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Q2 2016 U.S. Legal and Regulatory Developments

The following is our summary of significant U.S. legal and regulatory developments during the second quarter of 2016 of interest to Canadian companies and their advisors.

1. BREXIT: Potential Consequences and Disclosure Implications

On June 23, 2016, the United Kingdom voted in a referendum to leave the European Union ("Brexit"). The European Union and the United Kingdom now face a remarkable range of political, monetary, economic and even constitutional challenges.

Securities and Exchange Commission ("SEC") reporting companies will need to consider their continuing disclosure obligations as Brexit could implicate disclosure contained in, among other sections, risk factors, management's discussion and analysis of financial condition and results of operations ("MD&A"), business and the note on forward-looking statements. Similar disclosures will be reflected in earnings releases and, in the case of foreign private issuers, information required to be disclosed in the home market.

The two areas that likely will need the greatest amount of attention are risk factors and MD&A. In both cases, it is important that reporting companies focus on the potential impact and risks to them in specific, not generic, terms. Management should consider – both for operational reasons as well as for purposes of assessing what public disclosure is required or desirable – the challenges, risks and/or opportunities that Brexit presents for their business, financial condition and results of operations.

For a detailed summary of disclosure implications for SEC reporting companies see the Paul, Weiss memorandum at: https://www.paulweiss.com/media/3628328/12julbrexit.pdf.

For an overview of potential legal, institutional and political consequences of Brexit see the Paul, Weiss memorandum at: https://www.paulweiss.com/media/3625989/6jul16brexit.pdf.

2. SEC Adopts Disclosure Rules for Resource Extraction Issuers

On June 27, 2016, the SEC adopted final rules requiring resource extraction issuers to disclose payments made to the U.S. federal government or foreign governments for the commercial development of oil, natural gas or minerals. The rules are mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act and are intended to advance U.S. policy interests by promoting greater transparency regarding payments related to resource extraction, combatting global corruption and empowering citizens

of resource-rich countries to hold their governments accountable for the wealth generated by those resources.

Under the final rules, resource extraction issuers are required to disclose payments that are:

- made to further the commercial development of oil, natural gas or minerals;
- not *de minimis*; and
- one of the types of payments specified in the rules.

The rules define "not *de minimis*" as any payment, whether a single payment or a series of related payments, that equals or exceeds U.S.$100,000 during the same fiscal year.

The types of payments related to commercial development activities that are required to be disclosed include taxes, royalties, fees (including license fees), production entitlements, bonuses, dividends and payments for infrastructure improvements. This list of payment types is generally consistent with the requirements of Canada's Extractive Sector Transparency Measures Act ("ESTMA"), the EU Accounting and Transparency Directives, and the Extractive Industries Transparency Initiative.

The rules require a resource extraction issuer to provide the following information about payments made to further the commercial development of oil, natural gas or minerals:

- the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas or minerals;
- the type and total amount of such payments for all projects made to each government;
- the total amounts of the payments by category;
- the currency used to make the payments;
- the fiscal year in which the payments were made;
- the business segment of the resource extraction issuer that made the payments;
- the government that received the payments, and the country in which the government is located;
- the project of the resource extraction issuer to which the payments relate;
- the particular resource that is the subject of commercial development; and
- the subnational geographic location of the project.

Significantly, issuers will be able to meet the requirements of the final rules by providing disclosure that complies with a foreign jurisdiction's or the U.S. Extractive Industries Transparency Initiative's ("USEITI") resource extraction payment disclosure requirements if they are deemed equivalent by the SEC. In conjunction with the adoption of the final rules, the SEC issued an order recognizing Canada's ESTMA, the EU Accounting and Transparency Directives and the USEITI in their current forms as substantially similar disclosure regimes for purposes of alternative reporting, subject to certain conditions. In addition, issuers filing an alternative report prepared pursuant to a recognized foreign reporting regime are permitted to follow the reporting deadline in the alternative jurisdiction.

For a more detailed summary of the proposed rules, see the Paul, Weiss memorandum at: https://www.paulweiss.com/media/3621505/8jul16re.pdf.

For the full text of the final rules see: https://www.sec.gov/rules/final/2016/34-78167.pdf.

3. SEC Proposes Rules to Modernize Property Disclosure for Mining Registrants

On June 16, 2016, the SEC announced proposed rules to modernize the property disclosure requirements for mining registrants, with the objective of aligning standards with current industry and global regulatory practices. If adopted, the rules would rescind the SEC's Industry Guide 7 and Item 102 of Regulation S-K, the SEC's existing rules regarding mining disclosure, and create new Regulation S-K subpart 1300. The proposed rules would apply to both domestic registrants and foreign private issuers. However, Canadian registrants that file reports pursuant to the Canada-U.S. Multijurisdictional Disclosure System could continue to prepare mining disclosure in accordance with Canadian disclosure requirements.

The SEC's proposed rules represent a significant update to its disclosure rules for properties owned or operated by mining companies and introduce a number of new disclosure obligations. Among other things, the proposed rules:

- apply where a registrant's mining operations are material to its business or financial condition, with such operations being presumed material if a registrant's mining assets constitute 10% or more of its total assets;
- define "mining operations" to include all related activities from exploration through extraction to first point of material external sale;
- provide that individual properties must be identified as either "exploration," "development" or "production" stage on a property-by-property basis, as well as applying such designations to the registrant as a whole;
- require a registrant to disclose mineral resources and material exploration results in addition to its mineral reserves;
- adopt the Committee for Mineral Reserves International Reporting Standards ("CRIRSCO") based classification of mineral resources and require a registrant to classify its mineral resources into inferred, indicated and measured mineral resources, in order of increasing confidence based on the level of underlying geological evidence;
- revise the definition of mineral reserves to align it generally with the definition under the CRIRSCO-based standards; based on the definitions of "mineral reserves," "probable mineral reserves," "proven mineral reserves," and "modifying factors";

- require disclosure of mineral resources and mineral reserves to be based on either a preliminary feasibility study or a final feasibility study which, in either case, must include a technically and economically feasible life of mine plan;

- require that every disclosure of mineral resources, mineral reserves and material exploration results be based on documentation prepared by a "qualified person," defined as a person who is both (1) a mineral industry professional with at least five years of relevant experience and (2) a member or licensee of a recognized professional organization;

- require a registrant to file a technical report summary prepared by a qualified person for each material property, setting forth scientific and technical information and conclusions reached concerning material mineral exploration results, initial assessments used to support disclosure of mineral resources, and preliminary or final feasibility studies used to support disclosure of mineral reserves; and

- require royalty companies and similar companies to provide all applicable mining disclosure if the mining activities that generate the royalties or other payments are material to such company's operations as a whole.

For a more detailed summary of the proposed rules, see the Paul, Weiss memorandum at: https://www.paulweiss.com/media/3606589/29june16cdn.pdf.

For the full text of the proposed rules see: https://www.sec.gov/rules/proposed/2016/33-10098.pdf.

4. SEC Updates Guidance on Use of Non-GAAP Financial Measures

On May 17, 2016, the staff of the SEC's Division of Corporation Finance (the "Staff") issued new and revised Compliance and Disclosure Interpretations ("C&DIs") addressing the use of non-GAAP financial measures. These C&DIs address both communications subject to Regulation G, which applies to all public disclosures by public companies that contain non-GAAP measures, and to filings subject to Item 10(e) of Regulation S-K, which applies to certain reports filed with the SEC. The new and revised C&DIs address:

- potentially misleading non-GAAP financial measures;
- the presentation of GAAP measures with equal or greater prominence;
- the disclosure of non-GAAP financial information on a per-share basis; and
- the presentation of non-GAAP financial information calculated net of taxes.

For a more detailed summary of the C&DI, please see the Paul, Weiss memorandum available at: https://www.paulweiss.com/media/3571705/3june16_sec_updates.pdf.

For the full text of the C&DIs, see: http://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm.

5. SEC Increases Thresholds for Exchange Act Registration

On May 3, 2016, the SEC adopted final rules, substantially as proposed in December 2014, under the Jumpstart Our Business Startups Act (the "JOBS Act") and the Fixing America's Surface Transportation Act that reflect new, higher thresholds for registration under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The SEC has amended Rule 12g-1 under the Exchange Act to 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 is held of record by fewer than 2,000 persons or 500 persons who are not "accredited investors."

In addition, the SEC revised the definition of "held of record" in Rule 12g5-1 under the Exchange Act to exclude certain securities held by persons who received them pursuant to employee compensation plans in transactions exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act of 1933, as amended.

For a more detailed summary of the final rules, see the Paul, Weiss memorandum at: https://www.paulweiss.com/media/3526468/9may16sec.pdf.

For the full text of the final rules see: http://www.sec.gov/rules/final/2016/33-10075.pdf.

6. New York Court of Appeals Adopts Delaware's Roadmap for Business Judgment Review in Controlling Stockholder Transactions

In the recent decision of *In the Matter of Kenneth Cole Productions, Inc. S'holder Litig.*, the New York Court of Appeals adopted Delaware's standard of review for controlling stockholder going-private transactions as articulated by the Delaware Supreme Court in *Kahn* v. *M&F Worldwide Corp.* ("MFW"). Under MFW, the business judgment standard of review will apply to controlling stockholder buyouts if: (i) the controlling stockholder conditions the transaction on the approval of both a special committee and a majority of the minority stockholders; (ii) the special committee is independent; (iii) the special committee is empowered to freely select its own advisors and to say no definitively; (iv) the special committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority stockholders. The Court of Appeals distinguished prior cases that had held otherwise because they, among other things, did not involve a going-private merger (as opposed to a two-step merger), an independent special committee or a majority-of-the-minority vote requirement. Absent these protective conditions, however, entire fairness review would continue to apply to controlling stockholder transactions.

As MFW did for Delaware corporations, the *Kenneth Cole* decision similarly provides a clear and more predictable path for controlling stockholder transactions involving New York corporations.

For a more detailed discussion of *In the Matter of Kenneth Cole Productions, Inc. S'holder Litig.*, see the Paul,Weiss memorandum at: https://www.paulweiss.com/practices/transactional/mergers-acquisitions/publications/new-york-court-of-appeals-adopts-delaware%E2%80%99s-roadmap.aspx?id=21873.

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

For a discussion of certain other developments not highlighted above, please see our memoranda available at: http://www.paulweiss.com/practices/region/canada.aspx.

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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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