PUBLIC COMPANY ADVISORY

JULY 27, 2010

Dodd-Frank Wall Street Reform and Consumer Protection Act - Public Company Impact

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). The Act is aimed in part at accountability and transparency in the financial system and represents the most comprehensive financial reform legislation since the Great Depression. The Act also includes a number of provisions relating to executive compensation, corporate governance, credit ratings agency reforms and other matters that generally apply to public companies. This Advisory describes these provisions of the Act and how they may impact publicly traded companies.

Executive Compensation

The Act includes several provisions relating to executive compensation, which are summarized below. These include provisions relating to "say on pay," "say on golden parachute pay," independence of compensation committee members, independence of compensation committee advisors, additional executive compensation disclosures (pay vs. performance and internal pay comparison), clawback of erroneously awarded compensation and disclosure regarding employee and director hedging.

Say on Pay [§ 951]

The Act provides for say on pay for shareholders of all public companies. Under the Act, each company must give its shareholders the opportunity to vote on the compensation of its executives at least once every three years. The vote will be non-binding and will take the form of a resolution submitted to shareholders to approve the compensation of the company's executives as disclosed in the company's proxy statement. The frequency of the say-on-pay vote (i.e., every one, two or three years) will be determined by a separate shareholder vote at least once every six years. The Act permits the SEC to exempt companies or classes of companies from these requirements, taking into account, among other factors, whether the requirements disproportionately burden small companies.

It is important to note that this provision of the Act does not modify the executive compensation disclosure required in companies' proxy statements to require any additional disclosure of current or expected future compensation. Accordingly, as the say-on-pay vote will relate to the executive compensation that is disclosed in the proxy statement, it will primarily relate to historical compensation focusing on the compensation paid for or awarded during the prior year.

Effective Date: Companies must submit the say-on-pay vote and the vote to determine the frequency of future say-on-pay votes to their shareholders at the first annual meeting (or other shareholder meeting for which executive compensation disclosure is required in the proxy statement) occurring on or after January 21, 2011. As a result, most companies with a calendar year end will be required to submit these votes to their shareholders at their 2011 annual meetings.

Say on Golden Parachute Pay [§ 951]

In addition to the required say-on-pay votes, the Act also adds disclosure and voting requirements for golden parachute compensation that is payable to named executive officers in connection with sale transactions. These requirements apply to shareholder meetings at which shareholders are asked to approve a merger, consolidation, or sale of all or substantially all of the company's assets. In the proxy materials for such a meeting, the company soliciting proxies will be required to disclose, in a clear and simple form in accordance with regulations to be adopted by the SEC, any agreements or understandings with any named executive officer concerning any type of compensation (whether present, deferred or contingent) that is based on or otherwise relates to the transaction and 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 such executive officer. In addition, unless such agreements and understandings have already been subject to a say-on-pay vote, the company must give its shareholders a non-binding vote on such agreements and understandings and total compensation at the meeting for the transaction.

The Act permits the SEC to exempt companies or classes of companies from these requirements, taking into account, among other factors, whether the requirements disproportionately burden small companies.

Effective Date: These new requirements will apply to any meeting of shareholders at which shareholders are asked to approve a merger, consolidation, or sale of all or substantially all of the company's assets occurring on or after January 21, 2011.

Independence of Compensation Committee Members [§ 952]

The Act provides that the SEC must issue rules directing the stock exchanges (i.e., national securities exchanges and associations) to prohibit listing classes of equity securities if the company's compensation committee members are not independent. Under the Act, the SEC's rules must require the stock exchanges to consider the following in defining independence for compensation committee members: (i) sources of compensation for each compensation committee member, including any consulting, advisory or other compensatory fee paid by the company to the member, and (ii) whether the compensation committee member is affiliated with the company. This requirement is similar to the heightened independence standards that were placed on audit committee members by the Sarbanes-Oxley Act, except that the SEC rules to be adopted under the Act only require the stock exchanges to *consider* the factors described above in determining the independence standards for compensation committee members whereas the Sarbanes-Oxley Act effectively required the stock exchanges to *prohibit* persons from serving on the audit committee who (i) receive any consulting, advisory or other compensatory fee from the company or (ii) are affiliated with the company. However, if the stock exchanges adopt compensation committee independence rules that parallel current audit committee independence rules (which they might) then otherwise independent directors who are currently prohibited from serving on the audit committee will also be prohibited from serving on the compensation committee.

Once final SEC and stock exchange rules are adopted, companies will need to reevaluate the composition of their compensation committees to ensure that they meet whatever heightened independence standards are adopted.

These new requirements do not apply to controlled companies (i.e., companies where 50% of the voting power is held by an individual, a group or another company), foreign private issuers that provide annual disclosures to shareholders of the reasons they do not have an independent compensation committee or open-ended management investment companies that are registered under the Investment Company Act of 1940. In addition, the SEC rules must permit the stock exchanges to exempt categories of companies from these requirements and, in determining appropriate exemptions, the stock exchanges must take into account the potential impact of the requirements on smaller reporting companies.

Effective Date: The SEC is required to adopt rules by July 16, 2011 directing the stock exchanges to prohibit the listing of any securities of a company that is not in compliance with these requirements.

Independence of Compensation Committee Advisors [§ 952]

The Act provides that a company's compensation committee may only select a compensation consultant, legal counsel or other advisor after taking into consideration factors to be identified by the SEC that affect the independence of a compensation consultant, legal counsel or other advisor. These will include the following five specific factors identified in the Act:

- the provision of other services to the company by the person that employs the compensation consultant, legal counsel or other advisor[1];
- the amount of fees received from the company by the person that employs the compensation consultant, legal counsel or other advisor, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other advisor;
- the policies and procedures of the person that employs the compensation consultant, legal counsel or other advisor that are designed to prevent conflicts of interest;
- any business or personal relationship of the compensation consultant, legal counsel or other advisor with a member of the compensation committee; and
- any stock of the company owned by the compensation consultant, legal counsel or other advisor.

The Act does not require companies' compensation committees to make formal independence determinations with respect to any compensation consultant, legal counsel or other advisor that it engages, but it does require each company to disclose in its proxy materials for its annual meetings, in accordance with regulations of the SEC, whether its compensation committee retained or obtained the advice of a compensation consultant and whether the work of the compensation consultant raised any conflict of interest and, if so, the nature of the conflict and how it is being addressed. Under current rules, companies are already required in their proxy statements to identify any compensation consultants used in determining or recommending the amount or form of executive or director compensation and include some disclosure relating to potential conflicts of interest of such compensation consultants. However, as the current rules do not appear to squarely address all of the new disclosure requirements of the Act, we expect the SEC to adopt additional rules relating to the disclosure of conflicts of interest.

The Act also requires that (i) the compensation committee be directly responsible for the appointment, compensation and oversight of the work of a compensation consultant, independent legal counsel and any other advisor that it retains and (ii) companies provide appropriate funding as determined by the compensation committee for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other advisor to the compensation committee. However, the Act does not require the compensation committee to retain a compensation consultant, independent legal counsel or any other advisor, and it does not prohibit the compensation committee from receiving advice from a compensation consultant, legal counsel or other advisor to the company that was not specifically selected or retained by the compensation committee.

These new requirements do not apply to controlled companies (i.e., companies where 50% of the voting power is held by an individual, a group or another company). In addition, the SEC rules must permit the stock exchanges to exempt categories of companies from these requirements and, in determining appropriate exemptions, the stock exchanges must take into account the potential impact of the requirements on smaller reporting companies.

Effective Date: The proxy disclosure requirements described above apply to proxy materials for annual meetings occurring on or after July 21, 2011, provided that no specific deadline is set for the additional SEC regulations that appear to be contemplated by the Act regarding these disclosure requirements. The SEC is required to adopt rules by July 16, 2011 directing the stock exchanges to prohibit the listing of any securities of a company that is not in compliance with these requirements.[2] Lastly, the SEC is directed to identify factors that affect the independence of a compensation consultant, legal counsel or other advisor, but there is no specific deadline placed on the SEC for the identification of such factors.

Additional Executive Compensation Disclosures (Pay vs. Performance and Internal Pay Comparison) [§ 953]

The SEC is required under the Act to issue rules obligating companies to disclose in proxy materials for annual meetings of shareholders information that shows the relationship between executive compensation actually paid to their named executive officers and their financial performance, taking into account any change in the value of the shares of the company's stock and any dividends or distributions. The SEC is also required to amend Item 402 of Regulation S-K to require each company to disclose the median of total annual compensation for all employees of the company except the CEO, the total annual compensation of the CEO and the ratio of these two figures. Total compensation for the employees of a company will be calculated on the same basis as it is for purposes of the Summary Compensation Table required by Item 402 of Regulation S-K (i.e., including salary, bonus, grant date fair value of equity awards, perks, etc.). Depending on the number of employees a company has and the complexity of its compensation arrangements, among other things, determining the median of total annual compensation for all employees other than the CEO may impose a substantial additional administrative burden on the company.

Effective Date: Neither the date by which the SEC must adopt these rules nor the date by which any such rules must become effective is specified in the Act.

Clawback of Erroneously Awarded Compensation [§ 954]

The Act provides that the SEC must issue rules directing the stock exchanges to prohibit listing any security of a company unless the company develops and implements a policy providing (i) for disclosure of the policy of the company on incentive-based compensation that is based on financial information required to be reported under the securities laws and (ii) that, in the event that the company is required to prepare an accounting restatement due to the material noncompliance of the company with any financial reporting requirement under the securities laws, 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 the restatement based on the erroneous data, any excess compensation above what would have been paid under the restatement. This clawback requirement is significantly broader than the clawback contained in the Sarbanes-Oxley Act, which, among other things, only applied to restatements that resulted from misconduct and only applied to a company's CEO and CFO.

Due to the draconian nature of the clawback required, this provision of the Act may lead companies to consider restructuring their incentive-based compensation to either (i) include a deferral feature to reduce the amount of compensation that is paid out prior to the expiration of the clawback period, (ii) move more towards discretionary incentive-based compensation programs or (iii) utilize non-financial metrics such as stock price appreciation or total return to shareholders.

Effective Date: Neither the date by which the SEC must adopt these rules nor the date by which the stock exchanges must have adopted rules addressing these requirements is specified in the Act.

Disclosure Regarding Employee and Director Hedging [§ 955]

The Act requires the SEC, by rule, to require that each company disclose in the proxy materials for its annual meetings whether any employee or board member is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange traded funds) designed to hedge or offset decreases in the market value of equity securities granted as compensation or otherwise held by the employee or board member. As a result, companies that do not already have a comprehensive policy addressing the use of hedging instruments, whether in their insider trading policies and procedures or elsewhere, may want to consider adopting one.

Effective Date: Neither the date by which the SEC must adopt these rules nor the date by which any such rules must become effective is specified in the Act.

Corporate Governance

The Act includes several provisions relating to corporate governance, which are summarized below. These include provisions relating to proxy access, disclosure of Chairman and CEO structure, and broker discretionary voting.

However, in the area of general public company corporate governance, perhaps the most notable part of the Act is what is not included. The Act does not mandate majority voting in uncontested director elections, declassified boards or independent chairmen of the board, all of which had been in previously proposed legislation that was supplanted by the Act.

Proxy Access [§ 971]

The Act clarifies that the SEC may, but is not required to, promulgate rules that would require that a company's proxy materials include a nominee for the board of directors submitted by a shareholder. The Act also gives the SEC the authority to exempt companies or classes of companies from these requirements and specifically directs the SEC to consider whether the requirements would disproportionately burden small issuers. Prior versions of the Act (and its predecessors) had included limitations on the SEC's ability to adopt proxy access (e.g., limiting the shareholders entitled to access to those who had held at least 1% of a company's stock for at least two years). The most notable feature of this provision of the Act is that it does not include any such limitation and gave the SEC full flexibility to determine the parameters of proxy access. The SEC's latest proposal regarding proxy access, from June 2009, was summarized in Goodwin Procter's July 2, 2009 Public Company Advisory.

Effective Date: July 21, 2010.

Disclosure of Chairman and CEO Structure [§ 972]

Pursuant to the Act, the SEC must issue rules requiring companies to disclose in their annual proxy sent to investors the reasons why the company has the same person serving as chairman of the board and CEO or has different individuals serving in those roles. Given that Item 407 of Regulation S-K already requires companies to disclose their board leadership structure along with an explanation of why the company selected the structure, it is unclear what additional steps will need to be taken, if any, in response to this provision.

Effective Date: The SEC is required to issue rules by January 17, 2011 regarding this disclosure requirement.

Broker Discretionary Voting [§ 957]

The Act requires stock exchanges to have rules prohibiting their members (i.e., brokers) from voting securities that they do not beneficially own (unless they have received voting instructions from the beneficial owner) with respect to the election of a member of the board of directors (other than an uncontested election of directors of an investment company registered under the Investment Company Act of 1940), executive compensation or any other significant matter, as determined by the SEC by rule. The potential impact of the restriction on discretionary voting for directors by brokers should have already been determined by most companies given the recent amendment to NYSE rules eliminating discretionary voting for director elections for annual meetings of shareholders held on or after January 1, 2010. NYSE rules have also prohibited discretionary voting by brokers on many of the most typical matters relating to executive compensation, such as the adoption or amendment of an equity compensation plan. As a result, for most companies, this provision of the Act should not have a significant impact on their shareholder voting.

Effective Date: July 21, 2010. The Act does not specify a date by which the SEC must adopt rules identifying any "other significant matters" with respect to which discretionary voting must be prohibited (or even if the SEC must adopt any such rules).

Credit Ratings Agency Reforms [§§ 931 et seq.]

The Act includes a number of provisions that are targeted at improving the reliability of credit ratings. The precise impact of these reforms on companies and credit ratings agencies will not be fully known until the numerous additional rules the Act has charged the SEC with adopting and implementing have been promulgated. However, it does appear that these reforms could have a significant impact. Please note that the foregoing does not address the specific implications of the provisions of the Act relating to credit ratings agency reform as they apply to offerings of asset-backed securities.

One of the significant provision of the Act, in this respect, is the repeal of Rule 436(g) under the Securities Act of 1933, as amended (the "Securities Act"), which had provided that a credit rating disclosed in a registration statement (including any prospectus) was not considered an expertized portion of the registration statement requiring written consent of the applicable credit ratings agency for inclusion. In theory, this would require companies to either obtain the consent of the credit ratings agency or exclude the credit rating from the registration statement. However, because consenting to the inclusion of the credit rating would subject the ratings agency to potential liability under Section 11 of the Securities Act, the credit ratings agencies have indicated that they will not be willing to provide their consent. As a result, generally, companies will be required to exclude credit ratings from their registration statements (including any prospectuses) unless and until the credit ratings agencies change their positions. However, companies will still be permitted to refer to a credit rating orally, in a free writing prospectus or in communications complying with Rule 134 under the Securities Act, without obtaining the consent of the applicable credit rating agency and, therefore, the framework for offering rated debt securities as it currently exists (other than with respect to asset-backed securities) should not be effected materially by this change. In addition, the SEC has issued interpretive guidance confirming that companies (i) may still include disclosure of credit ratings if the disclosure is related only to changes to a credit rating, the liquidity of the company, the cost of funds for the company or the terms of agreements that refer to credit ratings[3] and (ii) may continue to use registration statements that were declared effective before July 22, 2010 that included or incorporated by reference credit ratings without obtaining the consent of the applicable credit ratings agency until the next required amendment of the registration statement pursuant to Section 10(a)(3) of the Securities Act[4], provided that no subsequently incorporated periodic or current report contains ratings information other than that described in clause (i) above.

The reforms also include several provisions that will change the type of information provided by credit ratings agencies and may change the type of information provided by public company issuers to credit ratings agencies. For example, the Act will require credit ratings agencies to publicly disclose additional information regarding the data relied upon to determine a credit rating and information on uncertainty of such credit rating (including information on the reliability, accuracy and quality of the data relied on in determining such credit rating and any limits on the accessibility to information that would have better informed such credit rating). Additionally, the SEC is directed to revise Regulation FD to remove the blanket exemption for a public company's disclosure to entities whose primary business is the issuance of credit ratings. Therefore, a public company will have to determine whether a disclosure to a given credit ratings agency is a disclosure that is subject to Regulation FD, and if it is, whether another exemption, such as the exemption that permits material non-public information to be shared with a person who expressly agrees to maintain the disclosed information in confidence, may be relied upon.

The Act also requires the SEC, along with all other federal agencies, to modify all of its regulations to remove any reference to or requirement of reliance on credit ratings and to substitute an alternative standard of credit-worthiness that is deemed appropriate by the SEC. Among other things, this would require the SEC to replace the Form S-3 eligibility requirement relating to the issuance of non-convertible securities that are "investment grade securities." The SEC has previously proposed replacing this eligibility requirement with an alternative requirement that would be satisfied by companies that had issued at least $1 billion in aggregate principal amount of non-convertible securities, other than common equity, for cash (not exchange) in registered offerings in the prior three years. If this previously proposed standard is adopted, it would exclude a number of companies, such as operating partnerships of REITs that have not met this volume threshold, from using Form S-3 to publicly issue investment grade debt securities.

Effective Date: Generally, final regulations with respect to the credit ratings reforms are to be issued by the SEC by July 21, 2011. The SEC is required to revise Regulation FD by October 19, 2010. The repeal of Rule 436(g) is effective on July 21, 2010.

Various Other Provisions

The Act includes several other provisions that will impact public companies that are summarized below. These include provisions relating to a revised accredited investor standard, exemption for non-accelerated filers from Section 404(b) of the Sarbanes-Oxley Act, Section 13 and 16 reporting, reporting of short sales and certain votes by institutional investment managers and securities litigation matters.

Revised Accredited Investor Standard [§ 413; § 926]

The Act directs the SEC to make certain adjustments to the accredited investor standard relating to a natural person's net worth under the Securities Act, including for purposes of Regulation D. Regulation D provides a safe harbor for securities offerings that meet certain requirements from the registration requirements of the Securities Act. Under the most commonly used Regulation D exemption, offers and sales of securities are only exempt if, among other things, (i) there are no more than 35 purchasers in the offering who do not qualify as accredited investors and (ii) the company furnishes each purchaser in the offering who is not an accredited investor with detailed disclosure similar to that required in a registered offering. As a result, the definition of who qualifies as an accredited investor is very important, and companies routinely limit sales in private placements to investors who qualify as accredited investors.

The existing accredited investor standard relating to a natural person's net worth, which is one of the ways a natural person may qualify as an accredited investor, provides that a natural person will qualify as an accredited investor if his or her net worth (or joint net worth with his or her spouse) at the time of purchase exceeds $1,000,000. The Act changes the net worth standard to "$1,000,000, excluding the value of the primary residence of such natural person" during the four-year period that begins on July 21, 2010, which is the date of enactment of the Act. Although this change was effective on the date of enactment, the Act also directs the SEC to adopt rules that will incorporate this change and permits the SEC to review and adjust other accredited investor standards for natural persons. The Act also directs the SEC to review and authorizes the SEC to adjust the definition of accredited investor in its entirety, as it applies to natural persons, at least once every four years to determine whether the definition should be adjusted or modified for the protection of investors and in light of the economy, provided that any adjustment to the net worth standard must be to an amount more than $1,000,000, excluding the value of the natural person's primary residence.[5] Companies intending to complete a private placement in reliance on this exemption after July 21, 2010 may need to take additional steps to ensure that this exemption will be available for offerings that were not closed before July 21, 2010.

In a separate provision, the Act also directs the SEC to issue rules to disqualify certain "bad actors" from participating in a private placement that is intended to satisfy the most commonly used Regulation D exemption (i.e., Rule 506 exemption).

Effective Date: The change in the accredited investor net worth standard is effective as of July 21, 2010. The SEC is required to issue rules by July 21, 2011 regarding the disqualification of "bad actors."

Exemption for Non-Accelerated Filers from Section 404(b) of the Sarbanes-Oxley Act [§ 989G]

The Act amends Section 404 of the Sarbanes-Oxley Act by exempting non-accelerated filers (i.e., generally, those companies with less than $75 million of non-affiliate common equity market capitalization) from the requirements to provide an independent auditor attestation of management's assessment of the effectiveness of the company's internal control over financial reporting. These companies will still be required to maintain internal control over financial reporting and assess the effectiveness of their internal controls on an annual basis. Previously, the SEC had temporarily delayed the application of this requirement to non-accelerated filers several times. This amendment will provide some much appreciated certainty on this issue for non-accelerated filers. The Act also requires the SEC to conduct a study to determine how it could reduce the burden of Section 404(b) of the Sarbanes-Oxley Act on companies with market capitalization between $75 million and $250 million.

Effective Date: July 21, 2010.

Section 13 and Section 16 Reporting [§ 929R; § 766]

The Act eliminated the requirement under Section 13(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), for persons filing a Schedule 13D to send copies to the issuer and the exchanges on which such securities are listed and the requirement under Section 16 of the Exchange Act for reporting persons to file their Section 16 reports with any national securities exchange on which the underlying securities are registered. The Act also modified Section 13(d) and Section 16 to permit the SEC to require persons to make their initial filings under these sections (i.e., Schedule 13Ds or Form 3s, respectively) within less than 10 days of the triggering event (i.e., becoming a 5% or greater shareholder or becoming a director, officer or 10% shareholder).

The Act also amends Section 13 of the Exchange Act to provide that a person will be deemed to have acquired beneficial ownership of an equity security for the purposes of Section 13 or Section 16 based on the purchase or sale of a security-based swap only to the extent that the SEC by rule, after consultation with banking regulators and the Treasury, makes certain determinations regarding the security-based swap and its comparability to the underlying security. The Act then amends Section 13(d), Section 13(f) and Section 13(g) of the Exchange Act to provide that such deemed beneficial ownership will be considered beneficial ownership of the underlying equity securities for purposes of the reporting requirements contained in those subsections.

Effective Date: July 21, 2010.

Reporting of Short Sales and Certain Votes by Institutional Investment Managers [§ 929X; § 951]

The Act requires the SEC to prescribe rules providing for monthly or more frequent public disclosure of short sales by institutional investment managers who are currently subject to reporting under Section 13(f) of the Exchange Act. Additionally, the Act requires these institutional investment managers to disclose their votes on say on pay and say on golden parachute pay at least annually unless they are otherwise required to report such votes publicly. These rules may provide additional insight to companies regarding shorting of their securities and how certain institutional investors voted on the new say-on-pay votes.

Effective Date: The provision relating to the reporting of say-on-pay votes is effective on July 21, 2010; however, as it only relates to annual reporting of votes required under the Act (which are only required for meetings occurring on or after January 21, 2011), the first reporting may not occur until late 2011 or early 2012. With respect to the rules regarding the disclosure of short sales, the Act does not specify the date by which the SEC must adopt such rules or the date by which they must become effective.

Securities Litigation Matters

The Act also has a number of provisions designed to promote the SEC's and private litigants' litigation efforts, including, among others, the following:

- establishing aiding and abetting liability for persons who knowingly or recklessly provide substantial assistance to another person in violation of the Securities Act with respect to civil actions brought by the SEC under certain provisions of Section 20 of the Securities Act;

- changing the liability standard for aiding and abetting liability with respect to civil actions brought by the SEC under certain provisions of Section 21(d) of the Exchange Act to includes persons who "recklessly" provide substantial assistance to another person in violation of the Exchange Act in addition to persons who do so "knowingly";

- increasing whistleblower protections relating to violations of securities laws and allowing whistleblowers to collect a portion of monetary sanctions collected by the SEC relating to the matter the whistleblower provided information regarding; and

- the addition of specific anti-fraud prohibitions relating to short sales.

Please note that this Advisory does not necessarily describe the specific impact of each of the provisions of the Act summarized above on voluntary filers, foreign private issuers, asset-backed issuers, registered investment companies and others subject to unique requirements.

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[1] Presumably, where the compensation consultant, legal counsel or other advisor is a firm or other entity, the phrase “the person that employs the compensation consultant, legal counsel or other advisor” is intended to refer to such firm or other entity.

[2] Note that the Act does not explicitly limit the application of these provisions to companies listed on stock exchanges (or state that they don’t otherwise apply to all companies as of July 21, 2010). However, based on the provisions relating to the stock exchanges and their ability to exempt certain companies (among other things), we do not believe that the Act should be construed in this manner.

[3] This position is consistent with the preliminary position that the SEC articulated in a concept release issued in 2009 relating to the potential repeal of 436(g).

[4] For registration statements on Form S-3, a Section 10(a)(3) updating amendment will occur upon the filing of a company’s annual report on Form 10-K.

[5] As written, this requirement only applies to the accredited investor definition under Rule 215 under the Securities Act and not the definition for purposes of Regulation D. However, we believe it is likely that the SEC will review and adjust both at the same time.

If you would like additional information about the issues addressed in this Client Advisory, please contact:

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