
April 15, 2021

Q1 2021 U.S. Legal & Regulatory Developments

The following is our summary of significant U.S. legal and regulatory developments during the first quarter of 2021 of interest to Canadian companies and their advisors.

1. SEC Division of Corporation Finance Issues Sample Comments for Issuers Conducting Offerings During Periods of Volatility

On February 8, the Securities and Exchange Commission (the “SEC”) Division of Corporation Finance issued a Sample Letter to Companies Regarding Securities Offerings During Times of Extreme Price Volatility (the “Sample Letter”). The Staff identified, among other factors, recent stock run-ups, high short interest and reports of strong and atypical retail investor interest as circumstances giving rise to the risks that its comments were intended to address.

On the prospectus cover page, issuers should describe recent volatility of their stock price, disclose any known risks of investing in their stock as a result of the volatility, disclose their stock market price prior to the volatility and describe any recent changes in financial condition or results of operations that are consistent with recent changes in their stock price. If there are no such recent changes, issuers should disclose that fact.

Issuers should also consider including risk factors addressing recent volatility in their stock price, the effects of a potential “short squeeze” on their stock price and the potential impact of the offering on the stock price and investors if the issuer is issuing a large number of shares relative to the number of shares currently outstanding. Furthermore, if the issuer expects to conduct future offerings, it should include a risk factor addressing the dilutive impact of future offerings on investors that purchase shares in the current offering at a significantly higher price.

Finally, issuers should include clear disclosure about the maximum offering amount, the stock price on which it is predicated, the fact that the issuer may not raise the maximum offering amount unless it meets or exceeds such price and a discussion of the issuer’s priorities for the proceeds received in the offering if less than the maximum offering amount is raised.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3980849/sec_division_of_corporation_finance_issues_sample_comments_for_issuers_conducting.pdf

For the SEC Sample Letter, please see:

- <https://www.sec.gov/corpfin/sample-letter-securities-offerings-during-extreme-price-volatility>

2. SEC Turns up the Heat on Climate and ESG Disclosures

Under Acting SEC Chair Allison Herren Lee, the SEC has been taking significant steps on climate and Environmental, Social and Corporate Governance (“ESG”) disclosures.

On February 24, Acting SEC Chair Lee issued a statement that she has directed the Staff of the Division of Corporate Finance to “enhance its focus on climate-related disclosure in public company filings.” The Staff of the Division of Corporate Finance will review the extent to which registrants are addressing the topics identified in the SEC’s 2010 interpretive guidance on climate-related disclosures, assess the compliance of companies with disclosure obligations under federal securities laws and engage with registrants on these issues to understand how the market is managing climate-related risks.

On March 4, the SEC announced the creation of a Climate and ESG Task Force in its Division of Enforcement (the “Enforcement Task Force”), which will oversee a Division-wide effort to develop initiatives to proactively identify ESG-related misconduct. The initial focus of the Enforcement Task Force will be to “identify any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules.” The ESG Task Force will scrutinize public disclosure by registrants as well as disclosure and compliance issues relating to ESG strategies of investment advisers and funds.

On March 15, Acting Chair Lee, in remarks delivered at a briefing hosted by the Center for American Progress, identified additional areas where the SEC’s regulatory mission intersects with climate and ESG issues and the associated initiatives that she has directed the SEC to undertake. These initiatives, if implemented, would have a significant impact not only on climate and ESG topics, but also on the rules governing shareholder proposals and “proxy plumbing.”

In addition, on March 15, Acting Chair Lee issued a statement calling for public comment on climate disclosures. The statement poses a number of questions for public input on a wide range of topics, including how the SEC should consider updating its climate disclosure requirements, how companies should make these disclosures and what the SEC should require companies to disclose.

For the full memorandum on the ESG task force, please see:

- https://www.paulweiss.com/media/3980877/sec_turns_up_the_heat_on_climate_and_esg_disclosures.pdf

For our full memorandum on Acting SEC Chair Lee’s March 15 comments regarding additional climate and ESG initiatives, please see:

- https://www.paulweiss.com/media/3980904/acting_sec_chair_lee_discusses_additional_climate_and_esg_initiatives.pdf

For our full memorandum on the statement by Acting Director Coates of the SEC’s Division of Corporate Finance regarding ESG disclosure standards, please see:

- https://www.paulweiss.com/media/3980897/sec-s_coates_calls_for_adaptive_and_innovative_policy_on_esg_disclosure.pdf

For our full memorandum on Acting Chair Lee’s February 24 direction to the Division of Corporation Finance to “enhance its focus on climate-related disclosure in public company filings,” please see:

- <https://www.paulweiss.com/practices/transactional/capital-markets/publications/acting-sec-chair-allison-herren-lee-issues-statement-on-the-review-of-climate-related-disclosure?id=39448>

For the SEC press release regarding the creation of the ESG Task Force, please see:

- https://www.sec.gov/news/press-release/2021-42?utm_medium=email&utm_source=govdelivery

3. Nasdaq Amends Its Board Diversity Proposals

On February 26, Nasdaq filed an amendment with the SEC to the board diversity and disclosure requirements it first proposed in December 2020 (the “Amendment”). The Amendment adapts the original requirements for smaller boards, adding a grace period for companies that fall out of compliance and extending time periods for compliance for newly listed companies.

Previously, the proposed rules would have required listed companies to have at least one female director and one director that self-identifies as an “underrepresented minority” or as LGBTQ+ (each, a “Diverse” director). Under the Amendment, a company with a board of directors consisting of five or fewer members (a “small board”) would only need to demonstrate that it has at least one director who is Diverse. A company that had a small board prior to becoming subject to the board diversity objectives may add a sixth director who is Diverse in order to meet this reduced board diversity objective.

Under the Amendment, a company that no longer meets the applicable board diversity objectives due to a vacancy on its board would have until the later of (a) one year from the date of the vacancy or (b) the date the company files its proxy statement or its information statement (or, if it does not file a proxy or information statement, its Form 10-K or 20-F) for its annual meeting of shareholders (its “Annual Meeting Filing”) in the calendar year after the year in which the vacancy occurs, to satisfy the applicable board

diversity objectives. During this period, the company would publicly disclose that it is relying on the grace period.

Any company that ceases to be a foreign issuer, a smaller reporting company or an exempt company would be permitted to satisfy the applicable board diversity objectives by the later of (a) one year from the date the company no longer qualifies as such or (b) the date the company makes its Annual Meeting Filing during the calendar year following such event. There are no exemptions for controlled companies.

On March 10, the SEC issued a notice and order to solicit comments on the proposed rule changes, as modified by the Amendment. The deadline for submissions regarding the approval or disapproval of the proposals, as modified by the Amendment, was April 6. Rebuttals to any other person's submission must be filed by April 20.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3980879/nasdaq_amends_its_board_diversity_proposals.pdf

For our December 3, 2020 memorandum discussing the original proposed requirements, please see:

- https://www.paulweiss.com/media/3980655/nasdaq_proposes_board_diversity_requirements_for_listed_companies.pdf

For the Nasdaq Amendment, please see:

- https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081_Amendment_1.pdf

For the SEC notice and order to solicit comments on the proposed rule changes, please see:

- <https://www.sec.gov/rules/sro/nasdaq/2021/34-91286.pdf>

4. SEC Staff Issues Additional Guidance for SPACs

On March 31, 2021, the Staff of the SEC's Division of Corporation Finance issued a Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies ("SPACs") and the Acting Chief Accountant issued a public statement on Financial Reporting and Auditing Considerations of Companies Merging with SPACs. Together, these statements serve as a reminder of certain key issues that SPACs and potential SPAC acquisition targets should take into account.

The statement from the Staff of the Division of Corporation Finance highlights select issues that private companies should consider before entering into a business combination with a SPAC. Specifically, the

statement outlines the shell company restrictions that are applicable to SPACs and the books and records and internal controls requirements that are applicable to SPACs as well as to the post-combination business. The statement also notes that, if the SPAC is listed on a national securities exchange, in order for the post-combination business to be listed, the combined company must satisfy quantitative and qualitative initial listing standards upon the consummation of the business combination, which include certain corporate governance requirements such as requirements regarding a majority independent board of directors, an independent audit committee consisting of directors with specialized experience, independent director oversight of executive compensation and the director nomination process, and a code of conduct applicable to all directors, officers and employees.

The statement from the Acting Chief Accountant highlights key considerations related to the unique challenges of a private company entering the public market through a SPAC merger. Specifically, the statement details the importance of market and timing considerations; financial reporting considerations; internal control considerations; corporate governance and audit committee considerations; and auditor considerations. The statement highlights that it is essential that the board of directors, audit committee, management and auditors of SPACs fully understand and fulfill their respective professional responsibilities and for the combined public company to have a capable, experienced management team that understands the expectations, reporting and internal control requirements of a public company and can effectively execute the company's comprehensive plan on an accelerated basis.

For our full memorandum, please see:

- https://www.paulweiss.com/media/3980974/sec_staff_issues_additional_guidance_for_spacs.pdf

For the Staff Statement from the Division of Corporate Finance, please see:

- https://www.sec.gov/corpfina/announcement/staff-statement-spac-2021-03-31?utm_medium=email&utm_source=govdelivery

For the statement from the Acting Chief Accountant, please see:

- https://www.sec.gov/news/public-statement/munter-spac-20200331?utm_medium=email&utm_source=govdelivery

5. 2021 SEC Examination Priorities for Private Fund Advisers

On March 3, the SEC's Division of Examinations announced its examination priorities for 2021. Highlights of the examination priorities include compliance risks, including those related to liquidity, adviser-led fund restructurings, disclosures of investment risks and conflicts of interest, ESG and social impact strategies and related disclosures and dually registered investment advisers.

The Division of Examinations will continue to focus on investment advisers to private funds and will assess compliance risks, including a focus on liquidity and disclosures of investment risks and conflicts of interest such as preferential treatment of certain investors by private fund advisers that have experienced issues with liquidity. This includes imposing gates or suspensions on fund withdrawals, portfolio valuations and the resulting impact on management fees.

Private fund advisers that have a higher concentration of structured products, such as collateralized loan obligations and mortgage-backed securities, will also be a focus of the Division in order to assess whether the funds are at a higher risk for holding non-performing loans and having loans with higher default risk than that disclosed to investors.

In light of increased offerings of ESG and/or social impact investment strategies by registered investment advisors (“RIAs”), the Division of Examinations will review the consistency and adequacy of the disclosures that RIAs and funds provide to clients regarding these strategies and assess whether the firms’ processes and practices match their disclosures.

The Division of Examinations will continue to prioritize examinations of investment advisers that are dually registered as, or are affiliated with, broker-dealers, or have supervised persons who are registered representatives of unaffiliated broker-dealers. Areas of focus will include whether RIAs maintain effective compliance programs to address the risks associated with these business models, including conflicts of interest that arise from certain compensation arrangements and outside business activities, best execution and prohibited transactions.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3980880/2021_sec_examination_priorities_for_private_fund_advisers.pdf

For the 2021 SEC Examination Priorities, please see:

- <https://www.sec.gov/files/2021-exam-priorities.pdf>

6. Competition Agencies Launch Cross-Border Pharmaceutical Merger Working Group

On March 16, the U.S. Federal Trade Commission (the “FTC”), the Antitrust Division of the U.S. Department of Justice, certain state attorneys general, the Canadian Competition Bureau, the U.K. Competition and Markets Authority and the European Commission Directorate General for Competition announced the launch of a multilateral working group to examine mergers in the pharmaceutical industry. According to the agencies, the goal of the working group is “to identify concrete and actionable steps to review and update the analysis of pharmaceutical mergers.”

The FTC listed several “questions to be considered” such as how current theories of harm can be expanded and refreshed; how we should consider pharmaceutical conduct such as price fixing, reverse payments and other regulatory abuses; and what evidence would be needed to challenge a transaction based on any new or expanded theories of harm.

Although many competition agencies around the world have investigated mergers and other matters in the pharmaceutical industry in recent years, this initiative, with its focus on a particular industry, appears to be unique. The formation of the working group demonstrates that issues involving pharmaceuticals are at the forefront of many enforcement agency agendas.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3980905/competition_agencies_launch_cross_border_pharmaceutical_merger_working_group.pdf

For the FTC’s press release announcing the working group, please see:

- <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach>

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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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