January 21, 2020

2019 Year-End U.S. Legal & Regulatory Developments

The following is our summary of significant U.S. legal and regulatory developments during 2019 of interest to Canadian companies and their advisors. The first section below covers developments from the fourth quarter of 2019; the second section reprises key developments from the first three quarters of 2019 as previously reported in our quarterly client memoranda published during the year.

Recent Developments (Fourth Quarter 2019)

1. SEC Proposes to Update Accredited Investor Definition to Increase Access to Investments

On December 18, 2019, the Securities and Exchange Commission ("SEC") voted to propose amendments to the definition of "accredited investor," one of the principal categories of investor eligible to participate in certain private U.S. offerings. Accredited investors may, under SEC rules, participate in investment opportunities that are generally not available to non-accredited investors, such as investments in private placements and offerings by certain hedge funds, private equity funds and venture capital funds, on the basis that accredited investors possess financial sophistication and an ability to sustain the risk of loss such that the protections provided by the registration process under the U.S. Securities Act of 1933, as amended (the "Securities Act") are unnecessary.

The proposed amendments would add additional categories of natural persons that may qualify as accredited investors based on certain professional certifications or credentials designated from time to time by SEC order, representing the SEC's view that wealth – the basis of the current tests for natural persons that are not insiders – should not be the sole means of establishing financial sophistication for purposes of the definition. The proposed amendments would add to the definition of accredited investor natural persons holding certain certifications from FINRA, including Licensed General Securities Representative (Series 7), even if such persons do not meet the current income or net worth standards. The proposed amendments would also add a category in the accredited investor definition for "knowledgeable employees" of a private fund, with respect to investments in that private fund.

Additionally, the proposed amendments would add additional categories of entities that may qualify as accredited investors, including certain "family offices" with at least $5 million in assets under management, as well as their "family clients." A new catch-all category would also be created to include any entity owning investments in excess of $5 million that is not formed for the specific purpose of acquiring the securities being offered.

The proposed amendments would also codify a number of staff interpretative positions relating to the accredited investor definition and make a number of conforming changes, including to expand the definition of "qualified institutional buyer" under Rule 144A to include any institutional accredited investors of an entity type not already included in Rule 144A, provided such entities meet the existing $100 million in securities owned and invested threshold within Rule 144A.

For the full text of the SEC's proposed rule change, please see:
https://www.sec.gov/rules/proposed/2019/33-10734.pdf

2. SEC Proposes Amendments to Improve Accuracy and Transparency of Proxy Voting Advice and Modernize Shareholder Proposal Rules

On November 5, 2019, the SEC voted 3-2 to propose amendments to its proxy solicitation rules as applicable to proxy voting advice, and to its procedures for the submission of proposals by shareholders for inclusion in issuers' proxy statements.

The SEC proposes to codify that a "solicitation," as defined under the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act") Rule 14a-1(l), includes proxy voting advice (other than research reports or data not used to formulate voting recommendations and administrative or ministerial services). Notwithstanding that proxy voting advice is proposed to be codified as a solicitation, proxy advisory firms would still be able to rely on exemptions to certain of the SEC's proxy solicitation information and filing requirements so long as they (i) do not seek, directly or indirectly, the power to act as a proxy for a security holder and do not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention consent or authorization, and (ii) satisfy proposed new conditions related to the disclosure of conflicts of interest, the imposition of a review period for proxy voting advice, and the inclusion of hyperlinks to views of the company and soliciting persons on the proxy voting advice. Even though proxy advisory firms would be exempt from certain of the SEC's proxy information and filing rules, the proposed amendments indicate that such firms' voting advice as solicitations would be subject to the antifraud provisions of Rule 14a-9. Furthermore, the proposed amendments indicate that the failure to disclose "material information" with respect to proxy voting advice (which could include the proxy advisory firm's methodology, sources of information, conflicts of interest and use of standards that materially differ from relevant standards or requirements approved by the SEC) could be misleading.

The proposed amendments also include a number of changes to the rules governing when an issuer must include in its proxy statement proposals made by shareholders, including changing the eligibility requirements for the submission of shareholder proposals (by replacing the current single-threshold ownership and holding period requirements to a three-tiered threshold in which ownership requirements increase as the holding period decreases) and increasing the voting thresholds required to resubmit a substantially similar proposal that previously failed, including the creation of a "momentum" provision that would permit companies to exclude a proposal if it experiences a decline in shareholder support of 10% or more compared to the immediately preceding vote.

It remains to be seen whether the amendments will be adopted, and if so, with any revisions. The SEC's split vote to propose the amendments reflects wider disagreement amongst various stakeholders in this area. Earlier this year, proxy advisory firm Institutional Shareholder Services (ISS) sued the SEC (currently pending in the U.S. District Court for the District of Columbia) to seek injunctive and declaratory relief against guidance issued by the SEC on August 21, 2019 regarding the applicability of proxy rules to proxy voting advice (some of which is proposed to be codified by the SEC in the proposed amendments).

For the full text of our memorandum on the proposed amendments, please see:
https://www.paulweiss.com/media/3979135/14nov19-sec-proxy-solicitation-rules.pdf

For the full text of the SEC's proposed rule change, please see:
https://www.sec.gov/rules/proposed/2019/34-87457.pdf

3. SEC Concludes the 2018-19 Fiscal Year with Four FCPA Enforcement Actions

The SEC closed out its 2018-19 fiscal year by resolving four Foreign Corrupt Practices Act ("FCPA") enforcement actions and assessing over $25 million in combined penalties, bringing the total number of SEC resolutions in 2019 to twelve. The SEC resolved matters with TechnipFMC plc for $5.1 million; with Quad/Graphics, Inc. for $9.9 million; with Barclays plc for $6.3 million; and with Westport Fuel Systems, Inc. for $4.1 million.

Including these four corporate enforcement actions, the SEC settled seven FCPA corporate enforcement actions in the third quarter of 2019 alone. Penalties and disgorgement from these settlements totaled $78.5 million. Collectively, these resolutions demonstrate the SEC's continued commitment to FCPA enforcement, notwithstanding SEC Chairman Jay Clayton's remarks that the SEC has "not seen meaningful improvement" in global anti-corruption enforcement efforts. Focus on the adequacy of compliance also remains strong, as the enforcement actions reflect the SEC's continued reliance on the FCPA's accounting provisions in cases in which the SEC believes an issuer's inadequate compliance program creates the potential for bribery.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3979019/8oct19-sec-enforcements.pdf

4. Supreme Court to Consider whether the SEC May Collect Disgorgement in Civil Enforcement Proceedings

On November 1, 2019, the Supreme Court granted certiorari in *Liu* v. *Securities and Exchange Commission*, No. 18-1501, to review the question of whether the SEC may obtain disgorgement from a court for securities law violations. The Supreme Court expressly flagged, but did not address, this important question in its decision in *Kokesh* v. *Securities and Exchange Commission* — a decision discussed in depth in our June 6, 2017 client alert, hyperlinked below. In *Kokesh*, the Supreme Court characterized disgorgement as a "penalty" rather than an equitable remedy. Just over two years later, the Supreme Court has agreed to consider the question of whether the SEC thus lacks authority to collect disgorgement pursuant to its statutory authority to obtain equitable relief.

The Supreme Court's decision could have significant implications for a widespread SEC practice. In 2018 alone, the SEC collected approximately $2.51 billion in disgorgement, while collecting only $1.44 billion in civil monetary penalties. It has also used the threat of disgorgement as a key point of leverage in settlement negotiations with potential defendants. Still, the impact of a decision in petitioners' favor would be cabined by the fact that, regardless of the Court's decision in *Liu*, the SEC will retain the ability to seek disgorgement in administrative proceedings.

For the full text of our memorandum, please see:
https://www.paulweiss.com/practices/litigation/securities-litigation/publications/supreme-court-to-consider-if-the-sec-may-collect-disgorgement-in-civil-enforcement-proceedings?id=30169

For our June 6, 2017 memorandum on *Kokesh*, please see:
https://www.paulweiss.com/media/3977137/6june17-kokesh.pdf

5. CFIUS Issues Final Regulations for Implementation of the Foreign Investment Risk Review Modernization Act of 2018 – Expanded Jurisdiction and New Mandatory Filings

On January 13, 2020, the Treasury Department issued two final regulations in order to comprehensively implement the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") (which became law on August 13, 2018), along with a press release, a fact sheet and a set of frequently asked questions. The final regulations will become effective on February 13, 2020. Previously, on September 17, 2019, the Treasury Department had issued proposed regulations, which were discussed in depth in our October 3, 2019 client alert, hyperlinked below.

Prior to the enactment of FIRRMA, the jurisdiction of the interagency Committee on Foreign Investment in the United States ("CFIUS") — and the related ability of the President to block or unwind a transaction — was limited to acquisitions, investments and joint ventures that could result in foreign control over any U.S. business, direct or indirect (referred to as "covered control transactions" in the new regulations). FIRRMA expanded the range of transactions subject to CFIUS jurisdiction to include certain non-controlling, non-passive investments by foreign persons in U.S. businesses that involve critical technology, critical infrastructure or the maintenance or collection of sensitive personal data of U.S. citizens.

FIRRMA also expanded CFIUS jurisdiction to cover the purchase or lease by a foreign person of real estate located either (i) at an airport or maritime port or (ii) in close proximity to a U.S. military base or other U.S. government facility that is sensitive from a national security perspective. Prior to the adoption of FIRRMA, CFIUS could only review an acquisition of real estate if it was part of a transaction that could result in control by a foreign person of a U.S. business.

The final regulations represent a substantial undertaking on the part of the Treasury Department and other CFIUS agencies. The Treasury Department has estimated a substantial increase in filings with CFIUS as a result of the regulations. Even with the increases in funding and personnel under FIRRMA, such an increase in cases is likely to pose significant challenges for CFIUS. To what extent these significant demands on resources will constrain CFIUS' recently enhanced ability to monitor and, as necessary, take action in response to transactions that are not notified to CFIUS remains to be seen.

For the final regulations implementing FIRRMA and related Treasury Department materials, please see: https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius

For our October 3, 2019 memorandum on the proposed regulations, please see: https://www.paulweiss.com/practices/transactional/mergers-acquisitions/publications/cfius-issues-proposed-regulations-for-implementation-of-the-foreign-investment-risk-review-modernization-act-of-2018?id=29888

6. Court of Chancery Rules Boston Scientific Must Complete Merger with Channel Medsystems

On December 18, 2019, the Delaware Court of Chancery in *Channel Medsystems, Inc.* v. *Boston Scientific Corporation* ordered Boston Scientific to close the $275 million merger agreement it had sought to terminate in May 2018 after learning that a Channel Medsystems executive had submitted false data to regulators about its flagship product, Cerene.[1] In its case, Boston Scientific claimed that the facts were extremely similar to those in *Akorn, Inc.* v. *Fresenius Kabi AG* (a decision discussed in depth in our December 7, 2018 client alert, hyperlinked below), wherein the court permitted Fresenius to terminate its acquisition of Akorn.[2]

In *Channel*, shortly after a deal was announced, the target company disclosed that a quality control executive had made fraudulent submissions to the Food and Drug Administration in connection with its sole product. The executive was subsequently indicted for embezzlement. Ultimately, however, the court in *Channel* found that no material breaches of the merger agreement had occurred due to the misconduct, and

[1] Paul, Weiss represented Channel Medsystems, Inc. in *Channel Medsystems, Inc.* v. *Boston Scientific Corporation*.

[2] Paul, Weiss represented Fresenius Kabi AG in *Akorn, Inc.* v. *Fresenius Kabi AG*.

in fact that Boston Scientific had breached its obligation to proceed with the merger in good faith. The court's decision indicates that the *Fresenius* case was not a harbinger of change in the Court of Chancery's thinking on material adverse effect ("MAE") clauses and that the right to terminate a merger agreement due to the alleged occurrence of an MAE remains a difficult case to prove.

For the full text of our memorandum, please see:
https://www.paulweiss.com/practices/litigation/litigation/news/chancery-judge-rules-boston-scientific-must-complete-channel-medsystems-deal?id=30378

For our December 7, 2018 memorandum on *Fresenius*, please see:
https://www.paulweiss.com/practices/litigation/mergers-acquisitions-litigation/news/in-landmark-victory-delaware-supreme-court-affirms-that-fresenius-can-terminate-akorn-deal?id=27931

7. Courts Continue Focus on Board-Level Compliance Oversight

Following decisions earlier in 2019 in *Marchand* v. *Barnhill* and *Rojas* v. *Ellison*, the Delaware Court of Chancery continued its focus on breach of the duty of oversight claims (*i.e.*, "*Caremark* claims") in two decisions in the fourth quarter, one granting dismissal and the other not.

On October 1, 2019, the court in *In re Clovis Oncology, Inc. Derivative Litigation* permitted *Caremark* claims to survive a motion to dismiss. Although the company had in place a board-level compliance system, the plaintiffs' complaint adequately alleged that the board failed to monitor the compliance system and ignored a series of red flags related to the clinical trials of the company's primary product, a cancer drug. Importantly, the decision emphasized that courts are more inclined to find *Caremark* liability "when a monoline company operates in a highly regulated industry." In this regard, board oversight of a company's compliance with positive law is distinguishable from "management of business risk" inherent in the business plan. Here, regulatory compliance risk was itself "mission critical," and plaintiffs sufficiently pled that the board knew of, yet failed to act on, management's allegedly improper deviation from protocol when reporting clinical trials to investors.

However, on October 31, 2019, the court in *In re LendingClub Corp. Derivative Litigation* dismissed *Caremark* claims brought against the board. The court concluded that the board and its committees implemented and adequately monitored internal controls with respect to the various problems uncovered by the company's internal investigations following reports by a whistleblower. The court noted that the plaintiff did not allege a "single fact" of the board's acting in bad faith, reaffirming that *Caremark* claims are predicated not on the mere occurrence of a compliance incident but on a board's utter failure to implement reasonable compliance systems and procedures.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3979130/13nov19-caremark.pdf

For the full text of the *Clovis* opinion, please see:
https://courts.delaware.gov/Opinions/Download.aspx?id=295870

For the full text of the *LendingClub* opinion, please see:
https://courts.delaware.gov/Opinions/Download.aspx?id=297330

8. Court of Chancery Finds Special Committee Members Lacked Independence from Controller Due to Personal and Professional Relationships

On September 30, 2019, the Court of Chancery in *In re BGC Partners, Inc. Derivative Litigation* denied both motions to dismiss the plaintiffs' derivative claims challenging the fairness of BGC's acquisition of another controlled company. The court concluded that the personal and professional relationships between the directors and the controlling stockholder rendered it futile for the plaintiffs to first make a required demand on BGC's board to decide whether or not BGC should pursue the claims itself, and also stated a claim for breach of loyalty against the members of the special committee that approved the transaction. The court noted that demand was excused because of a "constellation" of relationships among the controller and a majority of the board.

In particular, the plaintiffs alleged that the four directors who served on the special committee (only three of whom remained directors when the complaint was filed) had professional and personal relationships of ten to twenty years with the controller, including through board service with lucrative pay at other affiliated companies and charitable giving and other relationships to a particular college (of which one special committee member formerly had been the provost and another had served on its board). For those same reasons, the court reasoned that the special committee members' approval of a transaction involving an interested party (the controller) from whom they may have lacked independence supported a reasonably conceivable claim for breach of their fiduciary duty of loyalty.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3979226/7jan20-dmaq.pdf

For the full text of the opinion, please see:
https://courts.delaware.gov/Opinions/Download.aspx?id=295730

Previously Reported 2019 Developments (First through Third Quarters)

9. SEC Adopts Rules Modifying and Simplifying Regulation S-K

On March 20, 2019, the SEC adopted amendments (the "Amendments") to Regulation S-K and related rules and forms to modernize and simplify disclosure requirements for public companies, investment advisers and investment companies. The Amendments are largely consistent with the SEC's 2017 proposing release and 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 SEC filings by domestic issuers, including annual reports on Form 10-K, quarterly reports on Form 10-Q and proxy statements. The 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 ("FAST") Act of 2015.

Below is a summary of certain key changes included in the Amendments:

- **Revisions to MD&A Disclosure Requirements**. Under the SEC's previous rules, a Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") prepared in accordance with Regulation S-K was required to contain a period-to-period comparison for a registrant's three most recent fiscal years. The Amendments allow registrants to disclose such comparison for only the registrant's two most recent years, if a discussion of the third most recent year is available in the registrant's prior periodic reports filed on EDGAR. The Amendments also permit registrants to make the required MD&A disclosures in narrative form, in lieu of a year-to-year comparison, if the registrant believes that a narrative discussion would more appropriately convey the required information.

- **Streamlining of Confidential Treatment Provisions**. The Amendments allow registrants to omit certain confidential information from material contracts filed on EDGAR, without the need to submit a confidential treatment request to the SEC, as was required prior to the adoption of the Amendments. Information sought to be omitted must be both (i) immaterial and (ii) likely to cause competitive harm to the registrant if publicly disclosed. Registrants must ensure that redactions are limited to those portions of a document necessary to prevent competitive harm.

- **Limitation on Material Contracts Required to be Filed**. Previously, registrants were required by Item 601 of Regulation S-K to file material contracts not made in the ordinary course of business if either (i) the contract was to be performed in whole or in part at or after the filing of the registration statement or report or (ii) the contract was entered into within the last two years before the filing. The Amendments eliminate the second criterion for all registrants other than newly reporting registrants, removing the requirement to file material contracts that have been fully performed before the date the relevant registration statement or report is filed.

- **Omission of Schedules and Similar Attachments**. Registrants are now permitted to omit schedules and attachments from certain agreements filed with the SEC, and may instead file with the relevant exhibit a list identifying the contents of the omitted schedule(s) or attachment(s).

- **Tagging Cover Page Data**. The Amendments require that all of the information on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F be tagged in Inline XBRL, including the ticker symbol for each class of securities registered under the Exchange Act to facilitate investors' efforts to search news websites and stock market data for information on registrants.

- **Description of Securities Exhibit**. The Amendments create a new requirement that registrants file, as an exhibit to annual reports on Form 10-K, a description of each of the issuer's classes of securities registered under Section 12 of the Securities Act.

Certain of the Amendments also affect the requirements of Form 20-F used by foreign private issuers not eligible to file under the U.S.-Canada Multijurisdictional Disclosure System, and conforming changes will be made to Form 20-F.

The Amendments are part of the SEC Division of Corporation Finance's "Disclosure Effectiveness Initiative," a systemic review of the SEC's disclosure requirements with the stated aim of improving the disclosure regime for the benefit of issuers and investors. The Disclosure Effectiveness Initiative mirrors similar efforts to review and streamline public issuer disclosure underway in other jurisdictions including the European Union, the United Kingdom and Canada, including by the Ontario Securities Commission's Burden Reduction Task Force.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3978556/2apr19-sec-regulation-s-k.pdf

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

10. SEC Approves Nasdaq Rule Change to Facilitate Listing without an Initial Public Offering

In February 2019, The Nasdaq Stock Market LLC ("Nasdaq") filed notice with the SEC of a proposed rule change creating new Listing Rule IM-5315-1 to the Nasdaq Global Select Market listing standards designed to facilitate a direct listing of a company's shares without conducting an initial public offering. The SEC approved the proposed rule change, which became effective upon filing.

New Listing Rule IM-5315-1 is substantially similar to the direct listing rule adopted by the New York Stock Exchange ("NYSE") in February 2018 and is aimed at facilitating direct listings by the growing number of highly valued start-ups, including so-called "unicorns," that have tended to delay going public in part because they have sufficient capital and therefore have no need to raise additional capital by undertaking a traditional underwritten primary offering of their shares. Direct listings can be attractive for these companies because they avoid the underwriters' discounts and commissions of a traditional IPO, prevent dilution of existing shareholders (as there would be no new issuance) and eliminate the contractual restrictions (lock-ups) on resales imposed by underwriters (though the resale restrictions under Rule 144 are unaffected). In April 2018, Spotify Technology took advantage of the NYSE rule change to undertake a direct listing on the NYSE, and in April 2019 Slack Technologies, Inc. filed a registration statement to do the same.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3978505/13mar19-nasdaq.pdf

For the SEC's approval of the proposed rule change, please see:
https://www.sec.gov/rules/sro/nasdaq/2019/34-85156.pdf

11. SEC Proposes to Amend Definitions of "Accelerated Filer" and "Large Accelerated Filer"

On May 9, 2019, the SEC announced a proposal to amend the definitions of "accelerated filer" and "large accelerated filer" under Rule 12b-2 of the Exchange Act in an ongoing effort to reduce costs and reporting requirements for registrants. The proposed rule changes would:

- exclude from "accelerated filer" and "large accelerated filer" status registrants that are eligible to be treated as "smaller reporting companies" and that had annual revenues of less than US$100 million in the most recent fiscal year for which audited financial statements are available;

- increase the transition thresholds for accelerated and large accelerated filers becoming nonaccelerated filers from a public float of US$50 million to US$60 million and for exiting large accelerated filer status from a public float of US$500 million to US$560 million; and

- add an annual revenue test of less than US$100 million (or less than US$80 million if not able to meet US$100 million at first test) to the transition thresholds for exiting both accelerated and large accelerated filer status.

As a result of the proposed rule changes, certain low-revenue registrants would not be required to have their assessment of the effectiveness of internal control over financial reporting ("ICFR") attested to, and reported on, by an independent auditor, although management would continue to be required to make such assessments and to establish and maintain the effectiveness of its ICFR.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3978669/23may19-accelerated-filer.pdf

For the full text of the SEC's proposed rule changes, please see:
https://www.sec.gov/rules/proposed/2019/34-85814.pdf

12. OFAC Issues Guidance on Sanctions Compliance Programs and Flags "Root Causes" Underlying Prior Enforcement Actions

On May 2, 2019, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") issued guidance entitled "A Framework for OFAC Compliance Commitments" (the "Framework") that strongly encourages companies to "develop, implement, and routinely update" risk-based sanctions compliance programs. OFAC made clear that the guidance was intended for U.S. companies as well as non-U.S. companies that conduct business in or with the United States, with U.S. persons or using U.S. origin goods or services. The guidance describes five "essential components" of an effective sanctions compliance program: (i) management commitment, (ii) risk assessment, (iii) internal controls, (iv) testing and audit and (v) training.

In an appendix to the Framework, OFAC also describes some of the common "root causes" of the apparent violations that were the subject of its prior enforcement actions. This appendix is meant to assist companies in "designing, updating and amending" their sanctions compliance programs.

The Framework, and the related "compliance commitments" in recent OFAC settlements, represents a new effort by OFAC to more clearly and comprehensively communicate its expectations about appropriate sanctions compliance practices. U.S. and non-U.S. companies would be well advised to study the Framework and the compliance commitments carefully.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3978645/14may19-ofac-compliance.pdf

For the full text of the Framework, please see:
https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf

13. SEC Proposes to Modernize Descriptions of Business and Legal Proceedings, and Risk Factor Disclosures, Under Regulation S-K

On August 8, 2019, the SEC proposed amendments to Regulation S-K under the Exchange Act that aim to modernize the current descriptions of business and legal proceedings and risk factor disclosure requirements. The proposed amendments are designed to improve the readability of disclosure documents, as well as discourage repetition and disclosure of non-material information. The proposed amendments would revise disclosure requirements for registrants under Items 101(a) (description of the general development of the business), 101(c) (narrative description of the business), 103 (legal proceedings) and 105 (risk factors) of Regulation S-K. The SEC proposal reflects a desire for more principles-based disclosure requirements whereby disclosure objectives are set and management can exercise judgment as to how to satisfy those objectives.

Once implemented, these changes will impact disclosures made by Canadian and U.S. issuers who report on U.S. domestic issuer forms, including Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q.

The proposed amendments principally impact four disclosure areas:

- **Item 101(a), General Development of Business**. The proposed amendments would eliminate the five-year disclosure timeframe for the registrant's description of general business development, instead focusing disclosure on the information material to understanding the development of a registrant's business irrespective of a specific timeframe. The SEC also proposed to eliminate the prescriptive list of disclosure items in Item 101(a) and instead shift to a principles-based approach, allowing registrants to satisfy their obligation by providing material information on the general development of their business. The proposed amendments would also require registrants to provide updated disclosure only for material developments in filings made after an initial registration statement;

- **Item 101(c), Narrative Development of Business**. The proposed amendments would reaffirm the existing principles-based approach of Item 101(c) and clarify that a registrant has to discuss the enumerated items for a segment only when material to its business;

- **Item 103, Legal Proceedings**. The proposed amendments would permit registrants to provide some or all of the information already required under Item 103 by using cross-references to disclosure elsewhere in the document (including the financial statements and MD&A), thereby avoiding duplicative disclosure of information; and

- **Item 105, Risk Factors**. The proposed amendments would require registrants to provide summary risk factor disclosure if the risk factor section exceeds 15 pages and would change the disclosure standard from the "most significant" factors to the "material" factors which make an investment speculative or risky. Registrants would also be required to organize risk factors under relevant headings and to place generic risk factors generally applicable to companies at the end of the risk factors section under a separate heading entitled "General Risk Factors."

The proposed amendments were subject to a 60-day public comment period that concluded on October 22, 2019.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3978834/21aug19-sec-regulation-s-k.pdf

For the full text of the SEC's proposed amendments, please see:
https://www.sec.gov/rules/proposed/2019/33-10668.pdf

14. SEC Extends the "Test-the-Waters" Accommodation to All Issuers

On September 26, 2019, the SEC announced that it has adopted a new rule under the Securities Act extending a "test-the-waters" accommodation, previously available only to emerging growth companies ("EGCs"), to all issuers. The goal of new Rule 163B is to encourage more issuers to enter the U.S. public equity markets, while continuing to maintain appropriate investor protections, by leveling the playing field among issuers, increasing their flexibility to tailor the size and other terms of an offering, and reducing core costs of going public. The rule became effective on December 3, 2019.

Section 5(c) of the Securities Act prohibits any written or oral offers prior to the filing of a registration statement. In 2012, the U.S. Congress passed the Jumpstart Our Business Startups Act that created, inter alia, a "test-the-waters" accommodation for EGCs (Section 5(d) of the Securities Act). The accommodation permits EGCs, or any persons acting on their behalf, to engage in oral or written communications with potential investors that are, or are reasonably believed to be, qualified institutional buyers ("QIBs") or institutional accredited investors ("IAIs"), either before or after filing of a registration statement, in order to ascertain such investors' interest in a contemplated securities offering.

Under new Rule 163B, all issuers (whether domestic or foreign, reporting or non-reporting, EGCs or non-EGCs, and including well-known seasoned issuers and investment companies) are now allowed to gauge market interest in a possible initial public offering or other registered securities offering through oral or written communications with certain institutional investors prior to, or following, the filing of a registration statement.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3978911/1oct19-sec-test-waters.pdf

For the full text of the SEC's final rule, please see:
https://www.sec.gov/rules/final/2019/33-10699.pdf

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For the full text of our quarterly U.S. Legal and Regulatory Developments memoranda published during 2019, please see:

Q3: https://www.paulweiss.com/media/3978917/3oct19-can-q3.pdf

Q2: https://www.paulweiss.com/media/3978797/29jul19-canq2.pdf

Q1: https://www.paulweiss.com/media/3978623/30apr19-can-q1.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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