MAYER·BROWN

Legal Update
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Corporate Governance and Disclosure Implications of the Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") was signed by President Obama on July 21, 2010.[1] As happened when the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") was adopted, the Act will spur significant additional regulation over the next year flowing from the specific and extensive rule-making required by the Act.

The Act covers a wide variety of issues, which are addressed generally in our Legal Update titled "Understanding the New Financial Reform Legislation"[2] This Legal Update more specifically addresses the provisions of the Act that are most likely to impact public companies and their officers and directors, including in areas such as corporate governance, stock exchange listing and executive compensation and other disclosure requirements. In many cases, the new requirements apply not only to US public companies, but also to foreign companies that are listed on a US stock exchange or that otherwise file reports with the US Securities and Exchange Commission (the "SEC"). Almost all of the provisions discussed in this Legal Update are contained in Title IX of the Act, referred to as the Investor Protection and Securities Reform Act of 2010.

There are a number of exceptions to the Act's provisions described in this Legal Update and the SEC is required to adopt regulations to implement many of the Act's provisions, which could significantly affect their application in particular circumstances. In addition, in many cases, the SEC has been given authority to grant limited exemptions, which it may exercise when adopting its implementing regulations.

Many of the Act's provisions and related regulatory initiatives discussed in this Legal Update become effective at various dates, depending on the provision. This Legal Update also describes the effectiveness and implementation schedule for each provision discussed. In addition, the applicable section of the Act is referenced in each provision discussed below.

Corporate Governance

COMPENSATION COMMITTEE MEMBER INDEPENDENCE

The Act adds new Section 10C to the Securities Exchange Act of 1934 (the "Exchange Act") which, in part, requires the SEC to direct the national securities exchanges and national securities associations to prohibit the listing of any class of equity security of a company unless each member of the compensation committee of a listed company's board of directors is independent. To be independent for this purpose, the SEC is to consider all relevant factors, such as the source of compensation, including any consulting, advisory or other compensatory fee paid by the company to the director and whether the director is otherwise affiliated with the company or a subsidiary of the company or an affiliate of a subsidiary of the company.

This provision heightens the compensation committee independence standards currently required by the national securities exchanges and is similar to that added to Section 10A of the Exchange Act by Sarbanes-Oxley as it relates to audit committee member independence.

The SEC is to required to adopt final rules directing the national securities exchanges and national securities associations to prohibit the listing of any security of a company that is not in compliance with this provision no later than July 16, 2011, 360 days after the date of enactment of the Act. [Section 952 of the Act]

COMPENSATION CONSULTANTS AND OTHER COMPENSATION COMMITTEE ADVISORS

New Section 10C of the Exchange Act also provides that the compensation committee of a listed company's board of directors may only select a compensation consultant, legal counsel or other adviser after considering any independence factors identified by the SEC. The independence factors are to be competitively neutral among categories of compensation consultants, legal counsel or other advisers, preserve the ability of compensation committees to retain the services of members of any such category and include:

- The provision of other services to the company by the person that employs the compensation consultant, legal counsel or other adviser;
- The amount of fees received from the company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;
- The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;
- Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee; and
- Any stock of the company owned by the compensation consultant, legal counsel or other adviser.

The compensation committee must have the authority, in its sole discretion, to retain or obtain the advice of a compensation consultant and independent legal counsel and other advisers and must be directly responsible for the appointment, compensation and oversight of the work of such persons. In addition, the company must provide appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant and to independent legal counsel or any other adviser. These provisions of new Section 10C of the Exchange Act are similar to comparable provisions added to Section 10A(m) of the Exchange Act by Sarbanes-Oxley with respect to audit committees.

This provision does not require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant or independent legal counsel or other advisers and does not otherwise affect the compensation committee's ability or obligation to exercise its own judgment in fulfillment of its duties.

In any proxy or consent solicitation material for an annual meeting of shareholders occurring on or after July 21, 2011, one year after the date of enactment of the Act, each company must disclose in the proxy or consent material whether the compensation committee retained or obtained the advice of a compensation consultant and whether the work of the compensation consultant has raised any conflict of interest. If there is a conflict, the solicitation material must disclose the nature of the conflict and how the conflict is being addressed.

The SEC is required to adopt final rules directing the national securities exchanges and national securities associations to prohibit the listing of any security of a company that is not in compliance with this provision no later than July 16, 2011, 360 days after the date of enactment of the Act. [Section 952 of the Act]

PROXY ACCESS

The Act amends Section 14(a) of the Exchange Act to make explicit that the rules and regulations prescribed by the SEC under Section 14(a) may include a requirement that a solicitation of a proxy, consent or authorization by, or on behalf of, a company must include a nominee submitted by a shareholder to serve on the company's board of directors, as well as a requirement that a company follow a certain procedure in relation to such a solicitation. In addition, the Act provides that the SEC may issue rules permitting the use by a shareholder of proxy solicitation materials supplied by a company for the purpose of nominating individuals to membership on the company's board of directors.

This provision becomes effective on July 22, 2010. [Section 971 of the Act]

On June 10, 2009, the SEC issued proposed rules on facilitating shareholder director nominations. Release Nos. 33-9046; 34-60089, available at http://www.sec.gov/rules/proposed/2009/33-9046.pdf. As proposed, if certain conditions are met, a company would be

required to include in its proxy statement shareholder nominations for director (but not if the shareholder is seeking to change control of the board of directors). The proposal also requires a company's proxy statement to include shareholder proposals to amend a company's governing documents with respect to director nomination procedures. More than 500 comments were submitted on the proposal. One concern critics had raised was whether the SEC has the authority to adopt this provision, but the Act has now settled this issue. At this time, it is unclear how the SEC intends to proceed on its proxy access proposal. For more detail about the scope of the SEC's proxy access proposal, see our Securities Update, dated July 6, 2009, titled "US SEC Proxy Access Proposal."[3]

LEADERSHIP STRUCTURE

The Act adds new Section 14B to the Exchange Act directing the SEC to issue rules that require a public company to disclose in its annual meeting proxy statement the reasons why the company has either chosen the same person to serve as chairman of the board of directors and chief executive officer or has chosen different individuals to serve as chairman of the board of directors and chief executive officer.

On December 16, 2009, the SEC adopted final rules titled "Proxy Disclosure Enhancements." Release Nos. 33-9089; 34-61175; IC-29092.[4] In relevant part, the new SEC rules added a disclosure provision requiring, in an annual meeting proxy statement, both a description of the board leadership structure and a statement as to why the company believes this is the appropriate structure for it given the specific characteristics or circumstances of the company.

As a result of these rules, companies currently are required to disclose whether and why they have chosen to combine or separate the principal executive officer and board chair positions. If a company has combined the roles of principal executive officer and board chair, the company is required to disclose whether and why it has a lead independent director and to discuss the specific role the lead independent director plays in the leadership of the company. These new disclosure requirements were effective February 28, 2010. For more detail about the existing SEC rules, see our Legal Update, dated December 17, 2009, titled "US Securities and Exchange Commission Approves Proxy and Other Disclosure Changes."[5]

Because it appears that the SEC's rules on this topic already contain the information required by this provision, it is unclear whether the SEC will revisit its existing disclosure requirements. However, if the SEC does so, it is required to adopt final rules no later than January 17, 2011, 180 days after the date of enactment of the Act. [Section 972 of the Act]

BROKER NON-VOTES

The Act amends Section 6(b) of the Exchange Act to require that the rules of all national securities exchange prohibit any member of the exchange (i.e., registered brokers or dealers or natural persons associated with a registered broker or dealer) that is not the beneficial owner of a security registered under Section 12 from granting a proxy to vote the security in connection with a shareholder vote with respect to the election of a member of the board of directors of a company, executive compensation or any other significant matter as determined by the SEC, unless the beneficial owner of the security has instructed the member to vote the proxy in accordance with the voting instructions of the beneficial owner.

This provision becomes effective on July 22, 2010; however, the Act does not contain a deadline for when final rules must be adopted by the SEC and the national securities exchanges. [Section 957 of the Act]

Currently a broker's ability to vote shares of which it is not the beneficial owner is governed by the rules of the national securities exchanges of which it is a member. For example, New York Stock Exchange Rule 452, titled "Giving Proxies by Member Organizations," allows brokers to vote on "routine" proposals if the beneficial owner of the stock has not provided specific voting instructions to the broker at least 10 days before a scheduled meeting. Rule 452 also sets forth those matters that are not routine. Rule 452 was last amended on July 1, 2009, to eliminate the ability of brokers to vote in their discretion with respect to elections of directors. For more detail on this change, see our Legal Update, dated July 1, 2009, titled "Amendment of NYSE Rule 452; Elimination of Broker Discretionary Voting in Director Elections."[6]

Going forward, the SEC and the national securities exchanges are able to independently determine the matters (other than the election of directors or executive compensation) upon which brokers may not exercise their discretion to vote shares for which they have not received voting instructions from the beneficial owner. Depending on how the SEC exercises this new authority, this provision could have additional consequences for annual shareholder meetings.

RISK COMMITTEES FOR CERTAIN BANKS AND NONBANK FINANCIAL COMPANIES

The Act requires the Board of Governors of the Federal Reserve System (the "Board of Governors") to adopt rules requiring each publicly traded bank holding company that has total consolidated assets of at least $10 billion and each nonbank financial company supervised by the Board of Governors to establish a risk committee of the board of directors. The risk committee must:

- Be responsible for the oversight of the company's enterprise-risk management practices;
- Include a number of independent directors as the Board of Governors may determine appropriate, based on the nature of the company's operations, the size of its assets and other appropriate criteria; and
- Include at least one risk management expert having experience in identifying, assessing and managing risk exposures of large, complex firms.

In addition, the Board of Governors may require each publicly traded bank holding company that has total consolidated assets of less than $10 billion to establish a risk committee as determined necessary or appropriate by the Board of Governors to promote sound risk management.

The Act establishes the Financial Stability Oversight Council, and authorizes it to determine whether material financial distress at a US nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness or mix of the activities of that US nonbank financial company, could pose a threat to the financial stability of the United States. If the Council finds it to be so, it is authorized to determine that the US nonbank financial company must be supervised by the Board of Governors and be subject to the prudential standards provided for in the Act (as well as this risk committee provision).

The Board of Governors is required to adopt final rules no later than July 22, 2012, two years after the date of enactment of the Act and the rules are to be effective no later than October 22, 2012, 27 months after the transfer date. [Section 165 of the Act]

Executive Compensation Disclosures

SAY-ON-PAY

The Act adds new Section 14A to the Exchange Act (the so-called "say-on-pay provision") that, in part, requires non-binding shareholder votes on executive compensation. This provision requires that at least every three years any proxy or consent statement or other authorization for an annual or other meeting of shareholders for which the SEC's proxy rules require the executive compensation disclosure of Item 402 of Regulation S-K must provide for a separate shareholder vote to approve the compensation of the company's executive officers as disclosed in accordance with the SEC's compensation disclosure rules for named executive officers. In addition, at least every six years, a proxy or consent statement or other authorization for an annual or other meeting of shareholders for which the SEC's proxy rules require executive compensation disclosure must provide for a separate shareholder vote to determine whether these votes on say-on-pay resolutions will occur every one, two or three years.

These shareholder votes are not to be construed as overruling a decision by the company or its board of directors. The new requirement does not create or imply additional fiduciary duties for the company or its board of directors or any change to those duties. It also does not restrict or limit the ability of shareholders to make proposals related to executive compensation for inclusion in a company's proxy statement.

Finally, every institutional investment manager subject to Section 13(f) of the Exchange Act must report at least annually how it voted on any say-on-pay resolution.

This provision is effective for the proxy or consent statement or other authorization for the first annual

meeting or other meeting of shareholders occurring on or after January 22, 2011, after the end of the six-month period beginning on the date of enactment of the Act. This provision does not require the SEC to adopt any implementing rules before it is effective. [Section 951 of the Act]

GOLDEN PARACHUTES

New Section 14A of the Exchange Act also requires that any proxy or consent solicitation material for a meeting at which shareholders are asked to approve an acquisition, merger, consolidation or proposed sale or other disposition of all or substantially all of the assets of a company (collectively, an "extraordinary transaction") must disclose in a clear and simple form, in accordance with rules to be adopted by the SEC, any agreements or understandings the person making the solicitation has with any named executive officers of the company, or of the acquiring entity if the company is not the acquiring entity, concerning any type of compensation (whether present, deferred or contingent) that is based on or otherwise relates to the extraordinary transaction. Section 14A also requires disclosure of the aggregate total of all such compensation that may, and the conditions upon which it may, be paid or become payable to or on behalf of an executive officer.

This provision also requires that any proxy or consent solicitation relating to an extraordinary transaction and containing the disclosure required by the previous paragraph must also provide for a separate non-binding shareholder vote to approve such agreements or understandings and compensation as disclosed, unless such agreements or understandings have been subject to a say-on-pay vote described in the previous section of this Legal Update. As with the say-on-pay requirements, the shareholder vote is not to be construed as overruling a decision by the company or its board of directors and the new requirements do not create or imply any additional fiduciary duties for the company or its board of directors or any change to those duties. It also does not limit the ability of shareholders to make proposals related to executive compensation for inclusion in a company's proxy statement.

Finally, every institutional investment manager subject to Section 13(f) of the Exchange Act must report at least annually how it voted on any golden parachute resolution.

This provision is effective for a meeting of shareholders relating to an extraordinary transaction occurring on or after January 22, 2011, after the end of the six-month period beginning on the date of enactment of the Act. Although the disclosure requirements discussed in this section of this Legal Update are subject to rules to be adopted by the SEC, the Act does not include a deadline for when any such rules must be adopted. This provision does not require the SEC to adopt any other implementing rules before it is effective. [Section 951 of the Act]

PAY FOR PERFORMANCE

The Act adds new subsection (i) to Section 14 of the Exchange Act that directs the SEC to require each public company to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders a clear description of any compensation required to be disclosed by Item 402 of Regulation S-K, including information that shows the relationship between executive compensation actually paid and the financial performance of the company, taking into account any change in the value of the shares of stock and dividends of the company and any distributions. This disclosure may include a graphic representation of the information required to be disclosed.

Although this provision is subject to rules to be adopted by the SEC, the Act does not include a deadline for when these rules must be adopted. Accordingly, it is unclear when this provision will be implemented. [Section 953 of the Act]

INTERNAL PAY COMPARISON

The Act directs the SEC to amend Item 402 of Regulation S-K to require each public company to disclose the median of the annual total compensation of all employees of the company, except: the CEO, the annual total compensation of the CEO and the ratio of the two numbers. For this purpose, total compensation is to be determined in accordance with Item 402(c)(2)(x) as in effect on July 20, 2010, the day before the date of enactment of the Act. Because of the way the statute is worded, it is likely that the application of this provision will not change even if the SEC subsequently changes

how annual total compensation is calculated pursuant to Item 402 of Regulations S-K. In addition, this disclosure is to be included in any filing of the company described in Item 10(a) of Regulation S-K, which includes:

- Registration statements under the Securities Act of 1933 (the "Securities Act");
- Registration statements under Section 12 of the Exchange Act;
- Annual or other reports under Section 13 and 15(d) of the Exchange Act;
- Going-private transaction statements under Section 13 of the Exchange Act;
- Tender offer statements under Sections 13 and 14 of the Exchange Act;
- Annual reports to security holders and proxy and information statements under Section 14 of the Exchange Act; and
- Any other documents required to be filed under the Exchange Act.

In each case the disclosure is required to the extent provided for in the forms and rules under the applicable act.

Although this provision is subject to rules to be adopted by the SEC, the Act does not include a deadline for when these rules must be adopted. Accordingly, it is unclear when this provision will be implemented. [Section 953 of the Act]

COMPENSATION CLAWBACKS

The Act adds new Section 10D to the Exchange Act requiring the SEC to direct the national securities exchanges and national securities associations to prohibit the listing of any security of a company that does not develop and implement a policy with respect to the recovery of incentive-based (so-called "compensation clawbacks"). In particular, this policy must address at least two points:

- First, it must require disclosure of the company's policy on incentive-based compensation that is based on financial information required to be reported under the securities laws; and
- Second, if the company is required to prepare a restatement due to the material noncompliance of the company with any financial reporting requirement under the securities laws, it must require that the company will recover from any current or former executive officer of the company who received incentive-based compensation (including stock options awarded as compensation) during the three-year period preceding the date on which the company is required to prepare an accounting restatement, based on the erroneous data, the excess above what would have been paid to the executive officer under the accounting restatement.

This provision differs from a comparable provision set forth in Section 304 of Sarbanes-Oxley in two major ways. First, it applies to all current and former executive officers, rather than just the CEO and CFO. Second, it applies to any accounting restatement due to material noncompliance, not just to those that are the result of misconduct.

Although this provision is subject to rules to be adopted by the SEC, the Act does not include a deadline for when these rules must be adopted. Accordingly, it is unclear when this provision will be implemented. [Section 954 of the Act]

Disclosure and Other Issues

RATINGS

Regulation FD

Regulation FD requires that whenever a company, or a person acting on behalf of a company, discloses material nonpublic information regarding the company or its securities to certain identified classes of person, the company must also make public disclosures of that information. One exception exists for disclosures made solely to any specified nationally recognized statistical rating organization or to any credit rating agency that makes its credit ratings publicly available, in each case for the purpose of determining or monitoring a credit rating. The Act requires the SEC to amend Regulation FD to remove the exemption for entities whose primary business is the issuance of credit ratings.

The SEC is required to adopt final rules no later than October 19, 2010, 90 days after the date of enactment of the Act. [Section 939B of the Act]

Reliance on Ratings

The Act requires the SEC, along with several other federal agencies, to review any regulation issued by such agency that requires the use of an assessment of credit-worthiness of a security or money market instrument and any references to or requirements in such regulations regarding credit ratings. The SEC must modify such regulations identified in its review, such as Form S-3 eligibility requirements, by removing any reference to or requirement of reliance on credit ratings and to substitute in such regulation standards of credit-worthiness as it determines appropriate.

The SEC must complete its review no later than July 22, 2011, one year after the date of enactment of the Act. The Act is not clear on when the changes required following the review are to be adopted by the SEC, although this provision does require the SEC, upon conclusion of its review, to provide a report to Congress containing a description of any modifications made as required by this provision. [Section 939A of the Act]

Rule 436(g)

Rule 436(g) promulgated under the Securities Act states that a security rating assigned to a class of debt securities, a class of convertible debt securities or a class of preferred stock by a nationally recognized statistical rating organization, or assigned with respect to registration statements on Form F-9 by any other rating organization, shall not be considered a part of the registration statement prepared or certified by a person within the meaning of Sections 7 or 11 of the Securities Act. The Act declares that this provision shall have no force or effect. The impact of this provision is that the organization providing a credit rating disclosed in a prospectus or registration statement will be regarded as an expert for purposes of Section 11 of the Securities Act, and, as a result, a company must include a consent from a nationally recognized statistical rating organization as an exhibit to any Securities Act registration statement that discloses a security rating. It would not apply however if the security rating discussion appears in some other document, such as a free writing prospectus, that is not part of the registration statement.

This provision becomes effective on July 22, 2010. [Section 939G of the Act]

HEDGING POLICIES

The Act adds new subsection (j) to Section 14 of the Exchange Act that directs the SEC to require each public company to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders whether any employee or member of the board of directors of the company, or any designee of such employee or member, is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange funds) that are designed to hedge or offset any decrease in the market value of equity securities granted to the employee or member of the board of directors by the company as part of the compensation of the employee or member of the board of directors or held, directly or indirectly, by the employee or member of the board of directors.

Although this provision is subject to rules to be adopted by the SEC, the Act does not include a deadline for when these rules must be adopted. Accordingly, it is unclear when this provision will be implemented. [Section 955 of the Act]

BENEFICIAL OWNERSHIP REPORTING

Upon acquiring more than 5% of a security of a class registered pursuant to Section 12 of the Exchange Act, Section 13(d) of the Exchange Act previously required that a statement be filed with the SEC, sent to the issuer of the security at its principal executive offices and sent to the exchange where the security is traded, within 10 days of the acquisition. The Act revises subsections (d) and (g) of Section 13 of the Exchange Act to permit the SEC by rule to shorten the 10-day filing period and also eliminates the requirement to send copies of a Schedule 13D or Schedule 13G to the issuer of the security and to the exchange where the security is traded. Similar changes were also made with respect to ownership reports required by Section 16(a) of the Exchange Act.

This provision becomes effective on July 22, 2010. [Section 929R of the Act]

In addition, the Act amends Section 13 of the Exchange Act to add to the list of persons subject to subsections (d)(1) and (g)(1) those persons who become or are deemed to become a beneficial owner of an equity security upon the purchase or sale of an equity-based swap that the SEC may define by rule. A similar change was also made to Section 13(f) of the Exchange Act. Correspondingly, the Act amends Sections 13 and 16 of the Exchange Act to clarify that, for purposes of those sections, a person is deemed to acquire beneficial ownership of an equity security based on the purchase or sale of an security-based swap, but only to the extent that the SEC, by rule, determines that the purchase and sale of the security-based swap provides incidents of ownership comparable to direct ownership of the equity security, and that it is necessary to achieve the purposes of these sections that the purchase or sale of the security-based swap, or class of security-based swaps, be deemed the acquisition of beneficial ownership of the equity security. Accordingly, until such time, if any, as the SEC adopts a rule defining beneficial ownership to include that resulting from ownership of an equity-based swap, a person shall not be deemed to have beneficial ownership of a security underlying a security-based swap.

No specific action by the SEC is required; however, if the SEC does undertake rulewriting in response to this provision, the rules adopted by the SEC are to be effective no earlier than 60 days after the SEC final rules are published in the Federal Register [Section 766 of the Act]

SHORT SALES

The Act amends Section 13(f) of the Exchange Act to require the SEC to prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, and aggregate amount of the number of short sales of each security, and any additional information determined by the SEC following the end of the reporting period. At a minimum, this public disclosure is required to occur every month.

Although this provision is subject to rules to be adopted by the SEC, the Act does not include a deadline for when these rules must be adopted. Accordingly, it is unclear when this provision will be implemented. [Section 929X of the Act]

AUDITOR ATTESTATION OF INTERNAL CONTROL OVER FINANCIAL REPORTING

Section 404(b) of Sarbanes-Oxley requires registered public accounting firm that prepares or issues an audit report for a public company to also attest to, and report on, management's assessment of the effectiveness of the internal control structure and procedures of the company for financial reporting required by Section 404(a) of Sarbanes-Oxley. To date, the SEC has deferred implementation of this provision for non-accelerated filers and for smaller reporting companies. The Act would make this deferral permanent by exempting from Section 404(b) of Sarbanes-Oxley any audit report on internal control over financial reporting prepared for a company that is not a large accelerated filer or an accelerated filer.

This provision becomes effective on July 22, 2010. [Section 989G of the Act]

ACCREDITED INVESTOR DEFINITION

The Act directs the SEC to adjust any net worth standard for an accredited investor to require that the individual net worth of any natural person, or joint net worth with the spouse of that person, at the time of the purchase of securities, exceeds $1 million excluding the value of such person's primary residence. This standard is to remain at $1 million until July 21, 2014, the four-year period beginning on the date of the enactment of the Act. Currently, Rule 215 under the Securities Act and Rule 501 of Regulation D under the Securities Act both include the value of the primary residence in determining a person's net worth for accredited investor purposes.

In addition, the SEC is authorized to undertake a review of the other provisions of the accredited investor definition, as that term applies to natural persons, to determine whether other requirements of the definition should be adjusted or modified for the protection of investors, in the public interest and in light of the economy. The only other provision currently part of the definition that applies to natural persons is an income test that, if satisfied, also would allow a person to be considered an accredited investor.

Beginning July 22, 2014, and every four years thereafter, the SEC is required to conduct reviews of this definition in its entirety as it term applies to natural persons, in order to determine whether it should be adjusted or modified for the protection of investors, in the public interest and in light of the economy.

The change to the net worth standard becomes effective on July 22, 2010. [Section 413 of the Act]

PERSONS PROHIBITED FROM PARTICIPATING IN CERTAIN REGULATION D OFFERINGS

The Act requires the SEC to adopt rules for the disqualification of offerings and sales of securities made under Rule 506 of Regulation D under the Securities Act that:

- Are substantially similar to the provisions of Rule 262 under the Securities Act; and
- Disqualify any offering or sale of securities by a person that:
  - » is subject to a final order of a state securities commission (or an agency or officer of a state performing like functions), a state authority that supervises or examines banks, savings associations, or credit unions, a state insurance commission (or an agency or officer of a state performing like functions), an appropriate federal banking agency, or the National Credit Union Administration, that
    - – bars the person from
      - association with an entity regulated by such commission, authority, agency or officer,
      - engaging in the business of securities, insurance or banking, or
      - engaging in savings association or credit union activities; or
    - – constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative or deceptive conduct with the 10-year period ending on the date of the filing of the offer or sale; or
  - » has been convicted of any felony or misdemeanor in connection with the purchase or sale of any security or involving the making of any false filing with the SEC.

A Rule 506 offering provides an exemption from the registration requirements of Section 5 of the Securities Act for limited offers and sales that meet the conditions specified in the rule without regard to the dollar amount of the offering. Rule 262 of Regulation A under the Securities Act contains provisions that disqualify a company from relying on the exemption provided by Section 3(b) of the Securities Act, applicable to offerings of less than $5 million, if the company or directors, officers, general partners, 10% beneficial owners, promoters, underwriters, or partners, directors or officers of any such underwriters, are subject to specified orders or convictions.

The SEC is required to adopt final rules no later than July 22, 2011, one year after the date of enactment of the Act. [Section 926 of the Act]

OTHER SPECIALIZED DISCLOSURE PROVISIONS

Conflict Minerals

The Act adds new subsection (p) to Section 13 to the Exchange Act that requires the SEC to adopt rules requiring any public company for which conflict minerals are necessary to the functionality or production of a product manufactured by such company to provide certain annual disclosures and to make such disclosures available on its web site. A conflict mineral is defined as columbite-tantalite (coltan), cassiterite, gold, wolframite or their derivatives or any other mineral or its derivatives determined by the U.S. Secretary of State to be financing conflict in the Democratic Republic of Congo or an adjoining country.

The SEC is required to adopt final rules no later than April 17, 2011, 270 days after the date of enactment of the Act. [Section 1502 of the Act]

Coal and Other Mine Safety

Each public company that is an operator, or that has a subsidiary that is an operator, of a coal or other mine must include in each periodic report filed with the SEC specified detailed information about the safety of its mines. In addition, these public companies must also file a current report on Form 8-K to report the receipt of a notice of certain safety violations.

This provision becomes effective on August 20, 2011, 30 days after the date of enactment of the Act. This

provision does not require the SEC to adopt any implementing rules before it is effective. [Section 1503 of the Act]

Payments by Resource Extraction Issuers

The Act adds new subsection (q) to Section 13 to the Exchange Act that requires each resource extraction issuer to include in its annual report specified information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer or an entity under the control of the resource extraction issuer to a foreign government or the federal government for the purpose of commercial development of oil, natural gas or minerals. For this purpose, a resource extraction issuer is a public company that engages in the commercial development of oil, natural gas or minerals.

The SEC is required to adopt final rules no later than April 17, 2011, 270 days after the date of enactment of the Act, and the final rules are to take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the fiscal year of the resource extraction issuer that ends at least one year after the date on which the SEC issues its final rules. [Section 1504 of the Act]

PRACTICAL CONSIDERATIONS

- Because of the many changes that will be effective within the next year for public companies, it is extremely important to begin planning now for these changes and to remain on top of the SEC's rule-writing process and the various implementation dates.
- Since the Act is silent on the details of many of the provisions that the SEC is required to adopt, companies should monitor the SEC rulewriting process at the proposal stage to determine whether to submit comments on any of the proposals, as well as to determine how any given proposal will impact the company, its disclosures controls and procedures and its timing for the upcoming proxy season.
- It appears that proxies that contain the say-on-pay proposal required by the Act must be filed with the SEC in preliminary form pursuant to Rule 14a-6 of Schedule 14A under the Exchange Act. Accordingly, unless this changes as part of the SEC rulewriting process, additional time will need to be included in annual meeting planning calendars.
- Consideration should be given to updating the compensation committee, if not the full board, now on the extent of the upcoming changes from the Act.
- It would be worthwhile for those who work on proxy statements or the annual meeting process generally to begin consideration of, among other things, how they will gather and present information to address the new requirements of the Act. This should include determining whether changes to the formatting of the proxy card will be needed in response to the new say-on-pay requirements and whether changes need to be made to a company's shareholder communications programs that reflect provisions of the Act, such as the new say-on-pay and golden parachute vote requirements.

Endnotes

1 Available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf

2 Available at http://www.mayerbrown.com/publications/article.asp?id=9307&nid=6.

3 Available at http://www.mayerbrown.com/publications/article.asp?id=7197&nid=6.

4 Available at http://www.sec.gov/rules/final/2009/33-9089.pdf.

5 Available at http://www.mayerbrown.com/publications/article.asp?id=8323&nid=6.

6 Available at http://www.mayerbrown.com/publications/article.asp?id=7172&nid=6.

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