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2011 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 2011.

Dodd-Frank Progress Report. *There was much discussion in 2011 regarding rulemaking by the Securities and Exchange Commission (the "SEC") under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which was signed into law on July 21, 2010. The SEC has now proposed or adopted more than three-quarters of the rules that Dodd-Frank requires the agency to write. In this memorandum, we address certain of the year's key Dodd-Frank developments that are relevant to our Canadian clients. For a status report on the implementation of Dodd-Frank, see http://www.sec.gov/spotlight/dodd-frank.shtml.*

1. **SEC Adopts Dodd-Frank Mine Safety Disclosure Requirements.** On December 21, 2011, the SEC adopted new rules outlining how mining companies must disclose the information required by Section 1503 of Dodd-Frank about mine safety and health in quarterly and annual reports filed with the SEC. The SEC rules require mining companies to provide mine-by-mine totals for the following:

   - Significant and substantial violations of mandatory health or safety standards under Section 104 of the Federal Mine Safety and Health Act of 1977 (the "Mine Act") for which the operator received a citation from the Mine Safety and Health Administration (the "MSHA");
   - Orders under Section 104(b) of the Mine Act;
   - Citations and orders for unwarrantable failure of the mine operator to comply with Section 104(d) of the Mine Act;
   - Flagrant violations under Section 110(b)(2) of the Mine Act;
   - Imminent danger orders issued under Section 107(a) of the Mine Act;
   - The dollar value of proposed assessments from the MSHA;
   - Notices from the MSHA of a pattern of violations or potential to have a pattern of violations under Section 104(e) of the Mine Act;

- Pending legal actions before the Federal Mine Safety and Health Review Commission; and
- Mining-related fatalities.

The new SEC rules will take effect January 27, 2012. For more information, see the Paul, Weiss memorandum at http://www.paulweiss.com/files/upload/23Dec11DF.pdf.

2. **SEC Delays Implementation of Rules Regarding Conflict Mineral Disclosure and Disclosure by Resource Extraction Issuers.** On December 30, 2011, the SEC updated its Dodd-Frank implementation schedule to reflect that it plans to adopt final rules under Section 1502 of Dodd-Frank, the conflict minerals provision, and Section 1504 of Dodd-Frank, the resource extraction issuers provision, sometime between January and June 2012, instead of in 2011 as previously planned. Section 1502 relates to reporting requirements in connection with the use of "conflict minerals" that originate from the Democratic Republic of Congo and adjoining countries and requires affected companies to make conflict minerals disclosure beginning with their first full fiscal year that starts after the SEC adopts final rules. If the final rules related to Section 1502 are adopted in 2012, issuers with calendar year-ends would be required to provide the requisite conflict minerals disclosure starting with their annual reports for the year ending December 31, 2013, which would be filed in the first quarter of 2014. Section 1504 requires disclosure of certain payments made by resource extraction companies to governments for the commercial development of oil, natural gas or minerals and requires affected companies to provide the government payments disclosure beginning with their first full fiscal year that starts after the SEC adopts the final rules. If the final rules related to Section 1504 are adopted in 2012, issuers with calendar year-ends would be required to furnish the requisite disclosure as an exhibit to their annual reports for the year ending December 31, 2013. For more information on the proposed rules with respect to Section 1502 of Dodd-Frank, see the Paul, Weiss memorandum at http://www.paulweiss.com/files/upload/20Sep11Alert.pdf, and with respect to Section 1504 of Dodd-Frank, see the Paul, Weiss memorandum at http://www.paulweiss.com/files/upload/10Jan11Payments.pdf.

3. **SEC Releases Annual Report on Dodd-Frank Whistleblower Program.** In November 2011, the SEC released its first "Annual Report on the Dodd-Frank Whistleblower Program." The report addresses whistleblower complaints filed with the Office of the Whistleblower, SEC responses to such complaints, the number of whistleblower awards granted, and the remaining balance of the Investor Protection Fund. According to the report, during the seven weeks of whistleblower tip data available for fiscal year 2011, the Office of the Whistleblower received 334 tips, with the most common complaints being market manipulation, corporate disclosures, and

offering fraud. While whistleblowers who contribute to the success of an action resulting in over $1 million in sanctions are eligible for monetary awards under the program, no awards have been paid this year because the application period has not yet passed. For more information, see the report at http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf, and the Paul, Weiss memorandum at www.paulweiss.com/files/upload/3Jun11SEC.pdf.

4. **SEC Adopts Say-On-Pay under Dodd-Frank.** Mandatory say-on-pay went into effect for most U.S. companies this past proxy season and will continue to play a role at shareholder meetings for the foreseeable future as the vast majority of companies has chosen to allow annual pay votes. Approximately 98% of companies subject to say-on-pay last year received approval of their compensation packages, and we do not anticipate that trend changing significantly in 2012. Say-on-pay votes will likely continue to serve as a proxy for shareholders' overall satisfaction. We expect that negative say-on-pay votes will continue to substitute for "withhold" campaigns against directors as a means of expressing general dissatisfaction with a company or with respect to specific pay/performance disconnects, poor pay practices, or poor compensation disclosure. We also note that a 70% approval rating has become a de facto "floor" for the say-on-pay vote, and any company that receives a vote in that range should expect to be actively engaged with shareholders on this issue.

While these rules do not apply to foreign private issuers, how the say-on-pay vote evolves in the U.S. will still be of interest to Canadian issuers from a "best practices" perspective. For more information on the say-on-pay rule, see the Paul, Weiss memorandum at http://www.paulweiss.com/files/upload/7-Feb-11_SOP.pdf.

5. **SEC Adopts Net Worth Standard for Accredited Investors under Dodd-Frank.** On December 21, 2011, the SEC amended its rules to exclude the value of an individual's primary residence from net worth calculations used to determine whether an individual may invest in certain unregistered securities offerings. The changes were made to conform the SEC's definition of an "accredited investor" to the requirements of Dodd-Frank. SEC rules permit certain private and limited offerings to be made without registration, and without requiring specified disclosures, if sales are made only to "accredited investors." One of the ways an individual may qualify as an "accredited investor" is by having a net worth of at least $1 million. Under the amended net worth calculation, a person's primary residence shall not be included as an asset. In addition, indebtedness secured by the person's primary residence, up to the estimated fair market value of the primary residence, is not treated as a liability, unless the borrowing occurs in the 60 days preceding the purchase of securities in the exempt offering and is not in connection with the acquisition of the primary residence. In such cases, the debt secured by the primary residence must be treated as a liability in the net worth calculation. This is intended to prevent manipulation of

the net worth standard by eliminating the ability of individuals to inflate net worth under the new definition by borrowing against home equity shortly before participating in an exempt securities offering. In addition, any indebtedness secured by a person's primary residence in excess of the property's estimated fair market value is treated as a liability under the new definition. The amended net worth standard will take effect February 27, 2012. For more information, see the Paul, Weiss memoranda at http://www.paulweiss.com/files/upload/6Jan12SEC.pdf.

6. **SEC Adopts Final Rules Implementing Advisers Act Provisions of Dodd-Frank.** On June 22, 2011, the SEC adopted final rules and amendments under the Investment Advisers Act of 1940, as amended (the "1940 Act"), implementing the provisions of Title IV of Dodd-Frank. The final rules repeal the Private Advisor Exemption of the 1940 Act and require certain advisers to private equity funds, hedge funds, and other private funds to register as investment advisers with the SEC. The rules do establish exemptions from SEC registration for venture capital fund advisers and private fund advisers with assets under management of less than $150 million and non-U.S. private fund advisers.

The final rules provide that an investment adviser whose principal office and place of business is outside of the United States (a "non-U.S. adviser") will be eligible to use the exemption so long as all of such non-U.S. adviser's clients that are U.S. persons are qualifying private funds – even if the adviser has non-U.S. clients that are not qualifying private funds. In determining whether less than $150 million of assets are managed, a non-U.S. adviser would only need to count assets it manages from a place of business in the United States. The final rule contains a note that clarifies that a client will not be considered a U.S. person if the client was not a U.S. person at the time of becoming a client of the adviser. This will permit a non-U.S. adviser to continue to rely on the exemption if a non-U.S. client that is not a private fund relocates to the United States or otherwise becomes a U.S. person. The final rules extend until March 30, 2012, the deadline for SEC registration for investment advisers that will no longer be exempt from SEC registration as a result of the repeal of the "Private Adviser Exemption" of the 1940 Act.

See the Paul, Weiss memoranda for more information about the final rules (http://www.paulweiss.com/files/upload/25-Jul-11 SEC.pdf) and for the implications for non-U.S. advisers (http://www.paulweiss.com/files/upload/21Dec10DF_Non-US.pdf).

Other Developments. *In addition to the Dodd-Frank-related activity discussed above, the following 2011 U.S. legal and regulatory developments may be of interest to our Canadian clients:*

7. **SEC Guidance on Disclosure Obligations Relating to Cybersecurity Risks and Cyber Incidents.** The Staff of the SEC's Division of Corporation Finance issued written guidance, which applies to both U.S. domestic companies and foreign private issuers, setting forth the views of the Staff regarding disclosure obligations in respect of cybersecurity risks and cyber incidents. The guidance is the result of heightened risks related to cybersecurity and the increase in the frequency and severity of cyber incidents. These risks, in turn, have prompted registrants, counsel, and auditors to focus on providing appropriate public disclosure without further compromising cybersecurity by conveying a roadmap to hackers through disclosures of vulnerabilities of systems and networks. The guidance is intended to assist registrants in preparing disclosure under both the Securities Act of 1933, as amended, and the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The SEC has provided the following guidance:

   - **Risk Factors.** The risk of cyber incidents should be disclosed in SEC filings if these issues are among the significant factors that make an investment in the registrant speculative or risky.

   - **MD&A.** To the extent that the costs or other consequences of known or threatened cyber incidents represent a material event, trend or uncertainty that is reasonably likely to have a material effect on the results of operations, liquidity or financial condition or would cause reported financial information not to be necessarily indicative of future operating results or financial condition, a registrant should address cybersecurity risks and cyber incidents in its MD&A.

   - **Business Description.** If one or more cyber incidents materially affect a registrant's products, services, relationships with customers or suppliers or competitive conditions, disclosure related to such cyber incident(s) should be included in the registrant's "Description of Business."

   - **Legal Proceedings.** If a material pending legal proceeding to which a registrant or one of its subsidiaries is a party involves a cyber incident, the registrant may need to provide disclosure as part of "Legal Proceedings."

   - **Financial Statement Disclosure.** Cybersecurity risks and cyber incidents may have a broad impact on a registrant's financial statements, before, during, and after any such incident and to the extent substantial costs are incurred, such costs may be required to be considered and accounted for under applicable accounting standards. To the extent the impact of a cyber incident is not readily known, a registrant may be required to develop estimates in preparing its financial statements and should subsequently reassess the assumptions that underlie such estimates.

- **Disclosure Controls and Procedures.** A registrant should consider the impact of any cyber attack on its ability to record, process, summarize, and report information that is required to be disclosed in SEC filings, and if there is an adverse impact on such ability, whether that renders the disclosure controls and procedures ineffective.

For more information, see the Paul, Weiss memorandum at http://www.paulweiss.com/files/upload/19-Oct-11SEC.pdf. Also see the article by our London-based securities partner Mark Bergman and associate Jillian Lutzy which appeared in the November issue of *BNA International*'s "World Data Protection Report" at http://www.paulweiss.com/mark-bergman-and-jillian-lutzy-publish-article-on-sec-cybersecurity-disclosures-12-07-2011/.

8. **Delay of Implementation of XBRL for IFRS Filers.** In April 2011, the SEC issued a no-action letter providing relief to foreign private issuers that prepare their financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board from submitting to the SEC and posting on their corporate websites, if any, Interactive Data Files, or XBRL, until the SEC specifies a taxonomy for use by such foreign private issuers. As of the date of publication, the SEC has not issued a timetable for issuance of the XBRL taxonomy. To view the SEC no-action letter, see http://www.sec.gov/divisions/corpfin/cf-noaction/2011/caq040811.htm.

9. **Disclosure Trends.** 2011 saw increased pressure on both U.S. companies and foreign private issuers to provide transparent disclosure relating to corporate governance practices and to align their governance regimes and disclosures with emerging global trends, evolving market standards, and increased stakeholder activism. Say-on-pay and new disclosure requirements applicable to U.S. companies regarding board leadership and the role of the board in risk oversight reflect feedback from institutional investors and other stakeholders who increasingly want to understand a board's leadership structure, the ways in which a public company identifies and manages risk, and the board's role in risk oversight. Even absent mandatory requirements, there is increasing pressure on foreign private issuers to provide similar transparent disclosures. The mandatory adoption of say-on-pay for U.S. companies has prompted many foreign private issuers to rethink their executive

compensation programs and provide more transparent disclosure on compensation processes and the relationship of compensation to risk.

In addition, Canadian companies should be aware of the SEC Focus on Loss Contingencies. In 2011, senior Staff members of both the SEC and the Financial Accounting Standards Board ("FASB") indicated in speeches and in the review and comment process that compliance with Accounting Standards Codification 450-20 Loss Contingencies ("ASC 450-20") (formerly known as FASB Statement No. 5) will increasingly be an area of focus for SEC review. In October 2010, the SEC issued a "Dear CFO" letter related to potential risks and costs associated with mortgage and foreclosure-related activities or exposures that highlighted the requirement to disclose loss contingencies in accordance with standards under ASC 450-20.

10. **SEC Adopts New S-3 and F-3 Criteria to Remove Credit Rating Requirement and Announces Rescission of Form F-9.** In July 2011, in furtherance of Dodd-Frank and the SEC's effort to reduce reliance on credit ratings, the SEC adopted new rules removing the requirement for an investment grade rating as eligibility criteria for companies seeking to use "short form" registration (*i.e.*, Forms S-3 and F-3) when registering non-convertible securities for public sale. At the same time as the SEC adopted these new rules, the SEC also adopted rules to rescind Form F-9 (a registration statement used by MJDS-eligible, investment grade issuers) effective December 31, 2012. The rescission of Form F-9 involves special considerations for SEC registrants in the oil and gas industry who will move from Form F-9 to Form F-10, as they will become subject to Accounting Standards Codification ("ASC") 932 oil and gas disclosure rules. The new SEC rules rescinding Form F-9 provide for a three-year grandfather period during which any issuer that would have been eligible to use Form F-9 as of December 31, 2012 will be permitted to use Form F-10 even if such issuer does not satisfy the $75 million public float or parent guarantee requirements of Form F-10. The final prospectus for any offering being made in reliance on the grandfather provision must be filed on or before December 31, 2015. The SEC has not also adopted a grandfather provision with respect to ASC 932. For more information, see the SEC release at http://www.sec.gov/news/press/2011/2011-155.htm and the Paul, Weiss memorandum at http://www.paulweiss.com/files/upload/23Aug11_F9.pdf.

11. **Amendments to Hart-Scott-Rodino Require Additional Reporting and Documentation.** On July 7, 2011, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, Antitrust Division, Department of Justice, issued final rules amending the Hart-Scott-Rodino ("HSR") Premerger Notification Rules, the Premerger Notification and Report Form, and associated instructions. The new HSR rules took effect in August 2011. The HSR rules (i) increase reporting requirements for certain HSR filers, including private equity and

investment funds; (ii) require HSR filers to submit additional types of documents beyond the Item 4(c) requirements; and (iii) expand the revenue information required in Item 5 for foreign manufacturing operations. For an overview of the key amendments, see the Paul, Weiss memorandum at http://www.paulweiss.com/files/upload/13Jul11HSR.pdf.

12. **SEC Adopts Large Trader Reporting Regime.** In July 2011, in an effort to enhance its ability to identify large market participants, collect information on their trading and analyze their trading activity, the SEC established a new reporting regime for so-called "large traders." The SEC did so through the promulgation of new Rule 13h-1 under the Exchange Act, which aims to strengthen the SEC's oversight of securities trading activities and to identify potentially manipulative and abusive practices. The new rule requires:

- large traders – defined as traders whose transactions in National Market System securities equal or exceed 2 million shares or $20 million during any calendar day, or 20 million shares or $200 million during any calendar month – to register with the SEC using the new Form 13H;
- large traders to disclose their status as such to broker-dealers; and
- recordkeeping, reporting, and limited monitoring by certain registered broker-dealers through which large traders execute their transactions.

Non-U.S. entities that meet the definition of a large trader are required to comply with the identification requirements of the rule and to file reports on Form 13H. However, the recordkeeping and reporting requirements apply only to U.S. registered broker-dealers. Many non-U.S. traders do not have a direct relationship with a U.S. registered broker-dealer and utilize non-U.S. intermediaries. U.S. registered broker-dealers may identify non-U.S. intermediaries that exceed the identifying activity level, and inform the intermediary that it may be a large trader under Rule 13h-1. In such cases, the non-U.S. intermediary will then bear the principal burden of compliance in determining whether it is a large trader. For more information about the identification and registration of large traders and the associated recordkeeping, reporting, and monitoring requirements, see the Paul, Weiss memorandum at http://www.paulweiss.com/files/upload/2-Aug-11_SEC.pdf.

13. **SEC Further Limits Confidential Submissions by Foreign Private Issuers.** In December 2011, the Staff of the SEC's Division of Corporation Finance announced a new policy that limits the ability of foreign private issuers to submit registration statements (and amendments) to the SEC on a confidential basis. Under the SEC's prior confidential submission process, the Staff would review the disclosure of foreign

private issuers registering for the first time (*i.e.*, on Form F-1 (for an initial public offering), on Form F-4 (for an exchange offer in connection with an acquisition or following an offering of debt securities under Rule 144A) or on Form 20-F (for a listing with no accompanying public offering)) and the issuer could respond to Staff comments and resolve any complicated issues before a public filing was made. In effect, by submitting confidentially, foreign private issuers were able to prepare to access the U.S. public markets without publicly revealing their intentions until ready to launch the offering. Under the new policy, the Staff will only review initial registration statements of foreign issuers that are submitted on a non-public basis where the issuer is:

- a foreign government registering its debt securities;
- a foreign issuer that is listed, or is concurrently listing its securities, on a non-U.S. securities exchange;
- a foreign private issuer that is being privatized by a foreign government; or
- a foreign private issuer that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.

The new policy will have its most significant impact on issuers that go public via an initial public offering in the United States without listing concurrently on an exchange outside the United States as such issuers will no longer be able to make a confidential submission to the SEC of the initial registration statement or any amendments prepared in response to Staff comments or otherwise. For more information, see the Paul, Weiss memorandum at http://www.paulweiss.com/files/upload/8Dec11SEC.pdf.

14. **Checklist for Form 20-F Filers.** As a result of Dodd-Frank, both 2010 and 2011 saw a host of new U.S. disclosure requirements and considerations for non-U.S. SEC reporting companies that prepare their annual reports on Form 20-F. In addition, several new disclosure rules have been proposed by the SEC but have not yet been adopted. The new SEC requirements and considerations include limitations on credit ratings disclosure, disclosure relating to climate change, contractual obligations table disclosure, and short-term borrowing disclosure. For an overview of disclosure requirements and considerations for 20-F filers, see the Paul, Weiss memorandum at http://www.paulweiss.com/files/upload/12Apr11_20-F.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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