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First Quarter 2012 U.S. Legal and Regulatory Developments

The following is a summary of significant U.S. legal and regulatory developments during the first quarter of 2012 of interest to Canadian companies and their advisors.

1. **JOBS Act Facilitates IPOs and Eases Restrictions on Private Capital Formation in the United States.** On April 5, President Obama signed into law the Jumpstart Our Business Startups Act (the "JOBS Act"), implementing sweeping changes to the rules governing IPOs and private capital formation in the United States by domestic and foreign issuers. The JOBS Act substantially reduces the regulatory burdens on "emerging growth companies" (companies with less than $1 billion in annual revenues) ("EGCs") during and following an IPO, and also substantially relaxes restrictions on communications with potential investors in the context of both public and private offerings.

   Many provisions of the JOBS Act, including the new relaxed standards for EGCs, are immediately effective and do not require further SEC rulemaking, though the SEC Staff has already issued guidance in the form of one announcement and a series of "FAQs," and can be expected to continue to do so in the coming weeks. The SEC "FAQs" with respect to the JOBS Act are available at http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm

   Certain other provisions, including the elimination of restrictions on publicity in connection with certain private offerings, will not become effective until the SEC adopts implementing rules.

   The SEC Staff has provided guidance stating that a foreign private issuer ("FPI") that qualifies as an EGC may avail itself of the scaled disclosure requirements to the extent relevant to the form requirements for FPIs. However, the SEC Staff has also stated that a FPI that avails itself of any of the benefits available to an EGC will be treated as an EGC for all purposes.

   The SEC Staff has provided guidance stating that an MJDS-eligible Canadian issuer may avail itself of the test-the-waters amendments to the Securities Act of 1933, as amended, and delayed compliance with Section 404(b) of the Sarbanes-Oxley Act. EGCs are exempt from the requirement to obtain an auditor attestation report on internal controls under Section 404(b) of the Sarbanes-Oxley Act. EGCs will still be required to disclose management's assessment and conclusions regarding the effectiveness of internal controls. For more information, see the Paul, Weiss memorandum at http://www.paulweiss.com/files/upload/19Apr12JOBS.pdf

2. **Update on SEC Whistle-Blower Rules and Internal Fraud Incident Reporting.** The Staff of the SEC reports that they have received nearly seven tips a day since new whistle-blower rules went into effect in August 2011. The new program requires that tips be made in the form of a sworn statement. The SEC Staff believes that this requirement has resulted in higher-quality tips. The greatest number of tips relate to corporate disclosure and financial statements, followed closely by market manipulation. For more information, see http://www.tnwinc.com/index.php/news/comments/is_the_secs_whistleblower_program_working

   In addition, a recent examination of fraud incident report activity indicates that fraud incident internal reporting has set a high mark for the third consecutive quarter. The upward trend in fraud reporting may demonstrate that companies are focused more than ever on creating a culture of compliance with respect to their fraud policies and other internal control mechanisms. The results also may indicate that despite the rewards offered to whistle-blowers under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), the reporting of such incidents continues to be made internally at the company. For more information, see http://www.tnwinc.com/index.php/releases/comments/4q_2011_corporate_fraud_index

3. **Second Circuit Rules on Legal Standard Required to Establish a "Domestic Transaction" in Securities under *Morrison.*** In its 2010 decision in *Morrison v. National Australia Bank,* 130 S. Ct. 2869 (2010), the Supreme Court addressed whether Section 10(b) of the Securities Exchange Act of 1934, as amended, applies to a securities transaction involving foreign investors, foreign issuers and/or securities traded on foreign exchanges. The *Morrison* decision curtailed the extraterritorial application of the federal securities laws by holding that Section 10(b) applies only to (a) transactions in securities listed on domestic exchanges or (b) domestic transactions in other securities.

   In March 2012, in *Absolute Activist Value Master Fund Ltd. v. Ficeto, et al.,* Docket No. 11-0221-cv (2d Cir. Mar. 1, 2012), the Second Circuit addressed for the first time what constitutes a "domestic transaction" in securities not listed on a U.S. exchange. The court held that, to establish a domestic transaction in securities not listed on a U.S. exchange, plaintiffs must allege facts plausibly showing either that irrevocable liability was incurred or that title was transferred within the United States. For more information, see the Paul, Weiss memorandum at http://www.paulweiss.com/files/Publication/0a203375-47d1-4d0f-8c27-0f41d6543bd5/Presentation/PublicationAttachment/79694f01-40e7-4f97-af82-1087eb2961be/5Mar12Memo.pdf

4. **Scrutiny over Dodd-Frank Conflict Mineral Rules Continues.** The SEC will not release its final conflicts minerals rules under Section 1502 of Dodd-Frank, which was signed into law on July 21, 2010, until the middle of 2012. Section 1502 relates to reporting requirements in connection with the use of "conflict minerals" that originate from the Democratic Republic of Congo and adjoining countries and requires affected companies to make conflict minerals disclosure beginning with their first full fiscal year that starts after the SEC adopts final rules. If the final rules related to Section 1502 are adopted as proposed in 2012, issuers with calendar year-ends would be required to provide the requisite conflict minerals disclosure starting with their annual reports for the year ending December 31, 2013, which would be filed in the first quarter of 2014. Dodd-Frank had set an April 2011 deadline for the rule, however, at a March 6th hearing before the House Committee on Appropriations, SEC Chairman Mary Schapiro indicated that the rules are "so complex" and "out of the ordinary for the SEC" that further delay is expected and necessary. For more details, see http://www.bloomberg.com/news/2012-03-06/sec-conflict-mineral-rule-may-miss-deadline-by-more-than-a-year.html and for a status report on the implementation of Dodd-Frank, see http://www.sec.gov/spotlight/dodd-frank.shtml

   As discussed recently in the New York Times, significant controversy surrounds who will be covered by the rule. For more information, see http://www.nytimes.com/2012/03/20/business/use-of-conflict-minerals-gets-more-scrutiny.html?_r=2&ref=business&pagewanted=all

   In addition, a group of Democratic lawmakers voiced their concern in a letter to the SEC, dated February 16, 2012, that the SEC may permit companies to "furnish" rather than "file" disclosures of conflict minerals, which could diminish liability under securities law and that the lack of final regulations from the SEC is undermining the policy goals of the law. For the full text of the letter, see http://www.sec.gov/comments/s7-40-10/s74010-497.pdf

5. **SEC Releases Guidance on Disclosure Concerning Exposure to European Countries.** In response to recent uncertainty concerning European sovereign debt, the SEC has released guidance that aims to assist registrants in their consideration of what information about exposures to European countries should be disclosed and how they should disclose this information for greater clarity and comparability. Specifically, the guidance suggests registrants should consider their funded exposure, unfunded exposure, total gross exposure, effects of credit default protection to arrive at net exposure, other risk management disclosures and post-reporting date events. To read the guidance, see http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic4.htm

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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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