April 30, 2019

Q1 2019 U.S. Legal & Regulatory Developments

The following is our summary of significant U.S. legal and regulatory developments during the first quarter of 2019 of interest to Canadian companies and their advisors.

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

On March 20, the Securities and Exchange Commission (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 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 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 current rules, a Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") prepared in accordance with Regulation S-K must 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 is currently required. 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

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either (i) the contract is 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 will now be 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 U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act") to facilitate investors' efforts to search news websites and stock market data for information on registrants.

Certain of the Amendments also affect the requirements of Form 20-F used by non-MJDS foreign private issuers, 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 currently underway in other jurisdictions including the European Union, the United Kingdom and Canada, including by the OSC's recently announced 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

2. 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

3. SEC Proposes to Expand "Test-the-Waters" Accommodation

On February 19, the SEC proposed a rule that would expand the "test-the-waters" accommodation—currently available only to emerging growth companies, or "EGCs"—to all issuers, including investment company issuers. If adopted, the proposed rule (Rule 163B under the Securities Act) would allow all issuers to engage in test-the-waters communications with certain institutional investors regarding a contemplated registered securities offering prior to, or following, the filing of a registration statement related to the offering. The proposal is part of the SEC's ongoing assessment of the Securities Act offering communications framework and its effort to encourage additional registered offerings in the United States.

The amendments are intended to facilitate IPOs and other registered offerings by providing increased flexibility with respect to communications with institutional investors. Notably, the impact of this accommodation on the IPO market may be limited, as EGCs have comprised an estimated 87% of U.S. IPOs since the Jumpstart Our Business Startups Act was enacted in 2012.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3978470/20feb19-test-the-waters.pdf

For the full text of the proposed rule, please see:
https://www.sec.gov/rules/proposed/2019/33-10607.pdf

4. Brexit Update

On March 29, "Brexit day" for the past two years, the U.K. Prime Minister's third attempt to have Brexit approved in the House of Commons failed by a vote of 286 (including 5 Labour MPs) to 344 (including 34 Tory MPs). The U.K. government was able to modify the European Union (Withdrawal) Act 2018, through a statutory instrument, to extend the departure date beyond March 29, 2019 (441 to 105). April 12, 2019 became the new Brexit day under the terms of the EU extension statement. The European Council met on April 10, 2019 and agreed to offer the U.K. an extension to the departure date until October 31, 2019, which the U.K. Prime Minister has accepted.

Since the June 2016 Brexit referendum, we have chronicled in a series of client memoranda the tremendous level of uncertainty and potentially far-reaching effects of the different Brexit scenarios. Public companies are not alone in worrying about Brexit; securities regulators have from time to time highlighted the obvious: Brexit has the potential to pose a range of challenges for businesses and the markets, depending on which scenario or combination of scenarios plays out. In particular, as long as a "no-deal" Brexit remains a possibility, a myriad of materially adverse developments could be only a few months away. In this respect, public companies, regardless of where they are listed, need to assess the potential impact of the various Brexit scenarios and craft appropriate disclosure in their risk factor sections, business descriptions and analysis of results.

For the full text of our most recent Brexit update, please see:
https://www.paulweiss.com/practices/region/europe/publications/brexit-lexicon-update?id=28426

5. FTC Announces New Hart-Scott-Rodino and Clayton Act Section 8 Thresholds

The Federal Trade Commission (the "FTC") has revised the jurisdictional and filing fee thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") and the Premerger Notification Rules, based on changes in the gross national product ("GNP") as required by the 2000 amendments to the HSR Act. For 2019, the thresholds will increase as a result of the increase in the GNP and will apply to transactions that close on or after April 3, 2019.

The HSR Act requires parties intending to merge or to acquire assets, voting securities or certain non-corporate interests to notify the FTC and the Department of Justice, Antitrust Division, and to observe certain waiting periods before consummating the acquisition if certain filing thresholds are met. Notification and Report Forms must be submitted by the parties to a transaction if both the (1) size of transaction and (2) size of parties thresholds are met, unless an exemption applies.

Effective April 3, 2019, the minimum size of transaction threshold is $90 million (increased from $84.4 million in 2018), and the size of parties threshold is inapplicable if the value of the transaction exceeds $359.9 million (increased from $337.6 million in 2018). For transactions with a value between $90 million

and $359.9 million, the size of parties threshold must be met and will be satisfied depending on the acquiring person and the acquired person meeting certain sales or asset value thresholds. In addition, the FTC also announced the maximum civil penalty for HSR Act violations, raising the amount from $41,484 per day to $42,530 per day, effective as of February 14, 2019. Finally, the FTC has increased, effective immediately, the thresholds that prohibit, with certain exceptions, competitor companies from having interlocking relationships among their directors or officers under Section 8 of the Clayton Act. For additional details, please see our full memorandum linked below.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3978482/4mar19ftc-hsr-thresholds.pdf

6. 10th Circuit Reinstates "Conduct-and-Effects" Test in SEC Enforcement Actions, Superseding *Morrison*

In January 2019, the United States Court of Appeals for the Tenth Circuit considered the scope of the SEC's authority to bring a civil enforcement action under the antifraud provisions of the federal securities laws arising from a securities transaction that occurred outside the United States. In *SEC* v. *Scoville*, No. 17-4059 (10th Cir. Jan. 24, 2019), the Tenth Circuit decided that the SEC may bring such an action if the alleged violation meets the "conduct-and-effects" test set forth in the Dodd-Frank Act. The "conduct-and-effects" test is satisfied if the action being brought meets either of two conditions: (i) it involves "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors", or (ii) it involves "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."

Both the U.S. Securities Act of 1933, as amended (the "Securities Act"), and the Exchange Act contain antifraud provisions, but neither statute states whether their respective antifraud provisions cover securities transactions that occur outside of the United States. Before the United States Supreme Court's decision in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), courts throughout the country had for decades applied what became known as the "conduct-and-effects" test to decide, on a case-by-case basis, whether the antifraud provisions of the Exchange Act and the Securities Act applied extraterritorially. *Morrison* rejected this test, acknowledging the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" Just weeks after the Supreme Court issued its decision in *Morrison*, the Dodd-Frank Act became effective, which Act in relevant part amended the jurisdictional sections of both the Exchange Act and the Securities Act to state that federal courts "shall have jurisdiction" over actions "brought or instituted by the [Securities and Exchange] Commission or the United States" under the antifraud provisions of those statutes if the actions satisfy the statutory "conduct-and-effects" test that is quoted in the immediately preceding paragraph. In *Scoville,* the Tenth Circuit confimed that the Dodd-Frank Act reinstated the "conduct-and-effects" test for actions brought by the SEC or the United States. As a result, at least in the Tenth Circuit, the SEC and the United States may bring actions for alleged federal securities fraud based on

transactions that occurred outside the United States if the actions satisfy the "conduct-and-effects" test, as codified in the Dodd-Frank Act, while private actions for federal securities fraud will continue to be governed by *Morrison*.

For the full text of our memorandum, please see:
https://www.paulweiss.com/media/3978419/30jan19-scoville-10th-circuit.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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