May 4, 2015

Q1 2015 U.S. Legal and Regulatory Developments

The following is our summary of significant U.S. legal and regulatory developments during the first quarter of 2015 of interest to Canadian companies and their advisors.

1. SEC Grants No-Action Relief Permitting Five Business Day Debt Tender Offers

On January 23, 2015, the Staff of the Division of Corporation Finance (the "Staff") of the United States Securities and Exchange Commission (the "SEC") issued a no-action letter granting the relief requested in a letter submitted by a number of nationally recognized law firms (including Paul, Weiss) and supported by various market participants regarding the conduct of certain debt tender offers. In its letter, the Staff confirmed that it would not recommend any enforcement action to the SEC if an issuer were to conduct a tender offer for non-convertible debt securities (including high-yield debt securities) and hold the tender offer open for at least five business days from and including the date the tender offer is first publicized, so long as such tender offer satisfies certain criteria (such offer, a "Five Business Day Debt Tender Offer"). The tender offer would be required to be held open for an additional ten business days following any change in the consideration offered or the announcement of any other material change in the offer. The new relief was effective immediately and superseded the Staff's prior no-action relief in this area, which permitted certain tender offers for investment grade securities to occur in as little as seven calendar days.

For a detailed summary of the Five Business Day Debt Tender Offer, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/2779114/25jan15alert.pdf.

2. SEC Proposes Increased Thresholds for Exchange Act Registration Pursuant to the JOBS Act

In December 2014, the SEC proposed rules under the Jumpstart Our Business Startups Act (the "JOBS Act") that reflect new, higher thresholds for registration under the Securities Exchange Act of 1934 (the "Exchange Act"). The SEC also proposed rules that would implement higher thresholds for termination of registration and suspension of reporting for banks and bank holding companies and savings and loan holding companies. In addition, the SEC has proposed to revise the definition of "held of record" in Exchange Act Rule 12g5-1 to exclude certain securities held by persons who received them pursuant to employee compensation plans and to establish a non-exclusive safe harbor for determining whether securities are "held of record" for purposes of registration under Exchange Act Section 12(g).

Higher thresholds for registration. The proposed amendments to Rule 12g-1 under the Exchange Act would exempt an issuer from the requirement to register a class of equity securities and comply with reporting obligations under the Exchange Act if the class of equity securities was held of record by fewer than 2,000 persons or 500 persons who are not accredited investors (as defined in Rule 501(a) of the Securities Act of 1933, as amended (the "Securities Act")).

Higher thresholds for termination of registration. The SEC is proposing changes to the thresholds contained in Rules 12g-2 and 12g-3 under the Exchange Act for terminating registration and suspending reporting requirements applicable to banks and bank holding companies and savings and loan holding companies from 300 persons to 1,200 persons. Rules 12g-4 and 12h-3 currently permit issuers, once reaching the designated threshold, to immediately suspend their duty to file periodic and current reports.

For more detailed information on the proposed higher thresholds, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/2768109/16jan15alert.pdf.

3. SEC Delays Resource Extraction Payment Disclosure Rulemaking

In an SEC court filing on March 27, 2015 aimed at dismissing a lawsuit against it, the SEC indicated that it will not take further action towards reproposal of a rule, mandated by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), to require resource extraction issuers, including foreign private issuers and MJDS-eligible Canadian issuers, to disclose certain payments they make to the U.S. federal government and foreign governments until Spring 2016.

The SEC had previously indicated that it expected to issue a reproposed rule by October 2015. The original resource extraction rule was promulgated in 2012 and vacated on July 2, 2013 by the U.S. District Court for the District of Columbia. The SEC elected in September 2013 not to appeal the decision.

For information regarding the July 2013 invalidation of the original resource extraction rule and the SEC's election not to appeal that decision, see the Paul, Weiss memoranda at: http://www.paulweiss.com/media/1702640/2-jul-13.pdf and http://www.paulweiss.com/media/1861897/4sep13alert.pdf.

4. SEC Adopts Rules to Update Regulation A

On March 25, 2015, the SEC voted unanimously to adopt amendments to its public offering rules to exempt an additional category of small capital raising efforts as mandated by Title IV of the JOBS Act.

Tier 1 and Tier 2 Offerings. The final rules update and expand the Regulation A exemption by creating two tiers of Regulation A offerings, available only to companies organized in or with their principal place of business in the United States or Canada:

Tier 1, which includes securities offerings of up to $20 million in a 12-month period, including up to $6 million for the account of selling securityholders that are affiliated with the issuer; and

Tier 2, which includes offerings of up to $50 million in a 12-month period, including up to $15 million for the account of selling securityholders that are affiliated with the issuer.

For offerings of up to $20 million, an issuer can elect to use either Tier 1 or Tier 2.

Offering Process. Issuers are required to prepare an offering statement including the narrative and financial information required by Form 1-A. Form 1-A requires basic information about the issuer, material risks, use of proceeds, an overview of the issuer's business, a management's discussion and analysis ("MD&A") type discussion, disclosures about executive officers and directors and compensation, beneficial ownership information, related party transactions, a description of the offered securities, and two years of financial statements (or for such shorter time that the issuer has been in existence). Preliminary offering statements must be filed with the SEC on EDGAR at least 48 hours in advance of a sale unless the issuer is already subject to, and current in, ongoing reporting requirements under Regulation A (described below). The offering statement is "qualified" by SEC order so that the SEC has the opportunity to review and comment. Final offering statements must be filed on EDGAR within two business days after the sale.

Tier 2 Offerings. Unlike Tier 1 offerings, Tier 2 offerings are preempted from state securities laws registration and qualification requirements but are subject to additional requirements, including a cap on the amount of securities a non-accredited investor may purchase, a requirement that financial statements must be audited and ongoing reporting requirements on Forms 1-K (annual report), Form 1-SA (semi-annual report) and Form 1-U (for certain current event reporting). Form 1-K requires disclosures relating to the issuer's business and operations, related party transactions, beneficial ownership, executive directors, officers and compensation, MD&A and audited financials.

For more a more detailed summary of the updates to Regulation A, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/2850660/8april15alert.pdf.

5. United States Supreme Court Limits Investor Suits for Misleading Statements of Opinion

The United States Supreme Court (the "Court") issued a decision on March 24, 2015 that resolves a split in the federal courts of appeals regarding when statements of opinion may give rise to liability under the federal securities laws. In *Omnicare, Inc.* v. *Laborers' District Council Construction Industry Pension Fund*, the Court addressed the pleading standard for claims alleging a false or misleading opinion in an issuer's registration statement under Section 11 of the Securities Act. The Court voted 9-0 to vacate a decision by the Sixth Circuit Court of Appeals which had held that issuers and individuals who sign a registration statement may be held liable for statements of opinion that later turn out to be false, regardless of their subjective belief in those statements.

In rejecting the Sixth Circuit's conclusion, the Court emphasized that the federal securities laws do not create liability based merely on a statement of belief that "turned out to be wrong." Rather, the Court held, a statement of opinion is actionable under Section 11 as an "untrue statement of material fact" only if the speaker did not honestly hold the opinion when it was expressed. The Court also held that, in certain circumstances, statements of opinion may be actionable based on an omission of material fact that renders the statements misleading to a reasonable investor.

The *Omnicare* decision may help to limit the scope of liability faced by companies, as well as their officers and directors, for alleged misstatements of opinion. But the decision also leaves significant uncertainty as to the circumstances under which affirmative statements of opinion will give rise to omission claims.

For a more detailed discussion of the *Omnicare* decision, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/2829533/25mar15alert.pdf.

6. SEC Announces 2015 Examination Priorities

On January 13, 2015, the staff of the SEC's Office of Compliance Inspections and Examinations ("OCIE") announced its examination priorities for 2015, focusing on the following thematic areas:

examining matters of importance to retail investors and investors saving for retirement, including whether the information, advice, products, and services being offered is consistent with applicable laws, rules, and regulations;

assessing issues related to market-wide risks; and

using OCIE's evolving ability to analyze data to identify and examine registrants that may be engaged in illegal activity, such as excessive trading and penny stock pump-and-dump schemes.

For a complete list of the OCIE's Examination Priorities for 2015, see: http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf.

7. SEC Proposes Rules for Disclosure of Company Hedging Policies Applicable to Directors, Officers and Employees

On February 9, 2015, the SEC proposed rules that would require domestic SEC reporting companies to disclose whether they permit directors, officers and other employees to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange funds) or to engage in transactions designed to or that have the effect of hedging or offsetting any decrease in the market value of their company's securities that are granted to them as part of their compensation or held directly or indirectly by them. The proposed rules do not apply to foreign private issuers.

The proposed rules implement Section 955 of the Dodd-Frank Act and are intended to inform shareholders when a company's employees or directors are permitted to engage in transactions that mitigate or avoid the incentive alignment associated with equity ownership. The proposed amendments would not require a company to prohibit hedging transactions or otherwise to adopt practices or policies addressing hedging, but relate solely to the disclosure of such policies. Prohibitions on hedging may be included in a company's securities trading policy or corporate governance guidelines or as standalone policies.

For a more detailed summary of the proposed rules, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/2790159/10feb15alert.pdf.

8. 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"). The new thresholds take effect on February 20, 2015 and will apply to transactions that close on or after that date.

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 $76.3 million, increased from the 2014 threshold of $75.9 million.

(2) Size of Parties

The size of parties threshold is inapplicable if the value of the transaction exceeds $305.1 million ($303.4 million in 2014). For transactions with a value between $76.3 million and $305.1 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:	$152.5 million annual net sales or total assets	$152.5 million annual net sales or total assets	$15.3 million annual net sales or total assets
	and	*and*	*and*
Acquired Person:	$15.3 million total assets	a manufacturer with $15.3 million annual net sales or total assets	$152.5 million annual net sales or total assets

For a more detailed summary of new HSR and Clayton Act thresholds, see the Paul, Weiss memorandum at: http://www.paulweiss.com/media/2770923/21-jan-15_alert.pdf

9. SEC Announces Proposed Pay-for-Performance Compensation Rules

On April 29, 2015, the SEC announced proposed pay-for-performance compensation disclosure rules aimed at making it easier for shareholders to determine whether public company executive compensation is properly aligned with financial performance. This SEC proposal was released after the March 31 cut-off for this memorandum and will be addressed in detail shortly in a separate Paul, Weiss mailing.

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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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