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Q3 2014 U.S. Legal and Regulatory Developments

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

1. Recent Second Circuit Decision in *Parkcentral* v. *Porsche* Extends *Morrison* Test by Limiting Applicability of Section 10(b) Based on "Foreignness" of Claims

In its 2010 decision in *Morrison* v. *National Australia Bank*, the United States Supreme Court addressed whether Section 10(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act") applies to a securities transaction involving foreign investors, foreign issuers and/or securities traded on foreign exchanges. The *Morrison* decision curtailed the extraterritorial application of the federal securities laws by holding that Section 10(b) applies only to (a) transactions in securities listed on domestic exchanges or (b) domestic transactions in other securities.

In *Parkcentral Global Hub Ltd*. v. *Porsche Automobil Holdings SE*, the Second Circuit added a layer of restrictions on the application of Section 10(b) of the Exchange Act to claims based in substantial part on extraterritorial conduct. In *Parkcentral*, the Second Circuit ruled that while a domestic securities transaction (or transaction in a domestically listed security) is *necessary* under *Morrison* for § 10(b) to apply, such a transaction is not *sufficient* to support the application of § 10(b), and claims may still be considered "predominantly foreign," and thus considered extraterritorial and immune to § 10(b) liability. The Second Circuit declined to lay out guidelines for determining whether a claim is "predominantly foreign," leaving that question for development in future cases.

For a summary of prior interpretations of *Morrison*, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/103257/5Mar12Memo.pdf.

For more information on the extension of the *Morrison* test, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/2593946/03sept14_alert.pdf.

2. The SEC Announces Largest-Ever Whistleblower Award

On September 22, 2014, the United States Securities and Exchange Commission (the "SEC") announced an expected award of more than $30 million to a whistleblower who provided key original information that led to a successful SEC enforcement action. The award will be the largest made by the SEC's whistleblower program to date and the fourth award to a whistleblower living in a foreign country, demonstrating the program's international reach.

The SEC's whistleblower program rewards high-quality, original information that results in an SEC enforcement action with sanctions exceeding $1 million. Whistleblower awards can range from 10 percent to 30 percent of the money collected in a case. The money paid to whistleblowers comes from an investor protection fund established by Congress at no cost to taxpayers or harmed investors. The fund is financed through monetary sanctions paid by securities law violators to the SEC. Money is not taken or withheld from harmed investors to pay whistleblower awards.

For more information about the whistleblower program and how to report a tip, see the SEC's website at: www.sec.gov/whistleblower.

3. Form SD Post-filing Survey Examines High Cost of Conflict Mineral Disclosure

Survey results released in October, 2014 by the Tulane University's Payson Center for International Development reveals that issuers spent more than $700 million this year to comply with Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requiring that businesses disclose their use of conflict minerals.

On average, the 1,300 issuers that filed Form SD spent more than $540,000 to comply with the law, according to the survey. For small issuers, with less than $100 million in revenue, expenditures were roughly $190,000. The survey was based on responses from 112 of the 1,300 issuers that filed Form SD, and the overall figures were calculated from that sample.

For more detail on the survey's results, see the Tulane University Payson Center for International Development website at:
http://www.payson.tulane.edu/welcome-tulanes-dodd-frank-section-1502-post-filing-survey-2014-presentation

4. Delaware Court of Chancery Upholds Forum Selection Bylaw Designating Exclusive Forum Adopted Concurrently with Merger Agreement

On September 8, 2014, the Delaware Court of Chancery held that the board of directors of First Citizens BancShares, a Delaware corporation, did not breach their fiduciary duty by designating North Carolina as the exclusive forum for intra-corporate disputes in a forum selection bylaw on the same day as it entered into a merger agreement to acquire First Citizens Bancorporation, which is allegedly controlled by the same stockholders that control the acquiring corporation.

In holding that the forum selection bylaw was valid and did not breach the directors' fiduciary duties, the court ruled the following:

- Nothing in *Boilermakers Local 153 Retirement Fund* v. *Chevron Corporation* prohibits a Delaware corporation from designating an exclusive forum other than Delaware in its bylaws;
- Because the forum selection bylaw did not regulate whether a stockholder could file a suit, but where, it was not invalid; and
- The fact that a controlling stockholder favored the bylaw and the minority stockholders could not repeal it did not make it invalid.

For more information on the court's ruling, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/2639475/9sept14alert.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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