

The Dodd-Frank Act: Significant Impact on Public Companies

If you have any questions regarding the matters discussed in this memorandum, please contact any of the attorneys listed on page 11, or call your regular Skadden contact.

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On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act” or the “Dodd-Frank Act”). The Act is wide-ranging and addresses almost every aspect of the financial services industry. In this memorandum, we explore provisions of the Act that will be relevant for most public companies.

For an in-depth discussion of the Act, including some of the provisions discussed in this memorandum, please refer to [“The Dodd-Frank Act: Commentary and Insights.”](#)

The Dodd-Frank Act requires various federal agencies to adopt hundreds of new rules to implement the Act and to deliver to Congress dozens of studies and reports that may influence future legislation. Many of the required rulemakings leave significant discretion to the agencies as to exactly how to implement the broad provisions of the Act. As a result, many of the details and much of the impact of the Dodd-Frank Act may not be known for many months.¹ There are, however, important provisions that will take effect in the near-term, including those related to:

- **Investor Protection and Securities Enforcement:** The Act strengthens the Securities and Exchange Commission’s enforcement program by, among other things, establishing a new whistleblower bounty program that may result in significant payments to whistleblowers (including for reporting events that pre-date the Act) and create a “lottery” mentality for disgruntled employees; and
- **Corporate Governance and Executive Compensation:** The Act (1) mandates “say-on-pay” votes — non-binding shareholder votes on executive compensation — beginning at 2011 annual shareholder meetings and (2) authorizes SEC adoption of “proxy access” — rules giving nominating shareholders the ability to have their nominees included in the company’s proxy materials. We expect the SEC to adopt proxy access rules in the coming weeks.

In addition, other provisions of the Act should be kept in mind going forward, particularly as rules and regulations are adopted and market practices develop to reflect the new business and regulatory landscape, including:

- **Derivatives:** The Act imposes a new regulatory regime on over-the-counter derivatives, which includes requirements for clearing, exchange trading, public reporting of swap pricing data, record-keeping, margin and capital requirements for some market participants, and other requirements intended to increase the transparency and

¹ It remains to be seen, for example, whether rules implementing the Act will include exemptions for foreign private issuers or smaller reporting companies.

liquidity of derivatives markets, and to decrease systemic risk. The Act also imposes significant limitations on the derivatives activities of banking organizations. The collective effect of these changes could materially affect the availability, as well as the costs and terms, of over-the-counter derivatives transactions to end users and other counterparties;

- **Credit Rating Agencies:** Credit rating agencies will be subject to substantially increased regulation and risk of liability under the Act. These changes may have significant implications for the securities offering process and may increase the cost of capital;
- **Securitization:** The Act requires securitizers and originators of securitized assets to retain a portion of the credit risk associated with those assets. The Act also generally requires issuers of asset-backed securities (a term that is defined broadly) to disclose asset-level or loan-level data and does not permit suspension of ongoing reporting requirements under the Securities Exchange Act of 1934, as amended (the “Exchange Act”); and
- **Other Securities Law Reforms:** The Act modifies or authorizes changes to federal securities laws and regulations, including the accredited investor standard, beneficial ownership and insider reporting and new disclosures relating to “conflict minerals,” mine safety and payments by companies engaged in the oil, natural gas and mining industries.

Investor Protection and Securities Enforcement²

Various provisions of the Dodd-Frank Act are intended to enhance investor protection by strengthening the SEC’s enforcement program. Although many of the changes are incremental, in the aggregate they are likely to increase the volume and pace of enforcement activity and add to companies’ compliance and litigation risks and costs.

SEC Whistleblower Bounty Program. In what may prove to be the provision that has the biggest immediate impact on the SEC’s enforcement program, the Dodd-Frank Act provides the SEC with new authority to pay large cash bounties to whistleblowers who provide original information that leads to a successful SEC enforcement action. The SEC is required to award such persons between 10% and 30% of monetary sanctions exceeding \$1 million assessed by the SEC, the DOJ or other regulatory agencies in related enforcement actions. **Bounty awards apply to information provided after the date of enactment even if the alleged violation of the securities laws occurred prior to enactment of the Dodd-Frank Act.**

The whistleblower bounty program dovetails with recent SEC efforts to encourage company insiders and other individuals to cooperate with enforcement investigations. The impact of this sustained effort to increase the flow of enforcement tips from potentially knowledgeable insiders is likely to lead to more investigative activity. Also, it underscores the importance of robust compliance and self-evaluative programs for all public companies. As a practical matter, it complicates already difficult judgments by companies regarding whether and when to self-report information to the government.

² For a more detailed discussion of the provisions of the Act relating to investor protection and securities enforcement, please see the section titled “[Capital Markets – Investor Protection and SEC Enforcement](#)” in “The Dodd-Frank Act: Commentary and Insights,” as well as the article titled “[Investor Protection and SEC Enforcement | New Authority and Directed Studies Increase Risks and Costs for Firms](#)” included therein.

Enhanced Remedial Authority. Among other things, the Dodd-Frank Act includes provisions that:

- Grant the SEC authority to impose monetary penalties in administrative cease-and-desist proceedings against “any person” for violations of the securities laws.
- Codify the ability of the SEC to reach transnational fraud in a way that effectively nullifies the effect of a recent U.S. Supreme Court decision in the context of SEC enforcement actions, and require the SEC to study the possibility of restoring the newly codified “conduct and effects” tests in private actions to enforce the anti-fraud provisions of the Exchange Act.
- Resolve a circuit split by clarifying that the SEC may impose joint and several liability against control persons under Section 20(a) of the Exchange Act.
- Clarify and expand the SEC’s authority to bring enforcement actions in federal district court against persons who aid and abet violations of the securities laws, including expanding the standard of liability to include those persons that act “recklessly.”
- Provide the SEC with new authority to serve subpoenas anywhere in the United States in the context of federal court enforcement actions.
- Require the SEC to adopt rules disqualifying persons who are subject to certain final orders by state securities regulators or state or federal banking regulators, or who have been convicted of a felony or misdemeanor relating to securities or false filings with the SEC, from participating in exempt offerings of securities under Regulation D, sometimes referred to as “bad boy disability.” Thus, under the Dodd-Frank Act, enforcement actions by state and federal officials will collaterally limit violators’ ability to raise capital through private placements.

Corporate Governance and Executive Compensation

The Dodd-Frank Act includes several corporate governance and executive compensation reforms. These provisions are discussed in greater detail in our memorandum titled “[House Approves Dodd-Frank Financial Reform Law; Would Mandate Say-on-Pay Votes and Other Corporate Governance and Executive Compensation Changes.](#)”³ We expect that the SEC will adopt rules implementing many of the corporate governance and executive compensation provisions in time for the 2011 proxy season.

These measures include:

- Non-binding “say-on-pay” votes on executive compensation at 2011 annual meetings.
- Non-binding votes for merger-related compensation (sometimes referred to by proponents as “golden parachute” say-on-pay) at shareholder meetings occurring on or after January 21, 2011 at which shareholders are asked to approve merger and similar transactions.

³ For additional discussion of these provisions, please see the sections titled “[Governance and Compensation – Corporate Governance](#)” and “[Governance and Compensation – Executive Compensation](#)” in “The Dodd-Frank Act: Commentary and Insights.”

- New compensation clawback policies applicable to all current and former executive officers of companies (not only CEOs and CFOs) who receive incentive compensation (including stock options) in the three years prior to a company restating financial statements, with clawbacks applicable even when the officer did not engage in misconduct.
- Explicit authorization for the SEC to adopt proxy access so that shareholders of public companies may nominate candidates for election as a director and have those nominees included in the company's proxy materials.
- Enhanced independence requirements for board compensation committee members and their advisors.
- Additional executive compensation disclosures relating to "pay versus performance," comparing CEO compensation to the median compensation of employees generally and describing whether employees and board members are permitted to hedge against declines in the value of company securities.

An important change from earlier versions of the Act is that it will not require public companies to adopt a majority voting standard for uncontested director elections.

Derivatives⁴

Title VII of the Dodd-Frank Act imposes a regulatory regime on over-the-counter ("OTC") derivatives and the market for such derivatives. The primary regulators will be the Commodity Futures Trading Commission ("CFTC") for "swaps" and the SEC for "security-based swaps." The term "swap" is broadly defined to include most types of products now known as OTC derivatives, including interest rate, currency, credit default, total return, equity, energy and many other types of swaps.⁵ "Security-based swap" is a much narrower category of transactions based on a single security or loan or a "narrow-based security index" (as defined under the Commodity Exchange Act).⁶

With limited exceptions, the provisions of Title VII do not become effective prior to approximately one year following enactment, and potentially later than that for provisions that require rulemaking. The Act leaves many key concepts and processes to be delineated by regulation, so that many requirements cannot yet be discussed with specificity. However, it is clear that the conduct of derivatives activities for all market participants will be affected to some degree. The impact will vary greatly depending upon the type of business enterprise, the types and amounts of swap transactions in which it engages,

4 For a more detailed discussion of these provisions, see the section titled "[Capital Markets – Derivatives](#)" in "The Dodd-Frank Act: Commentary and Insights," and the more extended analysis in the article titled "[Regulation of Over-the-Counter Derivatives Under the Dodd-Frank Wall Street Reform and Consumer Protection Act](#)" included therein.

5 There are specified exclusions from the broad definition of "swap," among these exclusions are options on securities (or groups or indices of securities) that are subject to the Securities Act of 1933, as amended (the "Securities Act"), and the Exchange Act, any contract of sale of commodities for future delivery (or option on such a contract) and certain physically settled forwards. In addition, although included in the definition of "swap," foreign exchange swaps and forwards may be excluded from regulation as swaps if the Secretary of the Treasury, subject to consideration of certain factors specified in the Act, makes a written determination that either or both should not be so regulated (however, they nevertheless would remain subject to reporting requirements and certain other compliance requirements under the Act).

6 Transactions that are security-based swaps but include other elements, such as also being based on the value of one or more interest or other rates, currencies, commodities, indices, etc. (referred to in the Act as "mixed swaps") will be treated as security-based swaps but will be subject to regulations issued jointly by the CFTC and the SEC. Unless otherwise indicated, as used herein the term "swap" refers to both "swaps" and "security-based swaps."

and the purposes for which it engages in them. In broad terms, financial institutions — particularly the U.S. banks that have been significant dealers in OTC derivatives — are expected to be the most directly and materially affected. The combined effect of the “Volcker Rule” (under the banking title) and the “swaps push out” provision (under Title VII) will significantly limit the derivatives activities of U.S. banks and their affiliates, including the activities that (following a transition period) will be permitted to be undertaken only in separately capitalized, non-bank affiliates.⁷ Other “financial entities” also could be significantly affected. “Financial entity” is defined broadly in the Act, and includes — in addition to companies involved primarily in banking or other financial activities (including captive finance affiliates of manufacturing companies, except those that meet strict criteria) — ERISA plans and most hedge funds, private equity funds and other investment funds and special purpose entities used in structured finance transactions. It also includes entities categorized as “swap dealers” or “major swap participants,” either of which could include businesses not ordinarily thought of as “financial entities,” depending upon the nature and volume of their derivatives activities.⁸

The swap counterparties expected to be the relatively least affected by the new swaps regime are those referred to as “end users.” Under Title VII, “end user” generally means a company that is not a “financial entity” and that uses derivatives to hedge or mitigate commercial risk. The concept is intended to include industrial corporations and other non-financial enterprises that use swaps on interest rates, foreign currencies, energy, commodities and other derivatives, as appropriate to their businesses, to hedge their business risks. However, as discussed below under “End User Exemption,” there are complexities involved in the determination of who may rely on the exemption, and ambiguities in the Act as to the intended scope of the exemption.

In general, at least over the next several years as the new regulations are developed and implemented, and new clearinghouses and trading facilities come on line, there is likely to be some degree of dislocation and uncertainty in the market. For this reason, as well as the increased capital, margin and business conduct requirements that will become applicable to swap dealers and major swap participants, and possibly decreased competition due to reduced market presence by banks, costs of hedging may increase, even for end users. Over time there could be an offset to those costs due to increased standardization and transparency of the clearinghouse approach, but it is too early to tell. The following summarizes certain provisions that may be of particular interest to businesses outside the financial services sector.

7 Foreign banks that are subject to U.S. regulation also will be affected by these provisions, at least with respect to the activities they conduct within the U.S. or with U.S. persons.

8 “Swap dealer” and “security-based swap dealer” are broadly defined and could include companies that do significant trading of swaps, even if they do not hold themselves out as “dealers.” The CFTC and SEC have the authority to further define the respective definitions by regulation, but the extent to which they may do so is not yet known, other than presumably to provide the criteria for the “de minimis” activity exception contemplated by the definitions and to the extent deemed necessary for anti-evasion purposes. “Major swap participant” and “major security-based swap participant” are new categories of regulated entities, determined primarily by the levels of their swap positions, that will be required to register with the CFTC or SEC, as applicable, and to satisfy capital, margin, reporting, business conduct and other regulatory requirements. The specific thresholds that will determine the major participant categories are required to be specified by regulation. Unless otherwise indicated, references herein to “swap dealer” mean both “swap dealer” and “security-based swap dealer” and to “major swap participant” mean both “major swap participant” and “major security-based swap participant.”

Mandatory Clearing and Exchange Trading. The Act requires that, subject to the end user exemption described below, any swap (or security-based swap) must be (1) cleared through a designated clearing organization or clearing agency and (2) traded on a designated contract market, a swap or security-based swap execution facility or a national securities exchange if:

- in the case of clearing, the swap is of a type that the CFTC or SEC, as applicable, determines must be cleared and is accepted for clearing by a “derivatives clearing organization” (if a swap) or a clearing agency (if a security-based swap); and
- in the case of trading, a designated contract market, swap or security-based swap execution facility or a national securities exchange, as applicable, makes the swap available to trade.⁹

Swaps entered into before enactment of the Dodd-Frank Act, or following enactment but prior to clearing becoming mandatory, are grandfathered from the clearing requirement but will be subject to reporting requirements, the details of which are to be provided by regulation. There is also some ambiguity, which has provoked concern in the business community, as to whether margin requirements may be imposed retroactively on existing swaps. However, while not yet certain, it is widely anticipated that a technical corrections bill or the rulemaking process will clarify that margin will not be imposed retroactively on most swap counterparties (at least those that are not swap dealers or major swap participants).

End User Exemption. An exemption from the clearing and exchange trading requirements will be available to counterparties that qualify as end users. The exemption is available to a counterparty that (1) is not a financial entity, (2) is hedging its own commercial risk¹⁰ and (3) notifies the CFTC or SEC, as applicable, in a manner to be set forth by regulation, how it generally meets its financial obligations associated with entering into uncleared swaps. A public company that wishes to rely on the end user exemption also will be required to obtain the approval of its board of directors or other governing body.¹¹

In addition, it is expected that end users will not be subject to mandatory margin requirements imposed by regulation upon their uncleared swaps, as opposed to whatever margin requirements may be negotiated with their counterparties. However, certain key wording that was in the Senate version of the legislation was omitted from the Act as it emerged from the House-Senate Conference. There is helpful legislative history expressly addressing this issue, but the outcome will be uncertain until definitively addressed in a technical corrections bill or by rulemaking.

⁹ A swap that is of a type required to be cleared and is accepted by a clearinghouse must be cleared even if no market, facility or exchange makes the swap available to trade.

¹⁰ The term “commercial risk,” which is undefined, is key for the following purposes: (1) the definition of major swap participant, (2) the concept of “end user” and (3) the specifications for a captive finance company that is excluded from the definition of financial entity. The CFTC and SEC have the authority to define the term, but are not required to do so.

¹¹ Until clarified by regulation, it is not known how cumbersome the regulatory notice and board approval requirements will be, including whether the necessary notifications and approvals may be made on a blanket basis, perhaps subject to periodic renewals, or whether they will be required to be obtained for each uncleared transaction. Also unknown is whether the notice to regulators will be informational only, or whether the CFTC or SEC may reserve the right to limit or deny the use of the exemption.

Moreover, the end user determination is not entirely straightforward. Due to the broad scope of the financial entity construct under Title VII, some organizations that are primarily non-financial in nature may find that the entities through which they conduct investing, financing or hedging activities are not end users. This could include captive finance companies that do not meet the strict requirements for exclusion from the financial entity category and special purpose entities used in securitization transactions; as a result, the derivatives legislation appears highly likely to increase the hedging expenses of such entities. Combined with changes in accounting treatment for securitization vehicles, and other changes affecting securitization under the Dodd-Frank Act and in separate SEC initiatives, the financing costs of businesses that rely significantly on securitization could increase.

Potential Registration and Regulatory Requirements. Defined terms such as “financial entity,” “major swap participant,” “major security-based swap participant,” “swap dealer,” and “security-based swap dealer” could apply to numerous companies outside of the financial services sector. Combined with the fact that key components of the terms “major swap participant” and “major security-based swap participant” remain to be specified by regulation, this means that for some market participants the requirements applicable to their derivatives activities, which may include registration and other substantial compliance requirements, will be unclear until final regulations are issued. Companies that use derivatives — in particular, companies that maintain large swap positions other than for hedging purposes, that engage in substantial swap trading activities, or that have financial entity affiliates with large positions in one or more types of swaps (even if for hedging purposes) — should consult with counsel to determine how the new requirements may affect them, and what actions they may wish to consider before the provisions of Title VII become effective.

Expanded Application of Securities Laws. Since the passage of the Commodity Futures Modernization Act of 2000, the anti-fraud and anti-manipulation provisions of the Securities Act and the Exchange Act as well as the insider trading provisions of the Exchange Act have applied to “security-based swaps” (as defined in the Gramm-Leach-Bliley Act). However, the Dodd-Frank Act will expand the application of securities laws to security-based swaps (as newly defined) in a number of respects that are specified in the Act. There also may be unintended consequences, due to the inclusion of security-based swaps in the definition of “security” under the Securities Act and the Exchange Act, which could require regulatory (or potentially legislative) clarification as they emerge.

Among the notable provisions are those relating to position limits and beneficial ownership. The SEC will have the authority, in order to prevent fraud and manipulation, to establish position limits on security-based swaps. For that purpose, positions in security-based swaps may be aggregated with positions in the securities or loans that the swap is based upon or references.

The Act also amends Section 13 of the Exchange Act to contemplate beneficial ownership via security-based swaps. Sections 13(d)(1), 13(f)(1) and 13(g)(1) of the Exchange Act are amended to provide that certain security-based swaps (those having characteristics to be specified by SEC rule-making) may be deemed to constitute beneficial ownership for purposes of required disclosure of acquisitions of greater than 5% beneficial ownership interests and quarterly reporting by institutional investment managers. In addition, a new subsection 13(o) of the Exchange Act provides — for purposes of Section 13 and Section 16, relating to disclosure and short-swing profit recovery for directors, officers and beneficial owners of more than 10% — that beneficial ownership of the security underlying a security-based swap may be deemed to have been acquired if the SEC determines that the security-based swap provides incidents of ownership comparable to direct ownership

(and that it is necessary to achieve the purposes of Section 13 of the Exchange Act that those swaps be deemed the acquisition of beneficial ownership of the related security). We expect that the rulemaking will result in beneficial ownership treatment for securities underlying the cash-settled total return swaps and other derivatives that have in the past been used to establish the economic equivalent of ownership of common stock positions in the acquisition context. The statutory language appears to contemplate a higher threshold for the determination that a security-based swap constitutes beneficial ownership for purposes of short-swing profit recovery than for purposes of 5% beneficial ownership reporting.

Credit Rating Agencies¹²

The Dodd-Frank Act includes reforms that address credit rating agencies and the credit ratings they provide. The Act seeks to impose corporate governance guidelines, reduce conflicts of interest and improve the rating process through enhanced controls and greater transparency. Furthermore, the Act will greatly expand the SEC's oversight and enforcement powers and seeks to make it easier for investors to bring civil lawsuits against rating agencies. In addition, the reforms seek to reduce reliance on ratings as a litmus test for credit quality in favor of broader standards that encompass multiple factors and credit criteria.

Among other changes, the Act will eliminate the exemption for rating agencies under Regulation FD and the exemption afforded under Rule 436(g) of the Securities Act to Nationally Rated Statistical Ratings Organizations ("NRSROs") with respect to expert liability for purposes of Section 11 of the Securities Act. The rescission of Rule 436(g) means that, subject to certain exceptions, the SEC will require issuers to file the consent of a rating agency named in a registration statement that includes credit rating information. Rating agencies have thus far indicated they will be unwilling to provide such consent.¹³ Additional changes relevant to asset-backed securities are discussed below, under "Securitization: Impact of Credit Rating Agency Reforms."

As a result, rating agencies are likely to review and make changes to the business of credit ratings. At least in the near term, these changes can be expected to increase the amount of time and the volume of information required to obtain credit ratings, possibly increasing the amount of time needed to bring a securities offering to market. In addition, the reforms will most likely result in higher fees charged by rating agencies to compensate them for incremental administrative, compliance and operating costs and increased exposure to third-party claims.

Securitization¹⁴

Companies that engage in the securitization of their accounts receivable or other assets likely will be impacted by the Act's requirements, including those relating to risk retention, disclosure and the regulation of credit rating agencies.

12 For additional discussion of the provisions in the Act relating to credit rating agencies, please see the section titled "Capital Markets – Credit Rating Agencies" in "The Dodd-Frank Act: Commentary and Insights."

13 Several law firms, including Skadden, are currently preparing a joint memorandum with input from the Staff of the SEC to address transition issues for issuers of non-asset-backed securities, including how the consent filing requirement would apply to: (1) registration statements that include or incorporate risk factor, liquidity or other "non-offering" disclosures that include credit ratings information; (2) ratings disclosure in "free writing prospectuses" and Rule 134 releases; and (3) registration statements that were declared effective prior to the effective date of the Act. When available, a copy of the joint memorandum will be available at www.skadden.com/publications.

14 For additional discussion of the provisions in the Act relating to securitization, please see the section titled "Capital Markets – Securitization" in "The Dodd-Frank Act: Commentary and Insights."

Risk Retention Requirement. Under the Act, a securitizer must retain no less than 5% of the credit risk in assets it sells into a securitization, though the retention threshold may be decreased below 5% if the quality of the underwriting standards employed by the originator of the assets would indicate that those assets have a reduced level of credit risk. The federal banking agencies and the SEC are required to prescribe regulations that provide for an allocation of the risk retention obligations between a securitizer and an originator.

The Act prohibits hedging or transferring the retained credit risk, but provides for exemptions or adjustments to be jointly issued by the federal banking agencies and the SEC.

Disclosure, Due Diligence and Reporting Requirements. The Act requires each issuer of asset-backed securities (“ABS”) to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence. While asset-level disclosure requirements are intended to enhance investors’ due diligence review, the Act requires the SEC to issue rules requiring issuers of ABS to conduct their own review of the underlying assets and to disclose the nature of that review. Earlier this year the SEC proposed new rules that would require extensive loan-level disclosure for most securitizations.¹⁵

The Act excludes ABS from the automatic reporting suspension provision of the Exchange Act that permits issuers to suspend their reporting obligations after one year if their securities are held by fewer than 300 holders.

Impact of Credit Rating Agency Reforms. The Act enables investors to bring private actions against a credit rating agency if there is a “strong inference” that the agency “knowingly or recklessly” failed to conduct a reasonable investigation of the factual elements related to the rated security that the credit rating agency relied on when evaluating credit risks or failed to obtain verification of such elements from a competent independent source. In the context of rated ABS transactions, this could mean that ABS issuers and other transaction parties will need to consider the engagement of third parties that are independent from the ABS issuers or underwriters to conduct a review of the assets underlying the ABS for purposes of the rating agency’s verification of the facts underlying the ratings.

The Act directs the SEC to conduct a two-year study on the credit rating process for structured finance products, conflicts of interest issues and the feasibility of establishing a system in which a self-regulatory organization assigns NRSROs to determine the ratings of structured finance products. The SEC will have the authority to establish a mechanism for assigning NRSROs to determine the initial credit ratings of structured finance products in a manner that would prevent issuers from “shopping” among NRSROs and must give thorough consideration to the so-called “Franken amendments,” under which an issuer must submit a request to the Credit Rating Agency Board (a self-regulatory organization to be established), which will select an NRSRO from a pool of qualified NRSROs based on a selection method intended to reduce the conflicts of interest inherent to the issuer-paid structure.

¹⁵ The SEC proposal includes a different formulation of a risk retention requirement. For additional discussions of the SEC’s proposed disclosure requirements for securitizations, please see our memorandum [“Summary of the SEC’s Proposed Changes to Regulation AB.”](#)

Other Securities Laws Matters

The Dodd-Frank Act amends, or requires the SEC to issue new rules under, various other provisions of the federal securities laws.

Adjusting the Accredited Investor Standard.¹⁶ Effective upon passage of the Act, the accredited investor standard for natural persons was revised so that the net worth threshold of \$1 million now excludes the value of the investor's primary residence. After the four-year period from the enactment of the Act, and at least once every four years thereafter, the SEC is required to review the accredited investor standard and determine if any adjustments are appropriate. The change to the accredited investor standard applies to all private placements under Regulation D and may preclude some investors from participating in private placements.

Exemption From the Auditor Attestation Requirements of SOX 404. Section 404(b) of the Sarbanes-Oxley Act of 2002 ("SOX") requires that a company's independent accounting firm provide an attestation report on the company's internal control over financial reporting. To date, companies with a public float below \$75 million have not had to comply with SOX 404(b), but the SEC had announced that the grace period would not be extended further. The Act amends Section 404 to exempt non-accelerated filers and smaller reporting companies from the attestation report requirement. In addition, the Act directs the SEC to provide a report to Congress within nine months that addresses possible methods of reducing or eliminating the compliance burden of SOX 404(b) for companies with market capitalizations between \$75 million and \$250 million and whether any such methods may encourage companies to list on U.S. exchanges for their initial public offerings.

Potential Shorter Reporting Deadlines Under Section 13(d) and Section 16(a). The Act amends Section 13(d) and Section 16(a) of the Exchange Act to permit the SEC to shorten the current 10-day period for reporting:

- an acquisition of greater than 5% of a public company's registered shares on Schedule 13D or Schedule 13G; and
- an acquisition of greater than 10% of certain classes of registered securities, or the fact that a person has become an officer or director of a public company, in each case for purposes of filing a Form 3.

In addition, see "Derivatives: Expanded Application of Securities Laws" above for a discussion of potential changes to beneficial ownership reporting for swaps.

Mine Safety. Beginning 30 days after the date of enactment, companies that operate, or have subsidiaries that operate, coal or other mines must include detailed disclosure in each of their periodic reports regarding the safety record of each mine and related health and safety administrative proceedings and legal actions. The Act also requires those companies to file a Form 8-K upon receipt of an imminent danger order or a notice from federal regulators regarding a pattern of health or safety violations at a mine.

¹⁶ For additional discussion of the provisions of the Act relating to the change to the accredited investor standard, please see "[The Dodd-Frank Act: Immediate Changes to the Accredited Investor Definition.](#)"

Although the Act does not amend the Exchange Act, violations of these disclosure requirements are treated as violations of the Exchange Act and the SEC is authorized to issue rules to carry out the purposes of this section of the Act.

“Conflict Minerals.” The Act requires the SEC to adopt rules (within 270 days of enactment) requiring annual disclosure of whether any “conflict minerals” necessary to the functionality or production of a company’s products originated in the Democratic Republic of Congo or any neighboring country. If conflict minerals did originate in any such country, companies will be required to disclose, in an independently audited report, additional information relating to the conflict minerals, including supply chain due diligence measures and a description of the relevant products and facilities. Affected companies will be required to publish the report on their websites.

Payments by Companies Engaged in the Oil, Natural Gas and Mining Industries. The Act requires the SEC to adopt rules (within 270 days of enactment) requiring companies that engage in the commercial development of oil, natural gas or minerals to include annual report disclosure about all payments for each project (including taxes, royalties, fees and production entitlements) paid to the U.S. or any foreign government relating to such activities. The disclosure must be submitted using an interactive data standard, and the SEC, to the extent practicable, is directed to provide an online compilation of such information. Companies will be required to submit such information for the first full fiscal year after the issuance of final rules.

Transparency of Information Regarding Lending or Borrowing Securities. The Act requires the SEC, within two years after enactment, to promulgate rules designed to increase the transparency of information available to brokers, dealers and investors with respect to lending or borrowing of securities. The Act amends the Exchange Act to make it unlawful to participate in a transaction involving lending or borrowing of securities in contravention of any relevant SEC rules.

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