



Dodd-Frank Permanently Exempts Smaller Reporting Companies From Sarbanes-Oxley Auditor Attestation Requirement

by Vincent A. Vietti and Lauren W. Taylor

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Among the vast number of changes, Dodd-Frank permanently relieves smaller public companies from the requirement of providing auditor attestation under Section 404 of the Sarbanes-Oxley Act (SARBOX).

Section 404(a) of SARBOX requires all public companies to include in their annual reports on Form 10-K a report from management on the effectiveness of the company's internal control over financial reporting. Section 404(b) requires the company's independent auditor to attest to management's assessment of the effectiveness of those internal controls.

Due to the high costs of complying with SARBOX Section 404(b), the Securities and Exchange Commission (SEC) has postponed the obligation of "non-accelerated filers" to comply with the attestation requirements of Section 404(b), the most recent extension expiring June 30, 2010. A "non-accelerated filer" is an Exchange Act reporting company that does not meet the definition of either an accelerated filer or a large accelerated filer. It includes, but is not limited to, "smaller reporting companies" that are generally those companies with less than \$75 million in worldwide public float.

Dodd-Frank adds a new Section 404(c) to SARBOX that is effective immediately and provides that the auditor attestation

requirement of Section 404(b) will apply **only** to accelerated filers and large accelerated filers. Although non-accelerated filers will continue to provide the report from management in their annual reports, the permanent exemption from 404(b) should significantly reduce the ongoing costs of being a public company.

Dodd-Frank also directs the SEC to conduct a study within the next nine months to determine how the burden of compliance with Section 404(b) of SARBOX could be reduced for companies with a market capitalization between \$75 million and \$250 million.

Dodd-Frank Increases Financial Threshold for Accredited Investor Status

by Vincent A. Vietti and Lauren W. Taylor

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) includes a provision increasing the minimum net worth required for natural persons to be an "accredited investor" under Regulation D under the Securities Act of 1933, as amended. Section 413(a) of Dodd-Frank is immediately effective and excludes the value of a natural person's primary residence in determining whether the net worth of such person, or joint net worth together with such person's spouse, exceeds the \$1 million required for such person to be considered an accredited investor. Prior to Dodd-Frank, the value of a person's primary residence was included in determining whether such person satisfied the \$1 million net worth

requirement. The SEC is required to adjust the \$1 million net worth threshold every four years.

In response to this change, the Securities and Exchange Division of Corporation Finance (the Division) withdrew its prior published interpretation that permitted a natural person to include in his or her net worth calculation the value of his or her primary residence when determining whether he or she satisfied the net worth requirement. The Division also issued a new interpretation requiring a person to deduct in his or her net worth calculation, the amount by which the value of such person's primary residence is less than any outstanding mortgage(s) on such property. The SEC will issue

amendments to its rules regarding accredited investor net worth standards to conform with Dodd-Frank.

This is very significant particularly for smaller reporting companies and other young companies seeking to raise capital. By reducing the pool of accredited investors, the increased threshold could make it more difficult for issuers to raise capital on a private placement basis. Issuers currently engaged in private offerings should immediately review, and if necessary revise, any private offering memoranda and securities purchase or similar agreements to ensure that investors who purchase their securities meet the new accredited investor standard.

SMALL CAP SECURITIES UPDATE

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