August 8, 2017

Q2 2017 U.S. Legal and Regulatory Developments

The following is our summary of significant U.S. legal and regulatory developments during the second quarter of 2017 of interest to Canadian companies and their advisors.

1. SEC Permits All Issuers to Submit Certain Registration Statements on a Confidential Basis

On June 29, 2017, the Securities and Exchange Commission (the "SEC") announced that it will permit all issuers to submit draft registration statements relating to initial public offerings ("IPOs") for review by the SEC staff on a confidential basis. In addition to IPOs, this process will be available for certain registrations under the Securities Exchange Act of 1934 (the "Exchange Act"), as well as for most offerings made under the Securities Act of 1933 (the "Securities Act") in the first year after an issuer has become an SEC reporting company. The confidential submission process is intended to give issuers more flexibility to plan their offerings and reduce the potential for lengthy exposure to market fluctuations that can adversely affect an offering.

The new procedures are also available for Canadian issuers utilizing the Multijurisdictional Disclosure System ("MJDS"), although the benefits to MJDS filers are not likely to be as significant, because MJDS filings are generally not subject to SEC review.

Under the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"), emerging growth companies ("EGCs") are able to submit draft registration statements confidentially in advance of an IPO, which has been one of the JOBS Act's most widely used accommodations by EGCs. The recently announced confidential submission procedures are consistent in most respects with those that currently apply to EGCs.

The new procedures took effect July 10, 2017.

For the full text of this article, please see: https://www.paulweiss.com/media/3977174/7jul17-sec.pdf

For the SEC's announcement, please see: https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded

2. PCAOB Adopts New Audit Standard Requiring Disclosure of Critical Audit Matters

On June 1, 2017, after several years of consideration, the Public Company Accounting Oversight Board (the "PCAOB") unanimously adopted a new audit standard, AS 3101, *The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*, intended to enhance the relevance and usefulness of the auditor's report by providing additional information to investors. The new audit standard is subject to approval by the SEC. If approved, the new audit standard will be phased in, with some changes becoming required for auditors' reports accompanying financial statements for fiscal years ending on or after December 15, 2017.

The new audit standard and related amendments require auditors to include in the auditor's report a discussion of "critical audit matters" ("CAMs")—namely, matters that (i) have been (or are required to be) communicated to the audit committee, (ii) are related to accounts or disclosures that are material to the financial statements and (iii) involved especially challenging, subjective or complex auditor judgment. Under the new audit standard, the auditor's report will also be required to disclose, among other things, the tenure of the auditor, including the year in which the auditor began serving consecutively as the company's auditor, and certain other information described in the Paul, Weiss memorandum available at the link below. Subject to SEC approval, the requirements related to the disclosure of CAMs will apply to audit reports for fiscal years ending on or after June 30, 2019, for large accelerated filers, and to audit reports for fiscal years ending on or after December 15, 2020, for all other non-exempt issuers.

In recent years, audit standards have been similarly updated to address critical audit matters by a number of organizations outside of the United States, including the International Auditing and Assurance Standards Board, the European Union and the Financial Reporting Council in the United Kingdom.

For the full text of this article, please see: https://www.paulweiss.com/media/3977140/9june17-pcaob.pdf

For the full report, please see: https://pcaobus.org/Rulemaking/Docket034/2017-001-auditors-report-final-rule.pdf

3. U.S. Supreme Court Holds That Five-Year Statute of Limitations Applies to Claims for Disgorgement Brought by the SEC

The Supreme Court ruled on June 5, 2017 that claims for the disgorgement of profits obtained through a violation of U.S. securities laws brought by the SEC are governed by a five-year statute of limitations. The Court's unanimous opinion in *Kokesh* v. *SEC*, No. 16-529, slip op. at 5 (U.S. June 5, 2017) (Sotomayor, J.), held that disgorgement, as it is applied in SEC enforcement proceedings, operates as a "penalty" for purposes of the general federal statute of limitations applicable to "actions for the enforcement of . . . any . . . penalty." Under *Kokesh*, a claim by the SEC seeking disgorgement is thus subject to the same five-year period of limitations as claims by the SEC for civil fines, penalties other than

disgorgement, and forfeitures. *Kokesh* rejected the SEC's position that claims for disgorgement are subject to no period of limitations at all, and could thus potentially be brought an unlimited number of years after the acts constituting the violation.

For the full text of this article, please see: https://www.paulweiss.com/media/3977137/6june17-kokesh.pdf

For the Supreme Court's decision, please see: https://www.supremecourt.gov/opinions/16pdf/16-529_i426.pdf

4. House Approves Financial CHOICE Act

On June 8, 2017, the House of Representatives passed a revised version of the Financial CHOICE Act (the "Act"). The Act would repeal or modify significant portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") and addresses a wide range of other financial regulations. The Act is the second version of a reform bill that was introduced last year. In many respects, the Act reflects priorities raised in President Trump's executive order signed on February 3, 2017, setting forth "Core Principles" intended to guide the regulation of the U.S. financial system and in his April 21, 2017 presidential memoranda calling for a review of certain features of the Dodd-Frank Act.

A variety of interest groups, including the Council of Institutional Investors, have expressed strong opposition to the Act, and the chances of the Senate passing the Act in its current form appear low. Nevertheless, the Act will serve as an important reference point in the negotiation of any legislation able to attract both House and Senate support. Any final legislation would likely include provisions designed to encourage capital market activities in the United States and could also address certain provisions of the Dodd-Frank Act, such as those relating to pay ratio and conflict mineral disclosure, which have been the subject of substantial controversy and litigation.

For the full text of this article, please see: https://www.paulweiss.com/media/3977148/12june17-choice.pdf

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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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