

Securities Law ADVISORY

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Dodd-Frank Implications for Non-Financial Services Companies

On Wednesday, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”). Although the bulk of the legislation enacts a host of reforms that will impact virtually all aspects of the financial markets, the Act also contains numerous provisions that will affect non-financial services companies.¹ The purpose of this advisory is to provide public companies with a summary of the following provisions of the Act that will most directly impact non-financial services companies:

- corporate governance and executive compensation;
- the internal control evaluation and reporting under Section 404(b) of the Sarbanes-Oxley Act of 2002 (SOX);
- private placements;
- other important securities laws, such as beneficial ownership reporting and short sales;
- securities litigation and enforcement, including whistleblower protections, aiding and abetting liability and extraterritorial private rights of action;
- companies doing business with credit rating agencies, especially those engaged in securities offerings;
- companies doing business with banking organizations, specifically with regard to interest-bearing transaction accounts, payment card transactions and derivatives; and
- new disclosure items, affecting only certain companies, relating to conflict minerals, mine safety and foreign payments.

Corporate Governance and Executive Compensation²

Shareholder Vote on Executive Compensation Disclosures (Sec. 951)

New Section 14A of the Securities Exchange Act of 1934 (the “Exchange Act”), entitled “Shareholder Approval of Executive Compensation,” will apply to all Exchange Act reporting companies that are subject to the proxy rules.

- *Say-on-Pay*: Beginning with the proxy statement for the first annual meeting occurring six months

¹ Alston & Bird has prepared an extensive Financial Services and Products Advisory summarizing the Act’s provisions. Alston & Bird’s comprehensive advisory is available at: http://www.alston.com/fisap_dodd_frank_reform_act_summary.

² Set forth below is a high-level summary; for a more in-depth discussion see Laura Thatcher’s article: “Dodd-Frank Wall Street Reform and Consumer Protection Act to Be Signed Into Law; Provisions Affect Executive Compensation and Corporate Governance,” Pension & Benefits Daily, 136 PBD, 07/19/2010, available at: http://www.alston.com/files/docs/Thatcher_BNA_Art.pdf.

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after the date of enactment (i.e., the 2011 proxy statement for calendar year companies), reporting companies will be required to include in their annual meeting proxy statements a separate advisory resolution (“say on pay”) regarding the compensation of executives as disclosed in the proxy statement.

At the first annual meeting occurring six months after the date of enactment (i.e., the 2011 meeting for calendar year companies), and no less frequently than every six years thereafter, shareholders will also be allowed to vote on whether the advisory say-on-pay vote should occur every year, every two years or every three years.

- *Golden Parachutes*: New Section 14A also provides for a separate advisory shareholder vote on so-called “golden parachutes,” in connection with merger votes in any proxy statement for a meeting of shareholders occurring six months after the date of enactment.

Compensation Committees (Sec. 952)

New Exchange Act Section 10C, entitled “Compensation Committees,” imposes a variety of new restrictions and obligations on public company compensation committees.

- *Independence Standards*: The Act requires the SEC to adopt rules directing the national securities exchanges and national securities associations to impose heightened independence standards for membership on compensation committees similar to those applicable to audit committees. The SEC must issue rules within 360 days of enactment.
- *Authority to Retain Compensation Consultants and Advisers*: Compensation committees must be directly responsible for the appointment, compensation and oversight of compensation consultants, legal counsel or other advisers retained by the committee, taking into account factors affecting independence prescribed by SEC rules (although the committee is not precluded from retaining advisers that are not independent). There is no stated deadline for SEC rulemaking.
- *Use of Compensation Consultants*: A company’s proxy statement for the first annual meeting that is one year after the date of enactment (generally the 2012 proxy season) must disclose whether the compensation committee retained or received advice from a compensation consultant, whether the consultant’s work raised any conflict of interest and, if so, the nature of the conflict and how it is being addressed.
- *SEC Study on Use of Compensation Consultants*: The SEC must submit a report to Congress on the use of compensation consultants within two years after enactment.

Executive Compensation Disclosures (Sec. 953)

New Exchange Act Section 14(i), entitled “Disclosure of Pay Versus Performance,” requires the SEC to promulgate rules requiring a company’s annual meeting proxy statements to provide information that shows the relationship between executive compensation actually paid and the company’s financial performance, and the ratio of CEO pay to the median pay of all other employees.

- *Deadline for Rulemaking*: No rulemaking deadline is specified.

Recovery of Erroneously Awarded Compensation (Sec. 954)

New Exchange Act Section 10D, entitled “Recovery of Erroneously Awarded Compensation,” requires the SEC to promulgate rules requiring each issuer to develop, disclose and implement a clawback policy for incentive-based compensation that is based on publicly reported financial information. The SEC is instructed to provide rules directing the national securities exchanges to prohibit the listing of any security of an issuer that is not in compliance with these requirements.

- *Deadline for Rulemaking:* No rulemaking deadline is specified.

Disclosure Regarding Directors’ and Employees’ Hedging (Sec. 955)

New Exchange Act Section 14(j), entitled “Disclosure of Hedging by Employees and Directors,” requires the SEC to adopt a rule requiring issuers to disclose in their annual proxy statements whether employees or directors (or their designees) are permitted to purchase financial instruments that are designed to hedge or offset any decrease in the market value of issuer stock they hold.

- *Deadline for Rulemaking:* No rulemaking deadline is specified.

Voting by Brokers (Sec. 957)

The Act amends Exchange Act Section 6(b) to prohibit brokers from uninstructed (discretionary) voting with respect to the election of directors, executive compensation or any other significant matter, as determined by the SEC. With respect to discretionary authority for director elections, this provision has little practical effect because the NYSE previously amended NYSE Rule 452 to remove such discretionary authority. With regard to executive compensation, the current NYSE Rule 452 prohibits discretionary voting with regard to the adoption or the material amendment of equity compensation plans. Because the Act prohibits discretionary authority with respect to “executive compensation,” this presumably will prohibit discretionary voting on the say-on-pay and golden parachute shareholder votes described above. The SEC may also enact rules to eliminate discretionary authority for other significant matters.

- *Effective Date:* Effective July 22, 2010 (one day after enactment).

Proxy Access (Sec. 971)

The Act amends Exchange Act Section 14(a) to permit (but not require) the SEC to prescribe rules permitting shareholders to use issuer proxy solicitation materials to nominate director candidates.

- *Rule Status:* The SEC is authorized to issue rules as of one day after enactment; however, this rulemaking authority is permissive and, therefore, there is no deadline by which the SEC must issue rules pursuant to this section. The SEC proposed proxy access rules on May 20, 2009, and could theoretically adopt such rules in the near future.

Disclosures Regarding Chairman and CEO Structures (Sec. 972)

New Exchange Act Section 14B, entitled “Corporate Governance,” requires the SEC to issue rules requiring companies to disclose in the annual proxy statement why they have chosen to separate, or not to separate, the positions of board chair and CEO. Current SEC rules require similar disclosure, and it is not clear whether or how the new requirement is any different from the current SEC disclosure rule.

- *Deadline for Rulemaking:* The SEC must promulgate rules within 180 days after enactment.

Items Related to SOX

Exemption from SOX Section 404(b) for Nonaccelerated Filers (Sec. 989G)

Section 404 of SOX is amended to exempt nonaccelerated filers (issuers with less than \$75 million of market capitalization) from the requirement for an external audit of internal control over financial reporting.

In addition, the SEC is required to conduct a study to determine how it could reduce the burden of complying with SOX Section 404(b) for companies whose market capitalization is between \$75 million and \$250 million, while maintaining investor protections for such companies.

- *Effective Date of Exemption for Nonaccelerated Filers:* The exemption for nonaccelerated filers is effective on July 22, 2010 (one day after enactment).
- *Deadline for Study on Burden Reduction for Compliance with SOX 404(b):* The SEC must deliver a report to Congress within nine months of enactment.

GAO Study Regarding SOX 404(b) Exemption for Smaller Issuers (Sec. 989I)

The GAO is required to conduct a study of the impact of the Act's amendments to SOX Section 404(b).

- *Deadline for GAO Study:* The GAO must report to Congress within three years of enactment.

Items Affecting Private Placements

Accredited Investor Standard (Sec. 413)

This section revises the net worth standard for a natural person accredited investor to exclude the value of the primary residence of such natural person from the \$1 million net worth test. The Act also permits the SEC to review the definition of the term "accredited investor" as it applies to natural persons, and promulgate rules adjusting the definition; however, the SEC may not adjust or modify the net worth standard for four years following enactment of the Act.

Beginning four years after enactment of the Act, and at least once every four years thereafter, the SEC must review the definition of the term "accredited investor" as it applies to natural persons in its entirety and may promulgate rules adjusting the definition as the SEC deems "appropriate for the protection of investors, in the public interest and in light of the economy."

- *Effective Date of New Accredited Investor Standard:* Immediately upon enactment.
- *Ongoing Requirement for SEC Review of Accredited Investor Standard (with ability to adjust accredited investor standard):* Beginning four years after enactment, and every four years thereafter.

GAO Study on Accredited Investors (Sec. 415)

The GAO must conduct a study regarding the appropriate criteria for determining the financial thresholds or other criteria needed to qualify for accredited investor status and eligibility to invest in private funds.

- *Deadline for GAO Study:* GAO must deliver a report to Congress within three years of enactment.

“Bad Actor” Disqualifications from Participation in Regulation D Offerings (Sec. 926)

This section requires the SEC to issue rules to disqualify Regulation D offerings and sales made by persons who have violated securities laws, or have been convicted of any felony or misdemeanor in connection with the purchase or sale of securities or involving making false filings with the SEC. This provision is similar to Rule 252, which disqualifies “bad actors” from Regulation A offerings. There is a waiver process under Rule 262, but it is not clear if a similar waiver will be available for this new rule.

- *Deadline for Rulemaking:* The SEC must promulgate rules within one year of enactment.

Other Important Securities Law Changes

Beneficial Ownership and Short-Swing Profit Reporting (Secs. 766, 929R)

The Act amends Exchange Act Section 13 to include the purchase or sale of a “security-based swap,” as the term will be defined by the SEC. In addition, the SEC may promulgate rules shortening the time period for filing a Schedule 13D in connection with acquiring beneficial ownership of more than five percent of a registered class of equity securities. In addition, the Act amends Section 16 of the Exchange Act to allow the SEC to shorten the time period for filing a Form 3 in connection with becoming a director, officer or 10 percent shareholder of a public company.

- *Effective Date:* Effective on July 22, 2010 (one day after enactment). No deadline is specified for when the SEC must issue rules under this section.

Short Sale Reforms (Sec. 929X)

The Act amends Exchange Act Section 9 to prohibit manipulative short selling and give the SEC authority to adopt rules necessary to ensure enforcement. In addition, Exchange Act Section 13(f) is amended to require the SEC to issue rules requiring at least monthly public disclosure of short sale activity.

Exchange Act Section 15 is amended to require broker-dealers to provide notice to their customers that they may elect not to allow their securities to be used in connection with short sales, and that the broker-dealer may receive compensation for lending the customer’s securities. The SEC may specify the “form, content, time and manner” of the notice.

- *Effective Date:* Effective July 22, 2010 (one day after enactment). No deadline is specified for when the SEC must issue rules under this section.

SEC Study and Report on Short Selling (Sec. 415)

The SEC must conduct a study regarding the state of short selling on national securities exchanges and in over-the-counter markets, the impact of recent rule changes and the incidence of failure to deliver shares sold short or deliver shares on the fourth day following a short sale.

The SEC must also conduct a study regarding the feasibility, benefits and costs of (i) requiring the reporting of short sale positions of publicly listed securities in real time publicly or, alternatively, to the SEC and FINRA, and (ii) a voluntary pilot program in which public companies agree to have all trades with certain markets reported in real time.

- *Deadline for SEC Study of Short Sales and Effect of Short Selling Rules:* The SEC must submit a report to Congress within two years of enactment.
- *Deadline for SEC Study of Realtime Short Sale Reporting Requirements and Pilot Program:* The SEC must submit a report to Congress within one year of enactment.

Items Relating to Securities Litigation and Enforcement

New whistleblower protections, including provision for the payment of awards and new protections against retaliation and express protections for employees of subs and affiliates of publicly traded companies (Secs. 922, 923, 924, 929A)

These sections will require significant adjustments to corporate compliance systems and ethics mechanisms, as whistleblowers will now have an economic incentive to report any perceived violations outside of existing corporate channels. In addition, because of the antiretaliation protections provided under the Act, strong protections for known whistleblowers will have significantly increased importance.

- *Whistleblower Award* – Whistleblowers are entitled to a bounty between 10 and 30 percent of the money collected as part of a successful enforcement action resulting in monetary sanctions of more than \$1 million.
 - *Permitted Representation* – Whistleblowers are allowed to remain anonymous by acting through counsel, but whistleblowers must disclose their identity to the SEC prior to the payment of any bounty.
 - *Investor Protection Fund* – The Act establishes a fund from which to pay whistleblowers and fund the SEC Inspector General, using monetary sanctions collected by the SEC that are not otherwise committed.
 - *Whistleblower Protection* – The Act prohibits employers from retaliating against employees because they provide information to the SEC, or who initiate, testify or otherwise assist in an investigation or other action of the SEC.
 - *Confidentiality* – The Act requires that the identity of a whistleblower be kept confidential by the SEC except in certain limited circumstances and unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding. The SEC may also pass along the confidential information to certain other government agencies.
 - *New SEC Office* – The SEC must also establish a separate office within the SEC to administer and enforce the whistleblower program.
- *Deadline for Rulemaking:* The SEC must promulgate rules implementing the whistleblower provisions of the Act within 270 days of enactment.

Aiding and Abetting Liability in Enforcement Actions (Secs. 929M, 929N, 929O, 929P)

These sections amend Section 15 of the Securities Act of 1933 (the “Securities Act”), Section 20 of the Exchange Act, Section 209 of the Investment Advisers Act of 1940 and Section 48 of the Investment Company Act of 1940 to extend the SEC’s enforcement authority regarding aiding and abetting to persons who “recklessly” provide substantial assistance in violation of those acts.

- *Effective Date:* Effective July 22, 2010 (one day after enactment).

GAO Study on Securities Litigation (929Z)

This section requires the GAO to conduct a study regarding the impact of a private right of action against any person who aids or abets a violation of the securities laws.

- *Deadline for GAO Report:* The GAO must submit a report to Congress within one year of enactment.

Deadline for Resolving Enforcement Actions (929U)

This section requires the SEC staff to either file an action or provide notice to the Director of the Division of Enforcement of its intent not to file an action within 180 days of a Wells notification to any person. This deadline may be extended for certain complex actions.

- *Effective Date:* Effective July 22, 2010 (one day after enactment).

Extraterritoriality of U.S. Government Actions Under the Federal Securities Laws (Sec. 929P(b))

This Section is intended to allow the SEC or the United States to bring enforcement actions based on violations of the federal securities laws abroad. This section is in response to the recent Supreme Court decision *Morrison v. National Australia Bank, Ltd.* that held Section 10(b) of the Exchange Act and SEC Rule 10b-5 do not apply to securities transactions occurring outside the U.S.

Although Section 929P(b) of the Act was intended to extend application of securities laws to actions outside the United States, the actual language of the section refers to the U.S. court's "jurisdiction," and may not alter the substantive reach of the securities laws. This drafting issue will likely result in challenges to this provision that contend it does not extend the government's enforcement powers under the federal securities laws. Ultimately the effect of this provision will be determined by the courts.

- *Effective Date:* Effective July 22, 2010 (one day after enactment).

Study of Extraterritorial Private Rights of Action (929Y)

This section requires the SEC to solicit public comment and conduct a study to determine whether private rights of action under the anti-fraud provisions of the Exchange Act should be extended to cover conduct within the United States that constitutes a significant step in furtherance of a violation and conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

- *Deadline for GAO Report:* The SEC must submit a report to Congress within 18 months of enactment.

Items Affecting Companies Doing Business with Credit Rating Agencies***Elimination of Regulation FD Exemption for Disclosures to Credit Rating Agencies (Sec. 939B)***

The SEC is required to revise Regulation FD to remove the exemption for disclosures to credit rating agencies.

- *Deadline for Rulemaking:* The SEC must revise Regulation FD within 90 days of enactment.

Elimination of Exemption from Liability for Credit Rating Agencies (Sec. 939G)

This section repeals Rule 436(g) under the Securities Act, which exempted ratings issued by Nationally Recognized Statistical Rating Organizations (NRSROs) from being considered part of a registration statement

for the purposes of Sections 7 and 11 of the Securities Act. Because of the repeal of this rule, such ratings are now considered part of the registration statement and, therefore, NRSROs are subject to possible liability under Sections 7 and 11. In addition, because Rule 436(a) of the Securities Act requires that where a report or opinion of an expert or counsel, including a rating by an NRSRO, is quoted or summarized in a registration statement or prospectus, the written consent of the expert must be filed as an exhibit, many NRSROs may prevent the use of their ratings in such documents.

As a result of the repeal of the 436(g) provision, issuers may not include ratings for traditional marketing purposes in a registration statement or prospectus without first obtaining related rating agency consents. However, issuers may include a rating in a registration statement or prospectus in order to accurately describe certain other matters, such as covenants, liquidity or risk factors. In addition the SEC staff confirmed yesterday that issuers will continue to be able to use ratings information in free writing prospectuses and Rule 134 notices in non-Regulation AB offerings, as they are not deemed to be part of the registration statement.³ In the future, however, the SEC may adopt revisions to rules governing free writing prospectuses and notices under Rule 134 in order to better align them with the requirements under the Act.

- *Effective Date:* Immediately upon enactment.

Items Affecting Companies Doing Business with Banking Organizations

Interest-Bearing Transaction Accounts Authorized (Sec. 627)

This section amends Section 19(i) of the Federal Reserve Act to repeal prohibitions on payment of interest on demand deposit accounts.

- *Effective Date:* Effective one year after enactment.

Reasonable Fees for Payment Card Transactions (Sec. 1075(a))

The Electronic Fund Transfer Act of 1978 is amended to require the Federal Reserve to prescribe final regulations that establish standards for assessing whether the amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debt transaction is reasonable and proportional to the cost incurred by the issuer with respect to the transaction.

- *Deadline for Rulemaking:* The Federal Reserve must adopt final regulations no later than nine months after the date of enactment.

Rules for Payment Card Networks (Sec. 1075(b))

The Act prohibits four specific payment card network practices:

- Arrangements by a payment card network or a card issuer that restrict the number of payment card networks on which an electronic debit transaction may be processed to one network or two networks that are owned, controlled or otherwise operated by affiliated persons or networks affiliated with the card issuer;

³ See SEC Compliance and Disclosure Interpretations, Securities Act Rules, Question 233.06. With respect to registered offerings of asset-backed securities, see also Ford Motor Credit Company LLC, SEC No-Action Letter (Jul. 22, 2010).

- Arrangements by a payment card network or a card issuer that inhibit the ability of a merchant to direct the routing of electronic debit transactions for processing over any payment card network;
 - Arrangements by a payment card network that inhibit the ability of any person to offer a discount or in-kind incentive to induce a customer to pay by use of cash, checks, debit cards or credit cards, so long as the discount or incentive does not differentiate on the basis of the card issuer or payment card network; and
 - Arrangements by a payment card network that inhibit the ability of any merchant to set a minimum dollar value for credit card transactions, so long as the value does not exceed \$10.00, or any federal agency or institution of higher education to set a maximum dollar value for credit card transactions, so long as the value does not differentiate between card issuers or payment card networks.
- *Effective Date:* Effective one year after enactment.

Derivatives Clearing Requirements (Title VII)

The Act revamps the regulatory structure of the derivatives industry, requiring, among other things, that standardized swaps (as defined in SEC and CFTC rules) be cleared and executed either on an exchange or a swap-execution facility. Swaps will be exempt from the clearing requirement if one of the counterparties (i) is not a “major swap participant” or another type of “financial entity,” (ii) uses swaps to hedge commercial risk and (iii) can demonstrate how it meets its financial obligations associated with entering into non-cleared swaps. However, if an entity is a “major swap participant,” it will effectively be treated as a swap dealer subject to clearing, margin and capital requirements.

Under the Act, a non-financial company that is not a swap dealer may nonetheless be regarded as a “major swap participant” if the company (i) maintains a substantial position in any major swap category (excluding positions held for “hedging or mitigating commercial risk” and positions held by employee benefit plans for hedging purposes) or (ii) its outstanding swaps create substantial counterparty exposure that could have “serious adverse effects” on U.S. market stability.

- *Deadline for Rulemaking:* Regulations to be adopted within one year after enactment.

Derivatives Margin and Capital Requirements (Title VII)

The federal banking agencies, SEC and CFTC will set swap dealer and major swap participant margin and capital requirements for uncleared swaps. Although these margin and capital requirements are intended to be imposed only on swap dealers and major swap participants, the Act does not provide an express commercial end-user exemption from the Act’s margin and capital requirements analogous to the end-user exemption from the clearing and trading requirements. In any event, swap dealers and major swap participants will undoubtedly try to pass on to their end-user counterparties any additional costs associated with their capital and margin requirements.

- *Deadline for Rulemaking:* Regulations to be adopted within one year after enactment.

New Disclosure Items Affecting Only Certain Companies

Conflict Minerals (Sec. 1502)

Section 13 of the Exchange Act is amended to require the SEC to promulgate regulations that mandate annual public disclosure by certain Exchange Act reporting companies regarding conflict minerals originating in the Democratic Republic of the Congo or an adjoining country.

- *Deadline for Rulemaking:* The SEC must promulgate regulations within 270 days after enactment.

Reporting Requirements Regarding Coal or Other Mine Safety (Sec. 1503)

This section requires certain Exchange Act reporting companies to make reports to the SEC providing specified data relating to violations of certain health and safety standards applicable to coal mining, including shutdowns of operations.

- *Coal or Mine Safety Reporting:* Disclosure pursuant to this section must be made in each periodic report filed by a company under the securities laws on or after the date of enactment. However, this section states that it is not effective until 30 days following enactment. Therefore, it is not clear whether this periodic disclosure requirement will apply to periodic reports filed during that 30-day period.

Disclosure of Payments by Resource Extraction Issuers (Sec. 1504)

This section amends Exchange Act Section 13 to require the SEC to promulgate regulations that require each resource extraction issuer to include in its annual report information relating to any payment made by the resource extraction issuer, a subsidiary thereof or an entity under the control of the resource extraction issuer to a foreign government or the federal government for the purpose of the commercial development of oil, natural gas or minerals.

- *Deadline for Rulemaking:* No later than 270 days after enactment.

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