October 16, 2012

Third Quarter 2012 U.S. Legal and Regulatory Developments

1. **Recent Implementations of the Dodd-Frank Wall Street Reform and Consumer Protection Act**

    a. **NYSE and Nasdaq Propose Compensation Committee Rule Amendments.** As required by the Dodd-Frank Act and related SEC rules, both the NYSE and Nasdaq have issued their proposed rule amendments related to compensation committee independence and responsibilities. The NYSE's proposed standards are based on the SEC's rules and make substantial use of the discretion that the SEC gave to the exchanges in implementing its rules. Most notably, the NYSE is not proposing any additional mandatory independence conditions for compensation committee members beyond those already in place. Instead, the NYSE has chosen to add factors that boards must consider in determining compensation committee independence. Nasdaq's proposed new listing standards differ in significant ways from the NYSE's proposal. For example, Nasdaq proposes to add a new mandatory prohibition against compensation committee members accepting directly or indirectly any compensation from the company or its subsidiaries (other than directors' fees or certain fixed retirement payments).

    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 NSYE and Nasdaq's independence requirement. A Canadian issuer that files an annual report on Form 40-F with the SEC may include such disclosure on its Form 40-F or on its website.

    For the NYSE's rule proposal, see: http://www.nyse.com/nysenotices/nyse/rule-filings/pdf?file_no=SR-NYSE-2012-49&seqnum=1.

    For Nasdaq's rule proposal, see: http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2012/SR-NASDAQ-2012-109.pdf.

For a more detailed summary of the NYSE's proposals, see our memorandum at: http://www.paulweiss.com/media/1203603/1-oct-12_nyse.pdf, and for a more detailed summary of Nasdaq's proposals, see our memorandum at: http://www.paulweiss.com/media/1203628/1-oct-12nas.pdf.

b. **SEC Adopts Rules Under Dodd-Frank Requiring the Disclosure of Payments Made to Governments by Resource Extraction Issuers.** On August 22, 2012 the SEC adopted final rules to implement Section 1504 of the Dodd-Frank Act. Entities that are "resource extraction issuers" will be required, as of September 30, 2013, to disclose the details of payments in excess of US$100,000 made by the issuer to non-U.S. governments or the U.S. federal government for the purpose of the commercial development of oil, natural gas or minerals. These disclosures will be filed annually with the SEC on a new form, Form SD. "Resource extraction issuers" include all companies required to file annual reports with the SEC under the Exchange Act that are engaged in the commercial development of oil, natural gas or minerals, including domestic U.S. companies, foreign private issuers and Canadian companies filing reports under MJDS. The rules define commercial development of oil, natural gas or minerals to include the exploration, extraction, processing and export of oil, natural gas or minerals or the acquisition of a license for any such activity. However, the rules do not cover entities involved in ancillary activities, such as providing drilling equipment to resource extractors. The SEC has further clarified that "processing" does not include refining or smelting, but does include field processing activities, such as the removal of impurities from hydrocarbons. Disclosures on Form SD must provide the information in XBRL format and must include (1) the total amount of each payment, (2) the currency in which each payment was made, (3) the financial period in which each payment was made, (4) the entity and business segment of the issuer that made the payment, (5) the country and governmental entity that received the payment, (6) the project to which the payment relates and (7) the type of payment (e.g., royalties, taxes, fees). Importantly, these rules make no exception for situations where confidentiality clauses or foreign legal provisions would prohibit disclosure. Form SD will be required to be filed no later than 150 days after the company's fiscal year end.

For the SEC's final release, see: http://www.sec.gov/news/press/2012/2012-164.htm.

For a more detailed summary of the SEC's final rule, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1153118/27-aug-12_sec.pdf.

c. **SEC Adopts Rules Under Dodd-Frank Requiring Disclosures Regarding the Use of Conflict Minerals.** On August 22, 2012, the SEC adopted final rules to implement Section 1502 of the Dodd-Frank Act concerning conflict minerals, namely, coltan (the metal ore from which tantalum is extracted), cassiterite (the metal ore from which tin is extracted), gold, wolframite (the metal ore from which tungsten is extracted), their derivatives, or any other mineral determined by the Secretary of State to be financing conflict in the Democratic Republic of Congo or an adjoining country. The rules apply to each company that files annual reports with the SEC for which conflict minerals are *necessary* to the functionality or production of a product it manufactures or contracts to have manufactured, including domestic U.S. companies, foreign private issuers and Canadian issuers filing under MJDS. The rules do not apply to entities that only mine for these minerals. The SEC has provided guidance on the factors relevant to determining whether a conflict mineral should be considered *necessary*: (1) whether the mineral is intentionally used in the manufacture of the product; (2) whether the mineral is itself included in the actual product; (3) whether the mineral plays a role in the product's function; (4) whether the mineral is necessary to produce the product; and (5) whether, for primarily ornamental products, the mineral is incorporated for ornamental purposes. Once an issuer has determined conflict minerals are necessary to the functionality or production of one of its products, it must conduct a good faith inquiry to determine if it sources conflict minerals from the Democratic Republic of Congo or an adjoining country. If the issuer determines it has no reason to believe it sources conflict minerals from this region, it must disclose this determination on Form SD, along with a description of the inquiry that led it to this conclusion. If the issuer determines it has reason to know or knows it sources conflict minerals from this region, the issuer will be required to file a Conflict Minerals Report describing the measures the issuer has taken to due diligence the source and chain of custody of the conflict minerals. The Conflict Minerals Report must be audited by an independent auditor. The conflict minerals disclosure and/or Conflict Minerals Report included in Form SD must cover the calendar year from January 1 to December 31, regardless of an issuer's fiscal year end. The first Form SD will cover calendar year 2013. The final rule requires that an issuer's Form SD, including its Conflict Minerals Report, if applicable, be filed with the SEC no later than May 31, 2014. An issuer must provide its required conflict minerals information for the calendar year in

which it completes the manufacture of a product that contains conflict minerals or in which the issuer's contract manufacturer completes the manufacture of a product that contains any conflict minerals.

For the SEC's final release, see: http://www.sec.gov/news/press/2012/2012-163.htm.

For a more detailed summary of the SEC's final rule, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1153118/27-aug-12_sec.pdf.

d. **Phase-in of Swap-Related Rules.** The Dodd-Frank Act required the CFTC and the SEC to create a new regulatory regime for swaps and security-based swaps. Beginning on October 12, 2012, obligations under the CFTC and SEC's new rules will go into effect for swap dealers and major swap participants, which include duties regarding (1) information disclosures to counter-parties, (2) recordkeeping, (3) reporting, (4) clearing, (5) margin requirements and (6) position limits. A non-financial entity may elect to except from the clearing requirements any swap entered into for the purpose of hedging or mitigating commercial risk. Parties should ensure they have taken appropriate action to ensure compliance with these new measures.

For more information, including key considerations, timelines and action steps to aid corporate and investment fund end-users in their preparation to comply with the new regulatory regime see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1162351/31aug12_df.pdf.

2. **SEC Issues Proposed Rules Under The JOBS Act Eliminating the Prohibition on General Solicitation and General Advertising for Private Offerings.** On August 29, 2012, the SEC released proposed rules to eliminate the ban on general solicitation and general advertising in connection with offerings made pursuant to Rule 506 of Regulation D and Rule 144A under the Securities Act of 1933. Under the proposed rules, issuers would be able to use general solicitation or general advertising in connection with Regulation D offerings, as long as the issuer takes reasonable steps to verify that the eventual purchasers of the securities are all accredited investors or the issuer reasonably believes they are all accredited investors. The SEC declined to establish specific requirements that would constitute reasonable steps. Instead, the SEC said that issuers should consider the various objective facts and circumstances of each transaction, including the representations of a potential investor, the amount and type of information that the issuer has about each potential investor, the approach used to solicit investors and the terms of the offering, such as a minimum investment amount. Issuers wishing to make exempt offerings without engaging in general solicitation or general advertising would still be

able to do so and would not be subject to the requirement to take reasonable steps to verify accredited investor status. For Rule 144A offerings, the proposed rule would eliminate the requirement that offers only be made to qualified institutional buyers (QIBs) and would require only that securities be sold only to QIBs or to purchasers the seller reasonably believes are QIBs.

For more information, please see the SEC's proposed rule at: http://www.sec.gov/rules/proposed/2012/33-9354.pdf and the Paul, Weiss Memorandum at: http://www.paulweiss.com/media/1166517/10sep12jobs.pdf.

3. **Delaware Supreme Court Affirms $2 Billion Southern Peru Copper Damages Award.** In *Americas Mining Corporation v. Theriault Southern Copper Corp.,* on August 27, 2012, the Delaware Supreme Court affirmed the Court of Chancery's decision in the Southern Peru Copper litigation in which the Court of Chancery awarded damages of $2 billion and $300 million in attorneys' fees. The Court held that Southern Peru's controlling shareholder and its directors breached their fiduciary duty of loyalty by causing Southern Peru to acquire the controlling shareholder's interest in a Mexican mining company at an unreasonably high price. While the damage and fee levels were unprecedented, the Delaware Supreme Court found that the Court of Chancery exercised its discretion appropriately in awarding such amounts after the plaintiffs had prevailed in showing that Southern Peru Copper had overpaid. The Delaware Supreme Court also clarified that in a transaction where a majority stockholder stands on both sides, the enhanced entire fairness will apply instead of the standard business judgment rule.

   For more information on *Americas Mining Corporation*, please see the Paul, Weiss Memorandum at: http://www.paulweiss.com/media/1160927/28-aug-12-dcc.pdf.

4. **Supreme Court Upholds Landmark Federal Health Care Legislation.** In a high-profile test of the Supreme Court's approach to constitutional limits on Congressional power, on June 28, 2012, the Court upheld the Patient Protection and Affordable Care Act of 2010 (the "Act"), the sweeping federal overhaul of the nation's health insurance system. A majority of the justices found that the Act's "individual mandate," which requires citizens to purchase health insurance, was constitutional under Congress's power to tax, although a different majority of the Court—with the Chief Justice as the swing vote—held that the individual mandate violated the Commerce Clause. A majority of the justices also upheld the Act's expansion of the Medicaid program—but only so long as States may opt out of the expanded provisions without losing their pre-existing federal funding for Medicaid.

   As significant as the decision is for health care, it is arguably even more significant for the Court's federalism jurisprudence. Five justices have stated a willingness to

deem federal legislation beyond Congress's Commerce Clause powers. A majority of justices has also indicated a willingness to strike down the conditioning of federal spending on the States' acquiescence to what the Court regards as coercive policy requirements.

For more information on this landmark decision, please see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/1005593/2jul12scotus.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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