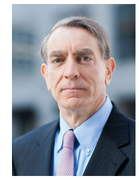
Rollback of SEC Regulations Promulgated Under Dodd-Frank Has Begun

In several uncoordinated actions, the dismantling of Securities and Exchange Commission (SEC) regulations promulgated under The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) has begun. In two recent statements, Acting SEC Chair Michael S. Piwowar (R) has directed the SEC staff to reconsider the SEC's prior guidance on two rules, conflict minerals, and CEO pay ratio disclosure, signaling that the SEC may be embracing the new administration's focus on deregulation. Separately, the Republican-led Congress has approved a joint resolution that has the effect of causing the SEC's resource extraction rule not to take effect. These three rules that have been targeted to date have been controversial within the business community, because, many have argued, the cost of compliance outweighs the minimal perceived value of the mandated disclosures to investors.

On January 31, 2017, Commissioner Piwowar directed the SEC staff to consider whether its guidance on conflict minerals disclosure is still appropriate and whether additional relief from those disclosure requirements should be granted to public company issuers. In a related development, according to a February 7, 2017, Reuters' report based on sources close to the new administration, President Trump is planning to issue an executive order on conflict minerals disclosure. The report did not provide any details on the scope or timing of such an executive order. The conflict minerals rule was enacted by the SEC in November 2012 as required by Dodd-Frank and requires certain public companies to provide disclosure to the SEC on their use of conflict minerals (including tantalum, tin, gold, and tungsten) that originated in the Democratic Republic of the Congo (DRC) or an adjoining country, if those minerals are "necessary to the functionality or production of a product" manufactured by such companies. The conflict minerals provision of Dodd-Frank was enacted in response to congressional concern that the exploitation and trade of conflict minerals by armed groups was helping to finance conflict in the DRC and fueling a humanitarian crisis in Africa. In his statement directing reconsideration of the rule, Acting Chair Piwowar questioned whether the rule has helped the crisis in Africa and also mentioned potential national security concerns posed by the rule.

On February 3, 2017, the U.S. Senate passed a resolution under the Congressional Review Act (CRA) disapproving of the SEC's resource extraction rule, which would have required publicly traded mining, oil, and gas companies to disclose the payments that they make to governments for the commercial development of oil, natural gas, or minerals. The measure had previously been approved by the House of Representatives and had been publicly supported by President Trump. The effect of the passage of the resolution by both houses of Congress is to cause the SEC's resource extraction rule not to take effect. The president's signature is not required for the congressional measure to be effective (but the president may sign the measure to signal his support). Under the CRA, the president could veto the measure (which would invalidate congressional disapproval of the regulation unless overridden by Congress), but this is unlikely as President Trump has publicly supported the abandonment of the resource extraction rule. In addition to causing the rule not to take effect, under the CRA a rule that does not take effect as a result of a joint resolution of Congress also may not be reissued "in substantially the same form and a new rule that is substantially the same as" the invalidated rule may not be issued unless specifically authorized by a law enacted after the date of the congressional joint resolution. Thus, reissuance of the resource extraction rule by the SEC is unlikely. The resource extraction rule has been unpopular with companies in resource extraction industries and had a difficult history even prior to passage of the congressional joint resolution.

The resource extraction rule was required by Dodd-Frank but was unrelated to the principal financial reform purposes of the Act. Rather, the SEC indicated that the resource extraction rule



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was enacted to promote U.S. foreign policy interests by mandating disclosure by the extraction industries and promoting transparency about payments to governments related to resource extraction. The SEC initially promulgated the rule in 2012 under Dodd-Frank, but the rule was invalidated by the U.S. District Court for the District of Columbia. The SEC was subsequently sued to seek to enforce the SEC's obligation to promulgate the rule as required by Dodd-Frank and, under a court-ordered schedule, the SEC published a final resource extraction rule for the second time in 2016. The disclosure required by the SEC's resource extraction rule would have first been required in 2019. Opponents of the rule have long argued that the disclosure mandated by the rule would put U.S. public company issuers in the resource extraction industries at an economic disadvantage in the global economy, without providing any meaningful disclosure for investors.

Separately, in a move that could broadly impact U.S. public companies, on February 7, 2017, Acting Chair Piwowar directed the SEC staff to reconsider implementation of the so-called CEO pay-ratio rule, including determining "as promptly as possible whether additional guidance or relief may be appropriate." The pay-ratio disclosure rule was adopted by the SEC in August 2015, also as required by Dodd-Frank, and requires public companies to disclose the ratio of the median of the annual total compensation of all employees to the annual total compensation of the CEO. The CEO pay-ratio rule has been unpopular among public company issuers. Critics have suggested that disclosing the CEO pay ratio provides little value, particularly compared to the costs issuers are incurring to collect and process the information needed to prepare and present the ratio. The SEC is now seeking comments on the challenges that public companies are experiencing as they implement and test systems and controls to comply with the rule. After the comment period, the SEC could delay implementation of the CEO pay-ratio rule beyond its scheduled 2018 implementation date (requiring the disclosure for fiscal years beginning on or after January 1, 2017), or could modify its guidance regarding the rule that could effectively invalidate the rule's efficacy.

Reconsideration of these rules may be a sign that the SEC, under the new administration, will embark on a pattern of deregulation, reversing or significantly cutting back some of the large numbers of new regulations implemented in response to the financial crisis and required by Dodd-Frank. (According to its website, the SEC has adopted final rules for 67 mandatory rulemaking provisions of Dodd-Frank.) Deregulation would be consistent with the new administration's policies.

On January 30, 2017, Trump's administration issued an executive order directing that the costs associated with any new regulation should, to the extent legally permissible, be offset by eliminating the costs of at least two existing regulations. While the executive order does not apply to independent agencies such as the SEC, the SEC could be indirectly affected as a result of joint rulemakings with other departments or agencies that are subject to the order, or it might voluntarily choose to deregulate to maintain consistency with the new administration's focus. The SEC currently has only two sitting commissioners, Commissioner (and Acting Chair) Piwowar and Commissioner Kara M. Stein (D). When fully constituted, the SEC has five sitting commissioners and, as an independent non-partisan agency, no more than three SEC commissioners may belong to the same political party. President Trump has nominated Jay Clayton to chair the SEC, but confirmation hearings have not yet been held.

To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact Ellen Canan Grady at (215) 665-5583 or egrady@cozen.com or Richard Busis at (215) 665-2756 or rbusis@cozen.com.