May 12, 2014

Q1 2014 U.S. Legal and Regulatory Developments

The following is a summary of significant U.S. legal and regulatory developments during the first quarter of 2014 of interest to Canadian companies and their advisors.

1. Washington D.C. Court Finds Conflict Minerals Rule Violates First Amendment

On April 14, 2014, the U.S. Court of Appeals for the District of Columbia Circuit (the "Court") issued a summary judgment ruling in National Association of Manufacturers v. SEC, a case that challenged Rule 13p-1 (the "Rule") under the U.S. Securities Exchange Act of 1934, as amended, the U.S. Securities and Exchange Commission's (the "SEC") rule requiring disclosure of the use of conflict minerals in manufactured products. The Court found that the provision in the Rule that compels companies to report to the SEC and to state on their websites that any of their products have "not been found to be 'DRC conflict free'" violates the First Amendment of the U.S. Constitution. As the Court stated: "By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment." The Court rejected the plaintiff's other claims regarding the Rule.

On April 29, 2014, the SEC's Division of Corporation Finance issued guidance on the effect of the Court's decision, stating that, subject to further action that may be taken either by the SEC or a court, the SEC expects companies to file any reports required under Rule 13p-1 on or before the due date of June 2, 2014. Companies that do not need to file a Conflict Minerals Report should disclose their reasonable country of origin inquiry and companies that are required to file a Conflict Minerals Report should include a description of the due diligence undertaken. No company will be required to describe its products as "DRC conflict free," "having not been found to be 'DRC conflict free'" or "DRC conflict undeterminable," although companies can voluntarily elect to describe their products as "DRC conflict free," as permitted by the Rule.

In keeping with the guidance contained in the statement, on May 2, 2014, the SEC issued an order staying the effective date for compliance with the portions of the Rule and Form SD that would require statements by issuers that the Court held would violate the First Amendment. In its order, the SEC denied the plaintiff's motion for a stay of the entire rule.

For a more detailed discussion of the SEC's guidance following the Court's decision on conflict minerals, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/2475522/2may14alert.pdf

2. Delaware Supreme Court Affirms Roadmap to Avoid Entire Fairness in a Going-Private Transaction

In *Kahn* v. *M&F Worldwide Corp.*, the Delaware Supreme Court provided a clear path for controlling stockholders of Delaware corporations to structure going-private transactions to avoid the entire fairness standard of review. The requirements to avoid entire fairness, and revert to the business judgment standard of review, are as follows: (i) the controller must condition the transaction from the outset on the approval of both a special committee and a majority of the minority stockholders; (ii) the special committee must be independent, empowered to freely select its own advisors and to say no definitively and meet its duty of care in negotiating a fair price; and (iii) the vote of the minority must be informed and uncoerced. It is critical that the conditions related to approval by the special committee and a majority of the minority stockholders be established by the controller at the outset of its efforts to take the corporation private.

This decision is important because it provides controllers who engage in a fair process a more predictable path to take controlled companies private. While the going-private process must still be carefully managed and the decision will not prevent lawsuits challenging such transactions, it is now possible to end the litigations at an earlier stage.

For a more detailed discussion of the decision in Kahn v. M&F Worldwide Corp., see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/2414608/14mar14del.pdf

3. Mandatory Exchange Trading Requirements for Swaps Begin February 18, 2014

The Dodd Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") mandates that swaps that (1) are subject to the Dodd-Frank Act's clearing requirement and (2) have been made "available to trade" be traded on either swap execution facilities ("SEFs") or designated contract markets ("DCMs", and such requirement, the "Mandatory Trading Requirement"). SEFs and DCMs are self-regulatory exchanges which serve as trading platforms for swaps.

The Commodity Futures Trading Commission (the "CFTC") established a process for certifying determinations by SEFs and DCMs that swaps are "available to trade," and began receiving available to trade submissions from SEFs in October 2013. In the first quarter of 2014, the CFTC began certifying these submissions. As a result of these certifications, certain interest rate and credit default swaps are now subject to the Mandatory Trading Requirement and must be executed through either a SEF or DCM. Available to trade determinations are product-level determinations, and market participants may execute swaps subject to the Mandatory Trading Requirement on any SEF or DCM that offers the relevant swaps, not just the SEF or DCM that submitted the relevant available to trade determination. The CFTC publishes on its website a list of swaps that have been made available to trade and all the SEFs and DCMs that list or offer those swaps.

The Mandatory Trading Requirement does not apply to swaps that benefit from the clearing exceptions under Section 2(h)(7) of the Commodity Exchange Act, which include the end-user exception and the inter-affiliate exception. Therefore, entities such as corporate end users will not be required to execute any swap on a SEF or DCM for which they elect the clearing exception, even if such swap has been made available for trading. In addition, certain block trades can be executed away from a SEF's or DCM's RFQ or order book system (e.g., as in a pre-arranged sale subject to the rules of the SEF or DCM).

For more information regarding the Mandatory Trading Requirement, SEFs and DCMs, and available to trade determination, see the Paul, Weiss memoranda at:
http://www.paulweiss.com/media/2367991/30jan14.pdf and
http://www.paulweiss.com/media/2250829/20dec13memo.pdf

4. SEC Announces 2014 Examination Priorities

On January 9, 2014, the staff of the SEC's National Examination Program ("NEP"), which examines and inspects entities such as broker dealers, transfer agents and investment advisors, announced its examination priorities for 2014. Compliance with new laws and regulations such as Rule 506(c) under the U.S. Securities Act of 1933, as amended (the "U.S. Securities Act"), and various provisions of the Dodd-Frank Act were added as examination priorities. Dodd-Frank priorities include examination of investment advisers registered under Section 402 and oversight of the Financial Industry Regulatory Authority ("FINRA") pursuant to Section 964. The promulgation of a new rule under Section 1504 of the Dodd-Frank Act requiring disclosure of government payments by resource extraction issuers was not included in the examination priorities.

Under one of the most significant NEP initiatives, the NEP staff will review general solicitation practices and verification of accredited investor status under newly adopted Rule 506(c) under the U.S. Securities Act; generally will review, monitor, and analyze the use of Rule 506(c); and will evaluate due diligence conducted by broker-dealers and investment advisers for such offerings. Similarly, in the event that rules are in place regarding security-based swaps dealers and other registered entities created or impacted by the Dodd-Frank Act, the staff expects to allocate resources to conduct reviews of those registrants, as well as customer margin and operational practices resulting from centralized clearing for various security-based swap products.

For a complete list of the NEP's Examination Priorities for 2014, see
http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2014.pdf

5. FTC Announces New Hart-Scott-Rodino and Clayton Act Section 8 Thresholds

The Federal Trade Commission (the "FTC") has revised the jurisdictional and filing fee thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") and the Premerger Notification

Rules (the "Rules") for all transactions closing on or after February 24, 2014. The adjustments to the dollar thresholds of the HSR Act and Rules (based on changes in the gross national product) are required by the 2000 amendments to the HSR Act.

The HSR Act requires parties intending to merge or to acquire assets, voting securities or certain non-corporate interests to notify the FTC and the Department of Justice, Antitrust Division, and to observe certain waiting periods before consummating the acquisition if certain filing thresholds are met. Notification and Report Forms must be submitted by the parties to a transaction if both the (1) size of transaction and (2) size of parties thresholds are met, unless an exemption from filing applies.

1. Size of Transaction

The minimum size of transaction threshold is US$75.9 million, increased from the 2013 threshold of US$70.9 million.

2. Size of Parties

The size of parties threshold is inapplicable if the value of the transaction exceeds US$303.4 million (formerly US$283.6 million for 2013). For transactions with a value between US$75.9 million and US$303.4 million, the size of parties threshold must be met and will be satisfied in one of the following three ways:

	I	II	III
Acquiring Person:	US$151.7 million annual net sales or total assets	US$151.7 million annual net sales or total assets	US$15.2 million annual net sales or total assets
	and	*and*	*and*
Acquired Person:	US$15.2 million total assets	a manufacturer with US$15.2 million annual net sales or total assets	US$151.7 million annual net sales or total assets

The FTC has also increased the safe harbor thresholds that prohibit, with certain exceptions, competitor companies from having interlocking relationships among their directors or officers under Section 8 of the Clayton Act. Section 8 provides that no person shall, at the same time, serve as a director or officer in any two corporations that are competitors, such that elimination of competition by agreement between them would constitute a violation of the antitrust laws. Competitor corporations are now subject to Section 8 if each one has capital, surplus, and undivided profits aggregating more than US$29,945,000, although no corporation is covered if the competitive sales of either corporation are less than US$2,994,500.

For a more detailed summary of new HSR and Clayton Act thresholds, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/2353281/23jan14hsr.pdf.

* * *

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:

Matthew W. Abbott 212-373-3402 mabbott@paulweiss.com	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

Emelia L. Baack contributed to this client alert.