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2010 U.S. Legal and Regulatory Developments Affecting Canadian Companies

The following is a summary of significant U.S. legal and regulatory developments affecting Canadian companies during 2010.

The most significant U.S. legal and regulatory development of 2010 was the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which was signed into law by President Obama on July 21, 2010. The Dodd-Frank Act reformulates the structure of federal financial regulation in the United States, and contains new regulatory and substantive requirements applicable to a wide range of market participants. In this memorandum, we are addressing only provisions of the Dodd-Frank Act that are relevant to Canadian issuers that are not financial institutions. For a comprehensive overview of the Dodd-Frank Act, see http://www.paulweiss.com/files/upload/Dodd-FrankBrochure-Aug10.pdf, and for a discussion of the most relevant provisions of the Dodd-Frank Act for foreign private issuers, see http://www.paulweiss.com/files/upload/30Jul10SEC.pdf

1. **Disclosure Requirements Relating to Governmental Payments by Resource Extraction Companies, Conflict Minerals and Mine Safety:** Responding to the Dodd-Frank Act requirement, in December 2010 the SEC proposed new disclosure rules for U.S. and non-U.S. companies that file reports with the SEC (including Canadian companies filing on Form 40-F) relating to (i) governmental payments made in connection with oil, natural gas and mineral extraction activities, (ii) the use of "conflict minerals" originating in the Democratic Republic of Congo ("DRC") or adjoining countries and (iii) mine safety.

    - **Governmental Payments by Resource Extraction Companies:** The Dodd-Frank Act requires disclosure of certain payments by resource extraction companies to governments for the commercial development of oil, natural gas and minerals. Specifically, taxes, royalties, fees (including license fees), production entitlements, bonuses and other material benefits must be disclosed. Assuming that the SEC adopts rules in April 2011 (the current deadline), an issuer with a fiscal year ending on December 31 would have to provide its first disclosure together with its annual report after the end of its December 31, 2012 fiscal year.

For a discussion of the proposed rules, see http://www.paulweiss.com/files/upload/10Jan11Payments.pdf

- **Conflict Minerals:** SEC reporting companies will need to disclose annually whether conflict materials that are necessary to the functionality or production of their products originated in the DRC or an adjoining country. If a company determines that conflict materials used in its products originate in the DRC or an adjoining country, it will need to disclose additional information in an independently audited report to the SEC, which must also be published on the company's website. Assuming that the SEC adopts rules in April 2011 (the current deadline), an issuer with a fiscal year ending on December 31 would have to provide its first disclosure in its annual report after the end of its December 31, 2012 fiscal year. Our memorandum discussing the proposed rules will be available shortly.

- **Mine Safety:** The Dodd-Frank Act also requires disclosure about mine safety and related information. Rules proposed by the SEC in December 2010 make it clear that such disclosure requirements will apply only to Canadian issuers who file periodic reports with the SEC *and* who operate mines in the United States subject to regulation under the Federal Mine Safety and Health Act of 1977. For a discussion of the proposed rules, see http://www.paulweiss.com/files/upload/10Jan11Safety.pdf

2. **Executive Compensation Clawbacks:** The Dodd-Frank Act contains a requirement for U.S. listed companies, including Canadian companies, to develop, implement and disclose policies with respect to the clawback of incentive-based compensation paid to current or former executive officers following a restatement of an issuer's financial statements due to material non-compliance by the company with financial reporting requirements. These rules will apply to incentive-based compensation (including stock options) paid during the three-year period preceding the restatement. This provision is significantly broader than the clawback provision of the Sarbanes-Oxley Act of 2002, which only applies to compensation received by the CEO and CFO during the 12 month period following the first issuance of the restatement, and only if such restatement resulted from misconduct. There is not currently an effective date or rulemaking deadline with respect to this provision, but additional guidance from the SEC and U.S. stock exchanges regarding this expanded clawback provision should be forthcoming.

3. **Whistleblower Rules:** In November 2010, the SEC proposed rules to implement whistleblower provisions mandated by the Dodd-Frank Act, which direct the SEC to provide monetary awards to whistleblowers who voluntarily provide the SEC with

"original information" about violations of securities laws that lead to successful administrative or judicial enforcement actions resulting in monetary sanctions exceeding U.S.$1 million. The proposed rules contain substantive and procedural requirements that whistleblowers must meet in order to qualify for monetary rewards, including requirements designed to address concerns that the whistleblower provisions could encourage employees to avoid reporting violations through in-house compliance programs in order to receive a monetary reward. For instance, the proposed rules would consider whistleblowers to have reported original information provided that the whistleblower reports to the SEC within 90 days of reporting internally. Whistleblower awards will be available for any information provided to the SEC after the July 21, 2010 enactment of the Dodd-Frank Act. For a discussion of the proposed rules, see http://www.paulweiss.com/files/upload/10Nov10SEC.pdf

4. **Use of Credit Ratings in Securities Offerings:** The Dodd-Frank Act nullified Rule 436(g) under the Securities Act of 1933, as amended (the "Securities Act"). Rule 436(g) provided that credit rating agencies were exempt from being treated as "experts" for purposes of liability under the securities laws with respect to information contained in registration statements. Before the nullification of Rule 436(g), credit ratings agencies were not required to provide written consent to the inclusion of their ratings in registration statements, and were not subject to liability under Section 11 of the Securities Act. As a result of the nullification, issuers must now either obtain consent of the relevant rating agencies or remove ratings information from their registration statements or other documents included or incorporated by reference therein.

   On behalf of our Canadian Form 40-F filer clients, Paul, Weiss has submitted a letter to the SEC requesting interpretive advice permitting Form 40-F filers (who are required by operation of Canadian law to include ratings information in their Annual Information Form that is incorporated by reference into the Form 40-F) to exclude ratings information from the Form 40-F. We expect a response from the SEC shortly. For a discussion of the use of credit ratings in securities offerings, see http://www.paulweiss.com/files/upload/26Jul10SEC.pdf

5. **Say-on-Pay and Say-on-Golden Parachute Requirements:** In October the SEC issued proposed rules to implement the advisory "say-on-pay" and "say-on-golden parachute" shareholder vote provisions required by the Dodd-Frank Act. Under the proposed rules, non-binding say-on-pay votes will be held at least every three years and say-on-golden parachute votes will be held at the time a business combination or sale of all or substantially all assets is voted upon. These proposed rules are only applicable to U.S. domestic reporting companies, but may, of course, influence Canadian company practices and Canadian shareholder expectations. Under the

Dodd-Frank Act, companies must include say-on-pay votes in any proxy statements for shareholder meetings taking place on or after January 21, 2011, irrespective of whether the SEC's proposed rules are effective at that time. For a discussion of the say-on-pay and say-on-golden parachute requirements, see http://www.paulweiss.com/files/upload/25-Oct-10SOP.pdf

6. **New Proxy Access Procedures and Related Rules:** On August 25, the SEC approved final rules establishing a federally mandated procedure to allow shareholders to access a company's proxy materials in order to nominate not more than a minority of directors for election in opposition to the board's nominees. These rules have not yet been implemented by the SEC as they are currently facing legal challenges in the U.S. Court of Appeals for the District of Columbia Circuit on several grounds, including constitutional grounds. Like the say-on-pay and say-on-golden parachute rules, the proxy access provisions of the Dodd-Frank Act apply only to U.S. domestic companies. For more information on the proxy access procedures and rules, see http://www.paulweiss.com/files/upload/3-Sept-10_SEC.pdf

7. **Internal Control Over Financial Reporting for Non-Accelerated Filers:** As directed by the Dodd-Frank Act, in September the SEC amended its rules and forms to provide that an audit report prepared for a "non-accelerated filer" does not need to include an attestation and report by an independent auditor on management's assessment of internal controls over financial reporting. Forms 40-F and 20-F have been revised to reflect this change. Canadian issuers that have not listed their equity on a U.S. stock exchange will, as a general matter, be "non-accelerated filers", and the amended rules could thus enhance the desirability for Canadian issuers to raise capital by issuing debt securities (including high-yield debt securities) in the United States. These revisions became effective on September 21, 2010.

8. **Extraterritorial Application of U.S. Securities Laws:** Certain provisions of the Dodd-Frank Act raise questions about the extent to which U.S. securities laws apply extraterritorially. On June 24, 2010 the U.S. Supreme Court highlighted the limitations of the extraterritorial application of U.S. securities laws in its decision in *Morrison v. National Australia Bank*. In *Morrison*, the Supreme Court found that the liability provisions of Section 10(b) (and Rule 10b-5) of the Exchange Act would not reach conduct involving a non-U.S. plaintiff and a non-U.S. defendant in circumstances where securities were not listed on a U.S. exchange and all aspects of the purchase of securities in question occurred outside the United States. However, the Dodd-Frank Act seeks to expressly provide for U.S. jurisdiction in circumstances where significant elements of a violation occurred outside the United States as long as such cases are brought by the SEC or the U.S. Department of Justice and either (i) there

has been conduct in the United States in furtherance of a potential violation or (ii) there has been a foreseeable substantial effect on the United States.

In addition to the Dodd-Frank-related developments mentioned above, the following 2010 U.S. legal and regulatory developments may be of interest:

9. **New Cooperation Mechanisms for Enforcement Investigations and Proceedings:** In January 2010, the SEC's Director of Enforcement unveiled a new set of enforcement policies and procedures to use in order to encourage cooperation by individuals and companies in the Enforcement Division's investigations. Along with the whistleblower provisions of the Dodd-Frank Act, this initiative represents an increasing trend in the United States for regulators to actively seek the cooperation of individuals in the identification of potential violations and illegal activity. For a discussion of the new cooperation mechanisms, see http://www.paulweiss.com/files/upload/PW19Jan10_SEC.pdf

10. **Statement on Global Accounting Standards:** In February 2010, the SEC issued a statement reaffirming its commitment to the goal of a single set of high-quality global accounting standards, acknowledging that International Financial Reporting Standards ("IFRS"), rather than U.S. GAAP, would likely serve as that set of standards for the U.S. capital markets in the coming years. For a discussion of the SEC statement on global accounting standards, see http://www.paulweiss.com/files/upload/26-Feb-10_SEC_r.pdf

11. **Interpretive Guidance on Climate Change Disclosure:** In February 2010, the SEC published guidance outlining its interpretation of existing disclosure requirements as they apply to climate change matters. The SEC indicated that SEC registrants should, if material, disclose in their risk factors, description of business, MD&A and description of legal proceedings, the actual and potential impact and risks relating to:

    - Existing and proposed domestic legislation and regulations as well as international accords relating to climate change;
    - Business trends associated with climate change; and
    - Physical effects of climate change such as effects on the severity of weather, sea levels, arability of farmland and water quality and availability.

    For a discussion of the interpretive guidance on climate change disclosure, see http://www.paulweiss.com/files/upload/PW_9Feb10_SEC.pdf

12. **Additional Guidance on eXtensible Business Reporting Language (XBRL):** In September 2010, the SEC updated its compliance and disclosure interpretations related to financial statement information in an interactive data format based on XBRL. The interpretations provide additional guidance on how a filer should determine when it is required to submit interactive data and to detail tag financial statement footnotes and schedules. Canadian companies filing reports with the SEC that prepare their primary financial statements using International Financial Reporting Standards must include XBRL data as part of their From 20-F or 40-F for fiscal periods ending on or after June 15, 2011. The SEC guidance is available at http://www.sec.gov/divisions/corpfin/guidance/interactivedatainterp.htm, and for more information on the XBRL requirements, including their application to Canadian companies, see http://www.paulweiss.com/resources/pubs/detail.aspx?publication=2250.

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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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