ohio, New Mexico and Utah, have held, relying on *Windsor*, that gay couples should have equal rights in marriage.

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

12. 2013 Amendments to the Delaware General Corporation Law

The Delaware General Assembly adopted several important amendments to the Delaware General Corporation Law (the "DGCL") and the Delaware Limited Liability Company Act (the "DLLCA") in 2013. The most significant amendment is new Section 251(h) of the DGCL, which in many instances eliminates the need for a target shareholder vote on a back-end merger following a tender or exchange offer for a publicly traded Delaware target in which the acquiror obtained sufficient shares to approve the merger agreement (generally, a majority of the outstanding shares) but less than the 90% necessary to effect a short-form, "squeeze-out" merger. This amendment not only eliminates the time and cost associated with obtaining a shareholder vote on a back-end merger but also facilitates the financing of two-step acquisitions because the tender offer and the merger can be closed substantially concurrently (generally, on the same day). Section 251(h) became effective on August 1, 2013.

For a more detailed discussion of the amendments to the DGCL and the DLLCA, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1743569/23july13.pdf

13. SEC Announces Enforcement Results for Fiscal Year 2013

On December 17, 2013, the SEC announced that its Enforcement Division filed 686 enforcement actions in the SEC's fiscal year ending September 30, 2013, resulting in a record US$3.4 billion in monetary sanctions ordered against wrongdoers, 10% higher than in fiscal 2012. The SEC also announced that it has a "strong pipeline" going into fiscal 2014, having opened 908 investigations last year (up 13%) and obtained 574 formal orders of investigation (up 20%). The SEC's Office of the Whistleblower received 3,238 tips in fiscal 2013 and paid more than US$14 million to whistleblowers whose information substantially advanced enforcement actions. Perhaps of most significance, during the last fiscal year the SEC announced a change in its longstanding "no admit/no deny" settlement policy and now will require admissions of misconduct in cases where the SEC is of the view that heightened accountability and acceptance of responsibility by a defendant are appropriate and in the public interest.

For more information, see the SEC news release at:
http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540503617#.UrIlLPRDtVk

14. Supreme Court to Consider Overruling "Fraud-on-the-Market" Presumption

On November 15, 2013, the U.S. Supreme Court granted leave to hear *Halliburton Co. v. Erica P. John Fund, Inc.*, raising the possibility that the Supreme Court may overrule or substantially modify the holding in *Basic Inc. v. Levinson* that recognizes a presumption of class-wide reliance derived from the "fraud-on-the market" theory. The "fraud-on-the-market" presumption enables potential plaintiffs to maintain a securities class action without having to prove that each individual shareholder actually relied on the challenged statements when making its purchase or sale of securities. Even if the Supreme Court ultimately affirms the "fraud-on-the-market" presumption, the Supreme Court may alter the structure of

the presumption or expand a defendant's ability to rebut the presumption and thereby prevent class certification by introducing evidence that the alleged misrepresentations did not distort the market price of an issuer's shares. The case is set for argument before the Supreme Court on March 5, 2014.

For a more detailed discussion of securities class action certification and the holding in *Basic*, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1521304/28feb13amgen.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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