January 11, 2018

2017 U.S. Legal and Regulatory Developments

The following is our summary of significant U.S. legal and regulatory developments during 2017 of interest to Canadian companies and their advisors. The first section below covers developments from the fourth quarter of 2017; the second section reprises key developments from the first three quarters of 2017 as previously reported in our quarterly client memoranda published during the year.

Recent Developments (Fourth Quarter 2017)

1. Update on the Enactment of the Tax Cuts and Jobs Act

On December 22, 2017, President Trump signed Public Law No. 115-97, formerly known as the "Tax Cuts and Jobs Act" (the "Act"), into law.

The Act makes a number of major changes to the U.S. federal income taxation of both individual taxpayers and businesses, including the creation of a preferential rate for income from certain types of businesses operated in pass-through form, by allowing a 20% deduction for such income; changing the rules for carried interest by increasing the required holding period for long-term capital gains to three years with respect to certain gains generated by certain investment management businesses; permanently reducing the corporate income tax rate from 35% to 21% and repealing the corporate alternative minimum tax ("AMT"); imposing limits on the deductibility of business interest and the utilization of net operating losses ("NOLs"); changing to a partial territorial system of international taxation while introducing new provisions designed to combat base erosion; modifying the tax brackets for individuals and reducing marginal tax rates, with the highest marginal rate for individuals reduced from 39.6% to 37%; increasing the standard deduction and limiting or eliminating various itemized deductions for individuals; increasing the AMT exemption amounts and phase-out thresholds for individuals; doubling the federal estate, gift and generation skipping transfer tax exemptions; and significantly expanding the scope of the Section 162(m) compensation deduction limitation and extending the principles of Section 162(m) to compensation payments made by tax-exempt organizations. As more fully explained in our memorandum, many of these changes are effective for taxable years beginning after December 31, 2017.

The legislative process for passing the Act was hurried and left many technical issues and potential drafting errors unresolved. The IRS and Treasury are likely to undertake sizable regulatory projects to provide guidance with respect to many aspects of the Act. Before those regulatory projects are completed, taxpayers may be left applying ambiguous and, in some cases, flawed statutory language.

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For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3977541/3jan18-tax.pdf

2. Delaware Supreme Court Reverses *Dell* Appraisal Decision, Urging Reliance on Deal Price

On December 14, 2017, the Delaware Supreme Court issued its decision in *Dell, Inc.* v. *Magnetar Global Event Driven Master Fund Ltd.*, reversing in part the Court of Chancery's determination of fair value of Dell, Inc., which was based entirely on the lower court's own discounted cash flow ("DCF") analysis. The Supreme Court held that, based upon the factual record, the Court of Chancery erred in affording no weight to the deal price in determining fair value. On remand and in line with other recent Delaware precedent, the Supreme Court urged the Court of Chancery to rely on deal price in determining fair value.

In October 2013, Dell was taken private by a group led by Michael Dell and the investment firm Silver Lake. Numerous Dell stockholders demanded appraisal of their shares in connection with the merger. Last year, the Delaware Court of Chancery issued an opinion determining the fair value of Dell's common stock by solely relying on its own DCF analysis. Although the court acknowledged the robust sales process and several recent Court of Chancery decisions holding that the deal price is the most reliable indicator of fair value (particularly when other evidence of fair value was weak), it chose to afford no weight to the company's pre-transactional stock price and deal price in its fair value analysis. On appeal, the Delaware Supreme Court, sitting *en banc*, in an opinion by Justice Valihura, reversed the Court of Chancery's decision in pertinent part.

The *Dell* decision continues the recent general trend of Delaware appraisal decisions, including the Delaware Supreme Court's decision in *DFC Global Corporation* v. *Muirfield Value Partners, L.P.* in August of this year, to rely on deal price as the best evidence of fair value in arm's-length mergers. Absent evidence suggesting that the sales process was tainted or unreliable, Delaware courts are likely to continue to afford the deal price considerable if not exclusive weight in their fair value appraisal determinations.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3977531/18dec17-dell.pdf

3. SEC Approves Revised NYSE Material News Release Rule

On December 4, 2017, the SEC approved a New York Stock Exchange ("NYSE") rule change prohibiting listed companies from issuing material news after the official closing time for the NYSE's trading session until the earlier of 4:05 p.m. Eastern Time or the publication of the official closing price of the listed company's security.

The rule change was implemented to alleviate confusion caused by price discrepancies between (1) the NYSE closing price and (2) trading prices on other markets after the NYSE official closing time and before the NYSE closing auction is completed, which can be after 4:00 p.m. Section 202.06 of the NYSE's Listed Company Manual continues to include advisory text recommending that listed companies not issue material news until 15 minutes after the scheduled closing time on the NYSE.

The rule change proposal was originally filed by the NYSE in August 2017 and was subsequently amended in November to explicitly make clear that the proposed restriction on issuing material news will not apply when a listed company is publicly disclosing material information following a non-intentional disclosure in order to comply with Regulation FD.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3977524/12dec17-sec.pdf

For the full text of the SEC's release, please see:
https://www.sec.gov/rules/sro/nyse/2017/34-82213.pdf

4. Recent Public Remarks by Co-Directors of SEC Enforcement Division Signal Potential Changing Enforcement Priorities

Recent public remarks by Steven Peikin and Stephanie Avakian, Co-Directors of the Division of Enforcement of the Securities and Exchange Commission (the "SEC"), suggest a potential shifting of enforcement priorities and emphasis.

The October 26, 2017 comments by the Co-Directors of the Division of Enforcement suggest that there may be significant changes in the enforcement environment under the new leadership at the Commission. In particular, it can be expected that the "broken windows" strategy of allocating significant enforcement resources to minor violations will no longer be a favored approach. The combination of skepticism toward corporate penalties and a reduced emphasis on admissions in the context of settled proceedings also could potentially lead toward a changed dynamic in negotiating enforcement resolutions. It should be noted, however, that the enforcement of scienter-based fraud continues to be a prominent and high priority area for the Division of Enforcement, with an increased emphasis on the protection of retail investors and cybersecurity issues, alongside more traditional scienter-based matters.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3977462/31oct17-sec.pdf

5. SEC Issues Proposed Amendments Modifying and Simplifying Regulation S-K

On October 11, 2017, the SEC published proposed amendments (the "Proposed Amendments") to Regulation S-K and related rules and forms. The Proposed Amendments are intended to improve the readability and navigability of disclosure documents and discourage the disclosure of immaterial or repetitive information. Regulation S-K governs non-financial reporting requirements for some SEC filings, including annual reports on Form 10-K, quarterly reports on Form 10-Q and proxy statements, and as a result, the Proposed Amendments will not apply to many Canadian issuers who file periodic reports with the SEC on Forms 40-F and Form 6-K pursuant to the Multijurisdictional Disclosure System.

The Proposed Amendments are based on the recommendations made in the SEC staff's Report on Modernization and Simplification of Regulation S-K, as required by the Fixing America's Surface Transportation Act of 2015. While the Proposed Amendments may raise some interpretive questions, particularly in respect of management's discussion and analysis ("MD&A") disclosures, on balance they represent a useful first step towards modernizing public company disclosure. It remains to be seen whether the SEC will take a harder look at disclosure in light of how shareholders and other market participants obtain and digest information. In the meantime, the reference to taking a "fresh look" at disclosure serves as a useful reminder that the SEC staff for some time now has been urging registrants to mitigate "disclosure overload" by streamlining their disclosures, particularly in the MD&A, to make their reports more user-friendly, more readable and more understandable. The objective should be disclosure that is tailored to a registrant's specific circumstances, contains no boilerplate discussions and presents material information that is not obscured by repetitive, less material or out-of-date information.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3977453/23oct17-sec.pdf

For the Proposed Amendments, please see:
https://www.sec.gov/rules/proposed/2017/33-10425.pdf

6. Treasury Issues Report Outlining Proposed Reforms to U.S. Capital Markets

On October 6, 2017, the U.S. Department of the Treasury issued the second of four reports in response to President Trump's executive order signed on February 3 (the "Executive Order") setting forth "Core Principles" intended to guide the reform of the U.S. financial regulatory system. This second, 220-page report covers the U.S. capital markets. The first report addressed the U.S. depository system, covering banks, savings associations and credit unions, and upcoming reports will cover the regulation of the asset management and insurance industries and nonbank financial institutions, financial technology and financial innovation.

The second report, like the first, echoes some of the regulatory reforms contained in the Financial CHOICE Act (the "CHOICE Act") passed by the House of Representatives in June 2017 and proposes the relaxation of various provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") addressing the regulation of the U.S. capital markets. As noted by Treasury Secretary Steven T. Mnuchin, "[t]he U.S. has experienced slow economic growth for far too long . . . [b]y streamlining the regulatory system, we can make the U.S. capital markets a true source of economic growth which will harness American ingenuity and allow small businesses to grow."

This second report addresses a broad range of issues regarding the regulation and functioning of the U.S. capital markets and is intended to be a road map for action by the SEC and the Commodity Futures Trading Commission ("CFTC"). In addition to discussing issues regarding capital formation, the second report addresses regulatory structure and process, equity market structure, the Treasury market, securitization, derivatives, financial market utilities and international aspects of capital market regulation.

Although any legislative changes to the Dodd-Frank Act would need at least limited bipartisan support, the majority of the changes proposed in the second report could be effected through the regulatory process alone. Importantly, however, regulatory changes made by the SEC and CFTC would often be subject to complex and time-consuming processes, including notice-and-comment rulemakings and interagency coordination.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3977435/16oct17-treasury.pdf

For the Report, please see:
https://www.treasury.gov/press-center/press-releases/Pages/sm0173.aspx

Previously Reported 2017 Developments (First through Third Quarters)

7. President Trump Signs Sanctions Legislation Targeting Russia, North Korea and Iran, Creating New Compliance Risks for U.S. and Non-U.S. Companies

On August 2, 2017, President Trump signed the Countering America's Adversaries Through Sanctions Act ("CAATSA") into law. CAATSA—which was passed overwhelmingly by the Senate and House of Representatives on a broad bipartisan basis—significantly expands certain U.S. sanctions targeting Russia. The law also restricts President Trump's ability to lift certain sanctions unilaterally, by including a congressional review mechanism that will allow Congress to potentially block the president from relaxing measures targeting Russia. CAATSA also adds sanctions targeting North Korea, largely incorporating an earlier House bill, the "Korean Interdictions and Modernization of Sanctions Act." Finally, CAATSA codifies certain non-nuclear sanctions in place against Iran. Many of the law's sanctions are secondary

sanctions, meaning that non-U.S. entities that engage in certain activities—even if such activities do not involve U.S. persons or the United States—may themselves be sanctioned by the United States.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3977222/3aug17-caatsa.pdf

For the CAATSA, please see:
https://www.congress.gov/115/bills/hr3364/BILLS-115hr3364enr.pdf

8. OFAC Breaks New Ground by Penalizing Non-U.S. Companies for Making U.S. Dollar Payments Involving a Sanctioned Country

On July 27, 2017, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") announced a $12 million settlement with CSE Global Limited and its subsidiary, CSE TransTel Pte. Ltd. ("TransTel"), which are both based in Singapore.

TransTel entered into contracts to install telecommunications equipment for several Iranian energy projects. According to the settlement, TransTel apparently violated U.S. sanctions by using its U.S. dollar account at a Singapore-based bank to make over $11 million in payments to various third-party vendors—including several Iranian companies—that were providing goods and services in connection with the Iranian contracts. These payments (which did not indicate their relation to Iran) were held to be processed through the U.S. financial system and to have caused multiple financial institutions to violate U.S. sanctions by engaging in the prohibited exportation of financial services (i.e., processing U.S. dollar payments) from the United States to Iran or for the benefit of Iran.

In light of this action, Canadian and other non-U.S. companies that do business with OFAC-sanctioned jurisdictions or persons should be aware of the significant risks of using U.S. dollar payments.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3977213/28jul17-transtel.pdf

For OFAC's announcement of its enforcement actions, please see:
https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20170727_transtel.pdf

9. Divided Second Circuit Panel Overrules Prior Newman Insider Trading Decision

On August 23, 2017, in *United States* v. *Martoma*, the United States Court of Appeals for the Second Circuit overruled its own 2014 decision in *United States* v. *Newman* and altered the standard for determining whether the personal benefit element of insider trading has been satisfied.

For more than 30 years, since the Supreme Court's seminal decision in *Dirks* v. *SEC*, the dividing line between lawful trading on material, nonpublic information and unlawful insider trading has been whether the tipper breached a duty in exchange for a "personal benefit." In *Newman*, the Second Circuit determined that, in the absence of an explicit *quid pro quo*, a gift of confidential information from a tipper to a tippee could only amount to a "personal benefit" when the tipper had a "meaningfully close personal relationship" with the tippee.

On August 23, 2017, the Second Circuit panel majority in *Martoma* created a new standard for defining the boundaries of the "personal benefit" requirement: a "personal benefit" to the tipper may exist "whenever the information was disclosed with the expectation that the recipient would trade on it and the disclosure resembles trading by the insider followed by a gift of the profits to the recipient."

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3977260/25aug17-martoma.pdf

10. House Approves Financial CHOICE Act

On June 8, 2017, the House of Representatives passed a revised version of the CHOICE Act. The CHOICE Act would repeal or modify significant portions of the Dodd-Frank Act and addresses a wide range of other financial regulations. The CHOICE Act is the second version of a reform bill that was introduced last year. In many respects, the CHOICE 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.

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

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

On June 1, 2017, after several years of consideration, 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. The SEC approved the PCAOB's new standard on October 23, 2017.

The new audit standard and related amendments require that auditors include in audit reports for all filers, including emerging growth companies, for fiscal years ending on or after December 15, 2017, a number of changes intended to clarify the auditor's role and responsibilities relating to the audit, provide additional information about the auditor, and enhance the readability of the auditor's report. These changes include disclosure of the tenure of the auditor, including disclosure of the year in which the auditor first began serving consecutively as the company's auditor; a statement indicating that the auditor

is required to be independent; the addition of the phrase "whether due to error or fraud" when describing the auditor's responsibility under PCAOB standards to obtain reasonable assurance about whether financial statements are free of material misstatements; the requirement that an opinion appear as the first section of the auditor's report; and a requirement that the audit report be addressed to the company's shareholders and board of directors.

The new audit standard and related amendments also will 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. 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.

For the full text of our memorandum, 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

12. SEC Issues Statements Following Recent Conflict Minerals Decision

On April 7, 2017, the Acting Chairman of the SEC issued a public statement addressing the recent final judgment of the District Court for the District of Columbia in *National Association of Manufacturers* v. *SEC*. In the final judgment, issued on April 4, the court held that certain SEC rules and sections of the Dodd-Frank Act violate the First Amendment to the extent that they require companies to report to the SEC and state on their websites that any of their products "have not been found to be 'DRC conflict free.'"

The Acting Chairman announced that he has instructed the staff of the SEC to begin work on a recommendation for future action to address the Court of Appeals decision, and how that determination affects overall implementation of the conflict minerals rule. In a separate statement issued the same day, the Division of Corporation Finance stated that it will not recommend enforcement action to the Commission if companies, including those that are subject to paragraph (c) of Item 1.01 of Form SD—companies who know or have reason to know that any of its necessary conflict minerals originated in the Democratic Republic of the Congo ("DRC") region and are not, or may not be, derived from recycled or scrap sources—only file disclosure under the provisions of paragraphs (a) and (b) of Item 1.01 of Form SD, effectively permitting issuers to not conduct the supply chain diligence or prepare the detailed Conflict Minerals Report required by paragraph (c). All issuers to whom the conflict minerals rule applies will continue to be required to conduct a reasonable country of origin inquiry ("RCOI") and to disclose the results and process of its RCOI on Form SD.

For guidance on the conflict minerals rule, please see:
https://www.paulweiss.com/media/2475522/2may14alert.pdf

For the SEC's public statements, please see:
https://www.sec.gov/news/public-statement/piwowar-statement-court-decision-conflict-minerals-rule

https://www.sec.gov/news/public-statement/corpfin-updated-statement-court-decision-conflict-minerals-rule

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3977052/10apr17sec.pdf

13. President and Congress Eliminate SEC Resource Extraction Rule

On February 14, 2017, President Trump signed a joint resolution of Congress passed under the Congressional Review Act ("CRA"), which eliminated an SEC rule 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.

However, given that Canada has adopted a disclosure initiative similar to the SEC's original rules, the elimination of this rule will not have a significant impact on companies subject to the Canadian disclosure regime.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3954480/15feb17_sec.pdf

14. Second Circuit Holds That Trust Indenture Act 316(b) Prohibits Only Non-Consensual Amendments to Core Payment Terms of Bond Indentures

On January 17, 2017, the U.S. Court of Appeals for the Second Circuit issued its long-anticipated opinion in *Marblegate Asset Management, LLC* v. *Education Management Finance Corp*., ruling that Section 316(b) of the Trust Indenture Act of 1939 (the "TIA") prohibits only non-consensual amendments to core payment terms of bond indentures. The 2-1 ruling vacated and remanded the decision of the district court, which determined that the defendants (two affiliated note issuers and their corporate parent) violated Section 316(b) by engaging in a series of transactions that, while they did not amend the governing indentures, were designed to restructure the defendants' debt in a manner that deprived non-consenting noteholders of their practical ability to collect payment on the notes. The Second Circuit opinion clarifies an issue that had caused substantial doubt and debate in the U.S. debt markets and provides companies that issue debt in the United States with broader ability under the TIA to restructure that debt outside of bankruptcy court.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3890505/18jan17marblegate.pdf

15. XBRL Now Applicable to Canadian 20-F and 40-F Filers

On March 1, 2017, the SEC issued a notice that the International Financial Reporting Standards ("IFRS") Taxonomy has been published and is available for foreign private issuers to submit their financial statements in eXtensible Business Reporting Language ("XBRL"). Canadian foreign private issuers that prepare their financial statements in accordance with IFRS will be required to submit financial data in XBRL with their first annual report on Form 20-F or Form 40-F for a fiscal period ending on or after December 15, 2017. The SEC has not made clear whether MJDS issuers that register offerings of securities on Form F-10 must file interactive data files in XBRL in respect of interim financial statements incorporated by reference into, and filed as exhibits to, those issuers' registration statements on Form F-10. At the time of publication of this memorandum, the SEC had yet to provide a response to Paul, Weiss's request for interpretive advice on the matter.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3976979/3mar17sec.pdf

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For the full text of our Q3 U.S. Legal and Regulatory Developments memorandum, please see:
https://www.paulweiss.com/media/3977431/12oct17-canada.pdf

For the full text of our Q2 U.S. Legal and Regulatory Developments memorandum, please see:
https://www.paulweiss.com/media/3977226/8aug17-canadian.pdf

For the full text of our Q1 U.S. Legal and Regulatory Developments memorandum, please see:
https://www.paulweiss.com/media/3977093/4may17canada.pdf

For a discussion of certain other developments not highlighted above, please see our memoranda available at:
https://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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