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Second Quarter 2012 U.S. Legal and Regulatory Developments

The following is a summary of significant U.S. legal and regulatory developments during the second quarter of 2012 of interest to Canadian companies and their advisors.

1. **How Foreign Private Issuers are Likely to be Affected by New Listing Standards for Compensation Committees.** The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") directed the U.S. Securities and Exchange Commission (the "SEC") to establish minimum standards related to compensation committees and compensation consultants that companies listed on a U.S. stock exchange must meet. On June 20, 2012, the SEC issued final rules directing U.S. stock exchanges to require that listed companies comply with the Dodd-Frank provisions governing the composition of compensation committees, compensation committee responsibilities and advisors, and disclosure regarding compensation consultants.

   Under the new rules, foreign private issuers that provide annual disclosure to shareholders of the reasons why they do not have an independent compensation committee will be exempt from the requirement to have an independent compensation committee. However, it is unclear whether an exemption will be made available with respect to the requirements related to compensation committee responsibilities and advisors. The U.S. stock exchanges have discretion to exempt issuers from these rules, as they deem appropriate.

   For the SEC final release, see http://sec.gov/rules/final/2012/33-9330.pdf

   For a summary of the SEC's final compensation committee rules, see the Paul, Weiss memorandum at http://www.paulweiss.com/media/955411/25-jun-12-sec.pdf and for more information on how foreign private issuers are likely to be affected by new listing standards for compensation committees, see the Paul, Weiss memorandum at http://www.paulweiss.com/media/978847/26jun12-df.pdf

2. **SEC to Hold Open Meeting to Discuss Conflict Mineral and Resource Extraction Payment Rules, and Title II of the JOBS Act.** The SEC has given notice that an open meeting will be held on August 22, 2012 (i) to discuss whether to adopt rules regarding disclosure and reporting obligations with respect to (a) the use of conflict minerals to implement the requirements of Section 1502 of the Dodd-Frank Act, and

(b) payments to governments made by resource extraction issuers to implement the requirements of Section 1504 of the Dodd-Frank Act and (ii) to consider rules to eliminate the prohibition against general solicitation and general advertising in securities offerings conducted pursuant to Rule 506 of Regulation D under the Securities Act and Rule 144A under the Securities Act, as mandated by Section 201(a) of the Jumpstart Our Business Startups Act (the "JOBS Act"). The SEC notice is available at http://www.sec.gov/news/openmeetings/2012/ssamtg082212.htm

3. **SEC Continues to Provide Guidance on JOBS Act.** On April 5, 2012, President Obama signed into law the JOBS Act implementing sweeping changes to the rules governing IPOs and private capital formation in the United States by domestic and foreign issuers. The JOBS Act substantially reduces the regulatory burdens on "emerging growth companies" ("EGCs") during and following an IPO, and also substantially relaxes restrictions on communications with potential investors in the context of both public and private offerings.

   Many provisions of the JOBS Act, including the new relaxed standards for EGCs, were immediately effective and did not require further SEC rulemaking. Certain other provisions, including the elimination of the prohibition against general solicitation and general advertising in connection with certain private offerings, will not become effective until the SEC adopts implementing rules.

   The SEC Staff has provided guidance stating that a foreign private issuer that qualifies as an EGC may avail itself of the scaled disclosure requirements to the extent relevant to the form requirements for foreign private issuers. However, the SEC Staff has also stated that a foreign private issuer that avails itself of any of the benefits available to an EGC will be treated as an EGC for all purposes. This means that a foreign private issuer that elects to be an EGC will not be entitled to make a confidential submission under the procedures applicable to foreign private issuers and, instead, will be required to publicly file its registration statement at least 21 days before the start of a roadshow.

   Also, the SEC Staff has provided guidance stating that an MJDS-eligible Canadian issuer that qualifies as an EGC may avail itself of the test-the-waters amendments to the Securities Act of 1933, as amended, and delayed compliance with Section 404(b) of the Sarbanes-Oxley Act of 2002.

   Since mid-April, the SEC has issued guidance on various provisions of the JOBS Act. Paul, Weiss has updated its earlier alert to reflect the guidance issued to date. For more information, see the Paul, Weiss memorandum at http://www.paulweiss.com/media/954002/22jun12-jobs.pdf

4. **SEC Staff Issues Updated Guidance on Confidential Submissions by Foreign Private Issuers.** On May 30, 2012, the SEC Staff revised its policy relating to confidential submissions to the SEC by foreign private issuers in connection with their initial registration of securities (the "FPI Procedure"). The SEC Staff aligned its policy with the confidential registration statement review procedure that became available to all issuers, including foreign private issuers, that qualify as EGCs under the JOBS Act.

   Under the revised policy, eligible foreign private issuers that take advantage of the FPI Procedure will be required at the time they publicly file their registration statements to publicly file their previously submitted draft registration statements (and any amendments) and resubmit issuer response letters to SEC Staff comments. This revised policy applies to draft submissions first made after May 30, 2012. For more information, see the Paul, Weiss memorandum at http://www.paulweiss.com/media/878194/6jun12sec.pdf

5. **Will Cost Benefit Analysis Limit Implementation of Dodd-Frank?** According to an article on Bloomberg, business lobbyists and Republican lawmakers are seeking to weaken Dodd-Frank by legislating a cost-benefit provision for SEC action. The change would require that the Dodd-Frank Act's provisions be scrutinized for its costs and benefits if they are to be enforced, a tool the business community is looking to utilize against unfavorable rule-makings. For more information, see http://www.bloomberg.com/news/2012-05-07/cost-benefit-analysis-puts-the-brakes-on-dodd-frank.html

6. **Delaware Court of Chancery Enjoins Unsolicited Offer For Violation of Confidentiality Agreement.** In *Martin Marietta Materials, Inc.* v. *Vulcan Materials Company*, the Delaware Court of Chancery enjoined Martin Marietta from continuing its unsolicited exchange offer for, and proxy contest against, Vulcan for four months because Martin Marietta violated its confidentiality agreement with Vulcan. The confidentiality agreement was entered into at a time when the two parties were focused on a potential friendly merger. When discussions failed, however, and Martin Marietta decided to make a public, unsolicited exchange offer for Vulcan, the confidential information obtained pursuant to the confidentiality agreement, including the amount of anticipated synergies, was central to Martin Marietta's campaign. The key provision at issue in the confidentiality agreement required that the parties would use confidential information solely for the purpose of evaluating a transaction "between" Martin Marietta and Vulcan. The court found that this sentence was ambiguous but ultimately, citing a 2009 Ontario Superior Court of Justice decision, *Certicom Corp.* v. *Research in Motion Ltd*., agreed with Vulcan's interpretation. As such, Chancellor Strine held that Martin Marietta could not use the confidential

information for its bid. The decision, which was recently affirmed by the Delaware Supreme Court, underscores the subtle ways that confidentiality agreements can impose standstill obligations even absent express standstill provisions. The key takeaway from the decision is that prospective deal parties must be vigilant in drafting and considering the practical effect of confidentiality agreements. For the full text of the Opinion, see http://courts.delaware.gov/opinions/download.aspx?ID=172290

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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:

Christopher J. Cummings
416-504-0522
ccummings@paulweiss.com

Andrew J. Foley
212-373-3078
afoley@paulweiss.com

Adam M. Givertz
416-504-0525
agivertz@paulweiss.com

Edwin S. Maynard
212-373-3024
emaynard@paulweiss.com

Stephen C. Centa
416-504-0527
scenta@paulweiss.com

Alexis A. Fink contributed to this client alert.

NEW YORK
1285 Avenue of the Americas
New York, NY 10019-6064
+1-212-373-3000

BEIJING
Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86-10-5828-6300

HONG KONG
12th Fl., Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852-2846-0300

LONDON
Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44-20-7367-1600

TOKYO
Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81-3-3597-8101

TORONTO
Toronto-Dominion Centre
77 King Street West, Suite 3100
P.O. Box 226
Toronto, ON M5K 1J3
Canada
+1-416-504-0520

WASHINGTON, D.C.
2001 K Street NW
Washington, DC 20006-1047
+1-202-223-7300

WILMINGTON
500 Delaware Avenue, Suite 200
Post Office Box 32
Wilmington, DE 19899-0032
+1-302-655-4410