DAVIES

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SEC Rulemaking Developments in 2015

The U.S. Securities and Exchange Commission (SEC) had a busy rulemaking year in 2015. Consistent with the reforms that began in 2012 with the *Jumpstart Our Business Startups Act*, Congress and the SEC continued their push to improve access to capital across the spectrum of issuers – from small private enterprises raising capital through crowdfunding to more mature companies preparing for an IPO. The SEC also proposed new rules for resource extraction issuers under the *Dodd–Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act). This update provides an overview of the following significant U.S. securities law and regulatory developments in 2015:

1. The FAST Act: Improving the registration process for emerging growth companies
2. The FAST Act: New exemption for private resales to accredited investors
3. Regulation A: Expanded capital-raising alternatives for non-reporting U.S. and Canadian issuers
4. Pay ratio disclosure rule for reporting U.S. issuers
5. Crowdfunding regulation for non-reporting U.S. issuers
6. Proposed new rules for all reporting U.S. and foreign resource extraction issuers
7. Proposed new rules requiring U.S. securities exchanges to adopt listing standards requiring all U.S. and foreign listed companies to adopt and implement policies to recover erroneously awarded executive compensation

Although some of these rules are applicable only to U.S. issuers, we believe that these developments should be of interest to market participants abroad, as well as Canadian issuers and their advisers.

1. The FAST Act: Improving the Registration Process for Emerging Growth Companies

The *Fixing America's Surface Transportation Act* (FAST Act) enacted on December 4, 2015, contains several legislative amendments that will help improve the registration process for emerging growth companies (EGCs). For example, for an EGC that has confidentially submitted its registration statement to the SEC for review, the FAST Act reduces the period of time that the issuer must wait before it may commence its initial public offering (IPO) road show after it publicly files its registration statement with the SEC. And to help reduce IPO costs, the FAST Act contains a long-awaited amendment enabling EGCs to omit from their preliminary registration statements certain financial information, and it mandates the SEC to review and simplify the extensive disclosure requirements in Regulation S-K.

2. The FAST Act: New Exemption for Private Resales to Accredited Investors

The FAST Act added a new section 4(a)(7) to the *Securities Act of 1933*, as amended (the Securities Act), which provides a non-exclusive safe harbor exemption that will help facilitate private resales of securities by shareholders to accredited investors if certain conditions are met.

3. Regulation A: Small Company Capital Formation

On March 25, 2015, the SEC adopted final rules to amend Regulation A under the Securities Act to modernize and expand the framework for capital-raising by smaller companies. Regulation A is available to U.S. and Canadian entities that have their principal place of business in the United States or Canada and are not subject to SEC reporting obligations under the *Securities Exchange Act of 1934*, as amended (Exchange Act). The types of securities that may be offered under Regulation A are limited to equity securities, debt securities and debt securities convertible into or exchangeable into equity securities, including any guarantees of such securities.

4. Pay Ratio Disclosure Rule

On August 5, 2015, the SEC adopted final rules to amend Item 402 of Regulation S-K under the Securities Act to require most SEC-registered U.S. companies to disclose the ratio of the compensation of their chief executive officer (or any equivalent position) to the median compensation of their other employees. Foreign private issuers, Canadian multijurisdictional disclosure system (MJDS) filers, smaller reporting companies and EGCs are exempt from providing pay ratio disclosure.

5. Regulation Crowdfunding

The SEC adopted Regulation Crowdfunding in October 2015 to address evolving methods of raising capital through the Internet. These rules, which will become effective on May 16, 2016, allow individuals to invest in securities through crowdfunding transactions, subject to certain investment limits. The rules also limit the amount of funds an issuer can raise using the crowdfunding exemption, require issuers to disclose certain information about their business and securities offerings, and create regulatory frameworks for the broker-dealers and funding portals that facilitate the crowdfunding transactions.

6. Resource Extraction Proposal

In December 2015, the SEC proposed Rule 13q-1 and an amendment to Form SD. The proposed rules would require all Exchange Act reporting issuers, including Canadian and other foreign companies, that are engaged in the commercial development of oil, natural gas or minerals to report information about payments made to the U.S. federal government or foreign governments that are related to the commercial development of these resources. The stated purpose of the rule is to increase the transparency of payments made by these companies to governments in order to help combat global corruption and empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources.

7. Proposed Rule 10D-1: Listing Standards for the Recovery of Erroneously Awarded Executive Compensation

On July 1, 2015, the SEC proposed a new rule to implement section 954 of the Dodd–Frank Act. Under proposed Rule 10D-1, U.S. national securities exchanges must adopt listing rules that will require all listed issuers, including Canadian companies and other foreign private issuers, to adopt, publicly disclose and implement written policies to recover from the issuer's current and former executive officers any incentive-based compensation received that was based on materially erroneous financial information.

The FAST Act: Improving the Registration Process for Emerging Growth Companies

The *Fixing America's Surface Transportation Act* (FAST Act) enacted on December 4, 2015, contains several legislative amendments that will help improve the registration process for emerging growth companies (EGCs).[1] For example, for an EGC that has confidentially submitted its registration statement to the U.S. Securities and Exchange Commission (SEC) for review, the FAST Act reduces the period of time that the issuer must wait before it may commence its initial public offering (IPO) road show after it publicly files its registration statement with the SEC. And to help reduce IPO costs, the FAST Act contains a long-awaited amendment enabling EGCs to omit from their preliminary registration statements certain financial information, and it mandates the SEC to review and simplify the extensive disclosure requirements in Regulation S-K.

Reduced Waiting Period Before the Road Show

Under the *Jumpstart Our Business Startups Act*, an EGC may confidentially submit to the SEC a draft registration statement for review so long as that registration statement and all amendments thereto are publicly filed with the SEC no later than 21 days before the EGC commences its IPO road show. The FAST Act reduces the wait period to 15 days, from 21 days.

Reduced IPO Costs: Company May Omit Certain Financial Information from Initial SEC Filing or Submission

The FAST Act allows an EGC that is filing (or confidentially submitting) a Form S-1 or Form F-1 registration statement to omit from the registration statement annual audited financial information that relates to a prior fiscal year if the issuer reasonably believes that the omitted information need not be included in the registration statement at the time of the contemplated offering. To take advantage of this potential cost-saving measure, the issuer must, prior to distributing a preliminary prospectus, amend its registration statement to include all financial information that is required under the rules at the time of amendment. The amendment should help reduce IPO costs for some issuers by eliminating the need to incur audit fees and other incremental costs associated with including audited financial statements for a prior year that will not be included in the IPO prospectus.

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[1] An "emerging growth company" is defined as an issuer that has not completed an IPO of common equity securities prior to December 9, 2011, and that had "total annual gross revenues" of less than US$1 billion during its most recently completed fiscal year. An issuer's EGC status terminates on the earliest of (i) the last day of the first fiscal year of the issuer during which it had total annual gross revenues of US$1 billion or more; (ii) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the issuer's initial public offering; (iii) the date on which the issuer has issued more than US$1 billion in non-convertible debt during the previous three-year period; and (iv) the date on which the issuer is deemed to be a "large accelerated filer" under the *Securities Exchange Act of 1934*, as amended (Exchange Act) (*i.e.*, it has a public float of at least US$700 million and has been a reporting issuer for at least one year).

For example, an EGC whose a fiscal year coincides with the calendar year and is planning an IPO in 2017 after its 2016 annual audited financial statements become available may omit its 2014 annual financial statements from a registration statement that it files with (or confidentially submits to) the SEC before its 2016 annual audited financial statements become available. Prior to distributing a preliminary prospectus in 2017, the issuer will need to file an amended registration statement that includes the required 2015 and 2016 annual audited financial statements. The amendment enables the issuer in this example to avoid incurring incremental costs (that would have otherwise been incurred) to include its 2014 financial statements in the earlier version of the registration statement.

An EGC will not be able to omit from its registration statement interim financial information that will be replaced in a subsequent amended filing at the time of the offering with more recent or updated financial information covering a subsequent interim or annual period. For example, in the case of the calendar year EGC discussed above that is planning an IPO in 2017 after its 2016 annual audited financial statements become available, that issuer may not omit its nine-month 2016 interim financial statements from a prior SEC filing (or confidential submission) because those financial statements include relevant financial information relating to the 2016 fiscal year that will be covered in the issuer's 2016 annual audited financial statements, which must be included in the registration statement at the time of the offering.

Relief for an Issuer that Ceased to Qualify as an EGC During the SEC Review Process

The FAST Act enacts a "grace period" for an issuer that qualified as an EGC when it initiated its IPO registration process (either by confidentially submitting or publicly filing its IPO registration statement), but subsequently ceased to qualify as an EGC. Such an issuer is now "grandfathered" as an EGC until the earlier of the consummation of its IPO and the expiration of one year after ceasing to be an EGC. This amendment will permit such an issuer to continue with the confidential review process (rather than having to prematurely publicly file its IPO registration statement to continue the review process) and comply with the rules and regulations applicable to non-EGC issuers during the review process.[2]

Forward Incorporation for Smaller Reporting Companies

The FAST Act requires the SEC to revise the Form S-1 registration statement to permit a smaller reporting company (generally, an issuer with a public float of less than US$75 million) to incorporate by reference into the registration statement any reports that such issuer files with the SEC after the effective date of such Form S-1.[3] This change should eliminate the additional costs and time incurred by smaller reporting companies (that are not eligible to use Form S-3 or

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[2] Prior to the FAST Act, if that issuer confidentially submitted its IPO registration statement to the SEC for review and later ceased to qualify as an EGC during the SEC review process, the issuer was required to (i) publicly file its IPO registration statement to continue the review process and (ii) comply with the rules and regulations applicable to non-EGC issuers. Only EGCs that publicly filed their IPO registration statement before they ceased to qualify as an EGC during the SEC review process could continue to rely on the EGC rules through the effective date of their registration statement.

[3] Under the previous rules, registration statements on Form S-1 that were declared effective could be updated only by filing post-effective amendments because forward incorporation by reference to subsequent Exchange Act filings was permitted only on short-form registration statements on Form S-3 or Form F-3.

F-3 registration statements) by enabling them to keep their registration statements on Form S-1 current for continuous offerings that commence promptly after effectiveness and continue for a period in excess of 30 days after effectiveness.[4]

In January 2016, the SEC approved interim final rules implementing the required changes to Form S-1. The interim final rules contain certain eligibility requirements that must be satisfied for a smaller reporting company to forward incorporate by reference.[5] For instance, as is the case with historical incorporation by reference, in order to utilize forward incorporation by reference, a smaller reporting company must have filed under the Exchange Act (i) an annual report for its most recently completed fiscal year and (ii) all required reports and materials during the 12 months immediately preceding filing of the Form S-1 (or such shorter period in which the smaller reporting company was required to file such reports and materials).

Simplified Disclosure Requirements in Registered Offerings: SEC Must Examine Regulation S-K

By June 1, 2016, the SEC must revise Regulation S-K, the disclosure regulation for domestic issuers, to scale back or eliminate requirements in order to reduce the burden for EGCs, accelerated filers and smaller reporting companies, and to eliminate, for all issuers, provisions of Regulation S-K that are duplicative, overlapping, outdated or unnecessary. Additionally, by November 28, 2016, the SEC must conduct a study of Regulation S-K and issue a report to Congress containing detailed recommendations for simplifying the disclosure requirements under Regulation S-K. The SEC then has an additional 360 days after it issues its report to Congress to propose rules to the recommendations contained in its report.

[4] The revisions to Form S-1 do not affect the current requirement that issuers must conduct delayed offerings under Rule 415(a)(1)(x) according to the *Securities Act of 1933*, as amended, using Form S-3 or Form F-3.

[5] The SEC is soliciting comments on the interim final rules, including on whether the interim final rules should be extended to other registrants or forms. Therefore, although the FAST Act does not specifically reference the Form F-1 registration statement used by foreign private issuers, it remains to be seen whether similar revisions may be adopted for the Form F-1.

The FAST Act: New Exemption for Private Resales to Accredited Investors

The *Fixing America's Surface Transportation Act* added a new section 4(a)(7) to the *Securities Act of 1933*, as amended (Securities Act), which provides a non-exclusive safe harbor exemption that will help facilitate private resales of securities by shareholders to accredited investors if certain conditions are met.[6]

Section 4(a)(7) exempts from registration under the Securities Act resales of securities that meet the following conditions:

- Each purchaser must be an accredited investor.
- No form of general solicitation or general advertisement may be used in the offer or sale of the securities.
- The securities must be part of a class that has been authorized and outstanding for at least 90 days.
- The issuer must be engaged in a business and must not be in the organizational stage, bankruptcy or receivership, and must not be a blank check, blind pool or shell company that has no specific business plan or has indicated that its primary business plan is to engage in a merger, business combination or acquisition.
- The seller cannot be the issuer or a direct or indirect subsidiary of the issuer.
- The securities must not be part of an unsold allotment to, or a subscription or participation by, a broker or dealer as an underwriter of the securities or a redistribution.
- Neither the seller nor any person that receives remuneration or a commission in connection with his or her participation in the offer or sale of the securities, including solicitation of purchasers, may be subject to an event that would disqualify the issuer or other covered person under the "bad actor" provisions of Regulation D or be subject to certain "statutory disqualifications" under the *Securities Exchange Act of 1934*, as amended.
- In the case of non-reporting issuers, the seller and the purchaser must obtain from the issuer (at the request of the seller), and the seller must make available to the purchaser, specified general and financial information about the issuer and the securities. A seller who is a control person with respect to the issuer must provide a brief statement regarding the nature of the affiliation and also certify that the seller has no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations.

Securities acquired under section 4(a)(7) are considered "restricted securities" and cannot be transferred by the acquirer in the absence of another exemption under the Securities Act. In

[6] Market participants may continue to rely on other available resale exemptions, such as Rule 144, Rule 144A and even the so-called section 4(a)(1½) resale exemption.

addition, securities sold under the exemption are "covered securities" under the Securities Act and, consequently, are preempted from state "blue sky" registration requirements.

Regulation A: Small Company Capital Formation

On March 25, 2015, the U.S. Securities and Exchange Commission (SEC) adopted final rules to amend Regulation A under the *Securities Act of 1933*, as amended (Securities Act) to modernize and expand the framework for capital-raising by smaller companies. Regulation A is available to U.S. and Canadian entities that have their principal place of business in the United States or Canada and are not subject to SEC reporting obligations under the *Securities Exchange Act of 1934*, as amended (Exchange Act).[7] The types of securities that may be offered under Regulation A are limited to equity securities, debt securities and debt securities convertible into or exchangeable into equity securities, including any guarantees of such securities.

Regulation A may offer smaller companies a viable capital-raising alternative that is less time-consuming and costly, more efficient than a traditional public offering and more attractive than a private placement. The final rules became effective on June 19, 2015, so it remains to be seen whether Regulation A will be a "game changer" for smaller companies.

The final rules established two tiers of offerings: (i) offerings of up to US$20 million in any 12-month period, including up to US$6 million in secondary sales (Tier 1 offerings); and (ii) offerings of up to US$50 million in any 12-month period, including up to US$15 million in secondary sales (Tier 2 offerings). Under each tier, the amount of securities that selling securityholders can sell at the time of an issuer's first Regulation A offering and within the following 12-month period is limited to 30% of the aggregate offering price of a particular offering. After the expiration of the first 12-month period after an issuer's initial qualification of an offering statement under Regulation A, the amount of securities that affiliated securityholders can sell in a Regulation A offering in any 12-month period is limited to US$6 million in Tier 1 offerings and US$15 million in Tier 2 offerings. Sales by non-affiliated securityholders are not subject to this limit after the initial 12-month period, but are aggregated with sales by the issuer and its affiliates for the purpose of the maximum offering limit for each tier.[8]

Tier 2 offerings are subject to a number of additional requirements for investor protection. Most notably, Tier 2 offerings are subject to investment limits – a non-accredited investor is not permitted to invest more than 10% of the greater of the investor's annual income or the net worth in any single Tier 2 offering.[9] The investment limits do not apply to Tier 2 offerings of securities that will be listed on a national securities exchange upon qualification. Issuers in Tier 2 offerings must include audited financial statements in the offering statement and will be

[7] Regulation A is not available to issuers that are delinquent in their Regulation A filings or subject to certain "bad actor" disqualification events, such as orders of the SEC or other federal or state regulators.

[8] The final rules eliminated the prohibition on resales by affiliates unless the issuer has had net income from continuing operations in at least one of its last two fiscal years.

[9] Non-accredited, non-natural persons are also subject to an investment limit and should calculate the limit on the basis of no more than 10% of the greater of the purchaser's revenue or net assets (as at the purchaser's most recent fiscal year-end).

subject to ongoing reporting requirements. In light of the additional requirements for Tier 2 offerings, securities offered and sold in Tier 2 offerings are exempt from registration and qualification under state securities laws.

An issuer that seeks to conduct a Regulation A offering must prepare, file electronically on EDGAR and qualify an offering statement before any sale of securities can occur. The core of the offering statement is the offering circular, a disclosure document much like the prospectus required of smaller reporting companies in a registered offering.[10] No filing fees are associated with Regulation A filings and the qualification process.

The final rules modernize the Regulation A offering process in a manner consistent with regulatory developments in the registered offering process, including the following:

- The offering statement and all other documents required to be submitted or filed with the SEC under Regulation A, such as ongoing reports, must be submitted or filed electronically on EDGAR.
- An issuer that has not previously sold securities under Regulation A or under an effective registration statement is permitted to make a confidential submission of the offering statement. Confidential submissions (including subsequent amendments and SEC correspondence regarding these submissions) are required to be publicly filed as exhibits to the offering statement not less than 21 days before qualification of the offering statement.
- When a preliminary offering circular is used during the pre-qualification period to offer securities to potential investors, issuers (or broker-dealers participating in the offering) are required to deliver a preliminary offering circular to potential investors at least 48 hours in advance of the sale.[11] If the sale was made in reliance on the delivery of a preliminary offering circular, a final offering circular must be delivered within two business days of the sale but (under the "access equals delivery approach" used in registered offerings) issuers and intermediaries are permitted to satisfy their delivery requirements by filing the final offering circular on EDGAR. Likewise, electronic-only offerings of Regulation A securities (in which investors are permitted to participate only if they agree to accept the electronic delivery of all documents and other information in connection with the offering) are permitted under the final rules, provided that issuers and intermediaries comply with relevant SEC guidance.
- Issuers are permitted to "test the waters" by publicly soliciting indications of interest from *any* potential investor both before and after the filing of the offering statement. Solicitation materials must include certain disclaimers and satisfy certain other requirements and are subject to the anti-fraud and other civil liability provisions of federal securities laws. Issuers must submit or file all solicitation materials as an exhibit when the offering statement is either submitted for non-public review or filed with the SEC (and update for substantive changes in such solicitation material after the initial non-public submission or filing).

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[10] The provisions of section 11 of the Securities Act do not apply to Regulation A offerings. However, other anti-fraud and civil liability provisions of the securities laws do apply to Regulation A offerings, including the liability provisions of sections 12(a)(2) and 17 of the Securities Act and Rule 10b-5 under the Exchange Act.

[11] A final offering circular would continue to be required to accompany or precede any written communications that constitute an offer in the post-qualification period.

> Solicitation materials used by Regulation A issuers that file an offering statement with the SEC will be publicly available as a matter of course. Any solicitation materials used after the public filing of an offering statement would need to be preceded or accompanied by a preliminary offering circular or contain a notice informing potential investors where and how to obtain the most current preliminary offering circular. This requirement could be satisfied by providing the URL link to the preliminary offering circular or offering statement on EDGAR.

Issuers of Tier 1 offerings are not subject to ongoing reporting obligations, but must provide on Form 1-Z no later than 30 days after the termination or completion of the offering certain summary information concerning the offering, including the date on which the offering was qualified and commenced, the number of securities qualified and sold in the offering, the price of the securities sold, the fees associated with the offering and net proceeds to the issuer.[12] Issuers of Tier 2 offerings, however, are required to file annual reports on Form 1-K, semiannual reports on Form 1-SA and current reports on Form 1-U, and to provide notice to the SEC of the suspension of their ongoing reporting obligations on Part II of Form 1-Z.[13]

An issuer of Regulation A securities does not take on Exchange Act reporting obligations unless it separately registered a class of securities under section 12 of the Exchange Act or conducted a registered public offering. Section 12(g) of the Exchange Act, however, requires issuers with total assets exceeding US$10 million to register under the Exchange Act any class of equity securities held of record by either 2,000 persons or 500 persons who are not accredited investors. Securities of a class issued in a Tier 2 offering are exempt from the provisions of section 12(g) so long as the issuer (i) engages the services of a transfer agent registered with the SEC under the Exchange Act with respect to such class; (ii) remains subject to, and is current in, its Regulation A periodic reporting obligations; and (iii) has a public float of less than US$75 million as of the last business day of its most recently completed semiannual period, or, in the absence of a public float, has annual revenues of less than US$50 million as of its most recently completed fiscal year.[14]

Regulation A offerings are not integrated with (i) prior offers or sales of securities; or (ii) certain subsequent offers and sales of securities, including offers and sales that are made under the new crowdfunding rules, provided that each offering complies with the requirements of the

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[12] Issuers conducting Tier 2 offerings are also required to provide this information on Form 1-Z at the time of filing an exit report, if not previously provided on Form 1-K as part of their annual report.

[13] A Tier 2 issuer may suspend its reporting obligations by filing a Form 1-Z at any time after completing its reporting for the fiscal year in which the offering statement was qualified, provided that (i) the issuer has filed all required ongoing reports for the shorter of the period since the issuer became subject to such reporting obligations or its most recent three fiscal years and the portion of the current year preceding the date of filing the Form 1-Z; (ii) the securities of each class to which the offering statement relates are held of record by fewer than 300 persons; and (iii) offers or sales made in reliance on a qualified offering statement are not ongoing. Regulation A reporting requirements are automatically suspended if the issuer registers a class of securities under Section 12 of the Exchange Act or if a registration statement filed by the issuer under the Securities Act becomes effective.

[14] An issuer that exceeds either of the thresholds, in addition to exceeding the threshold in section 12(g) of the Exchange Act, is granted a two-year transition period before it would be required to register its class of securities under section 12(g), provided that it timely files all ongoing reports due during such period.

exemption that is being relied upon for the particular offering. For example, an issuer conducting a concurrent exempt offering for which general solicitation is not permitted will need to be satisfied that purchasers in that offering were not solicited by means of the offering made in reliance on Regulation A. Alternatively, an issuer conducting a concurrent exempt offering for which general solicitation is permitted must not include in any such general solicitation an advertisement of the terms of a Regulation A offering unless that advertisement also included the necessary legends for, and otherwise complied with, Regulation A.

Unlike in Rule 506 and 144A offerings, securities that are issued under Regulation A offerings are not "restricted" or subject to transfer restrictions. In addition, Regulation A does not limit the number of offerees or investors that can participate in an offering; nor does it impose any requirement that investors be accredited or financially sophisticated. Finally, Regulation A securities can be offered to the public by way of general solicitation.

On the other hand, Rule 506 offerings do not limit the amount of securities that may be sold in the offering or the amount of securities that a non-accredited investor may purchase. Rule 506 also pre-empts state securities law requirements, whereas Tier 1 offerings are still subject to state securities requirements. Finally, Rule 506 offerings do not involve any review of the offering documents by the SEC, whereas Regulation A offering documents are subject to review by the SEC staff (and state securities regulators in the case of Tier 1 offerings).

Pay Ratio Disclosure Rule

On August 5, 2015, the U.S. Securities and Exchange Commission (SEC) adopted final rules to amend Item 402 of Regulation S-K under the *Securities Act of 1933*, as amended, to require most SEC-registered U.S. companies to disclose the ratio of the compensation of their chief executive officer (or any equivalent position) to the median compensation of their other employees. Foreign private issuers, Canadian multijurisdictional disclosure system (MJDS) filers, smaller reporting companies and emerging growth companies are exempt from providing pay ratio disclosure.

All other domestic registrants are required to disclose the following: (i) the annual total compensation of the chief executive officer; (ii) the median of the annual total compensation of all other employees, which is calculated by identifying a registrant's "median employee"; and (iii) the ratio of the figures in (i) and (ii) expressed either as a ratio in which the median compensation of all other employees equals one or, narratively, as the multiple that the chief executive officer compensation bears to the median compensation of all other employees.

Subject to certain exemptions provided in the rule, all employees of a registrant and its consolidated subsidiaries worldwide must be taken into account in calculating the median compensation of all other employees, including part-time, seasonal and temporary employees.

Pay ratio disclosure is required in annual reports on Form 10-K, registration statements (other than registration statements on Form S-1 or Form S-11 for an initial public offering and registration statements on Form 10) and proxy and information statements. A registrant must provide pay ratio disclosure for a completed fiscal year upon the filing of an annual report on Form 10-K for that fiscal year or the filing of a definitive proxy or information statement for the next annual shareholders' meeting, whichever is later. In any event, however, the pay ratio disclosure must be provided within 120 days of the end of that fiscal year.

Registrants must commence providing pay ratio disclosure for their first fiscal year beginning on or after January 1, 2017. A new registrant's first pay ratio disclosure must be provided for the first fiscal year beginning after the registrant (i) has been subject to the requirements of sections 13(a) or 15(d) of the *Securities Exchange Act of 1934*, as amended (Exchange Act), for a period of at least 12 calendar months commencing on or after January 1, 2017; and (ii) has filed at least one annual report under section 13(a) or 15(d) of the Exchange Act that does not contain the pay ratio disclosure.

Regulation Crowdfunding

The U.S. Securities and Exchange Commission (SEC) adopted Regulation Crowdfunding in October 2015 to address evolving methods of raising capital through the Internet. These rules, which will become effective on May 16, 2016, allow individuals to invest in securities through crowdfunding transactions, subject to certain investment limits. The rules also limit the amount of funds an issuer can raise using the crowdfunding exemption, require issuers to disclose certain information about their business and securities offerings, and create regulatory frameworks for the broker-dealers and funding portals that facilitate the crowdfunding transactions.

Unlike the regulatory regime for crowdfunding in Canada, the U.S. regime explicitly prohibits issuers from raising funds via crowdfunding if they are required to file reports with the SEC under sections 13(a) or 15(d) of the *Securities Exchange Act of 1934*, as amended (Exchange Act). Thus, while the U.S. regime may be attractive to non-reporting companies, publicly listed companies will not be eligible to crowdfund in the United States. In addition, non-U.S. companies and companies that have no specific business plan or have indicated that their business plan is to engage in a merger or acquisition with an unidentified company will not be eligible to crowdfund in the United States.

New Regulation Crowdfunding: Section 4(A)(6)

Under Regulation Crowdfunding, an issuer can raise a maximum aggregate amount of US$1 million through crowdfunding offerings in a 12-month period. There are no restrictions on the type of securities that can be crowdfunded. Securities sold under other federal securities law exemptions do not count toward the cap of US$1 million per 12 months. An offering made under Regulation Crowdfunding would not be integrated with another exempt offering made by the issuer, such as an exempt offering made in reliance on Rule 506(c) of Regulation D, if each offering meets the requirements of the applicable exemption that is being used for that offering.

Individual investors, over a 12-month period, may invest in the aggregate across all crowdfunding offerings up to either (i) if their annual income or net worth is less than US$100,000, the greater of US$2,000 or 5% of the lesser of their annual income or net worth; or (ii) if both their annual income and net worth are equal to or more than US$100,000, then 10% of the lesser of their annual income or net worth. Furthermore, during the 12-month period, the aggregate amount of securities sold to an investor through all crowdfunding offerings may not exceed US$100,000.

Securities purchased in a crowdfunding offering generally cannot be resold for one year, unless they are transferred to the issuer; to an accredited investor; as part of a registered offering; or to certain members of the purchaser's family, to the purchaser's trust (or a family trust) or in connection with the purchaser's death or divorce. The resale restrictions apply to any purchaser during the one-year period beginning when the securities were first issued and not only to the initial purchaser.

Reporting and Disclosure Requirements

In addition, issuers have annual reporting obligations and must also make certain disclosures to the SEC and to their prospective investors relating to the offering and the issuer. All filings under Regulation Crowdfunding are made under the new Form C. Notable required disclosures include the price of the securities and/or the method used to calculate the price of the securities, the issuer's financial condition and financial statements (with varying requirements for certification or audit depending on the size of the offering), the issuer's business and proposed purpose for the proceeds of the offering, information on the officers and any owners holding 20% or more of the equity of the issuer, and related-party transactions.

Funding Portals

Regulation Crowdfunding also provides for the creation of so-called funding portals that can facilitate crowdfunding offerings without registering with the SEC as broker-dealers. Under the final rules, funding portals must take measures to reduce the risk of fraud in the offerings they host and are subject to various disclosure requirements. Funding portals organized or domiciled outside the United States may participate in crowdfunding offerings but are subject to additional restrictions.

Holders of crowdfunded securities will not count toward the threshold that requires an issuer to register its securities under Exchange Act section 12(g) if the issuer is current in its annual reporting obligations, retains the services of a registered transfer agent and has less than US$25 million in total assets as of the end of its most recently completed fiscal year.

Resource Extraction Proposal

In December 2015, the U.S. Securities and Exchange Commission (SEC) proposed Rule 13q-1 and an amendment to Form SD. The proposed rules would require all reporting issuers under the *Securities Exchange Act of 1934*, as amended (Exchange Act), including Canadian and other foreign companies, that are engaged in the commercial development of oil, natural gas or minerals to report information about payments made to the U.S. federal government or foreign governments that are related to the commercial development of these resources.[15] The stated purpose of the rule (which implemented a provision of the *Dodd–Frank Wall Street Reform and Consumer Protection Act*) is to increase the transparency of payments made by these companies to governments in order to help combat global corruption and empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources. In many respects, the proposed rules are consistent with corresponding regulations in the European Union (EU) and in Canada, and the SEC has framed its proposal as a further step in supporting international transparency efforts.

Under Rule 13q-1 as re-proposed, a "resource extraction issuer" (meaning an issuer that is required to file with the SEC annual reports on Forms 10-K, 20-F or 40-F under the Exchange Act and engages in the commercial development of oil, natural gas or minerals) would be required to disclose in a Form SD no later than 150 days after the end of such issuer's fiscal year certain payments made to the U.S. federal government or a foreign government for each project. The SEC did not extend this requirement to issuers that are exempt from Exchange Act registration and reporting under Rule 12g3-2(b), which provides relief to foreign private issuers that are not currently Exchange Act reporting companies (*i.e.,* they are not listed nor have made a registered offering in the United States) and whose primary trading market is located outside the United States.[16]

The proposed rules would require resource extraction issuers to disclose, among other things, the type and total amount of non-*de minimis* payments to the U.S. federal government or any foreign government related to the commercial development of oil, natural gas or minerals for each project.[17] Such payments include taxes, royalties, fees (including license fees), production entitlements, bonuses and other material benefits. The SEC added two categories of payments that were not required to be disclosed under the prior rules: dividends (except for dividends paid to a government as a common or ordinary shareholder of the issuer and therefore paid to the government under the same terms as other shareholders) and payments for infrastructure improvements, such as building a road or railway to further the development of oil, natural gas or minerals.

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[15] Rules implementing section 13(q) were originally adopted by the SEC in 2012; however, the U.S. District Court for the District of Columbia vacated these rules on the basis of two findings: first, that the SEC misread section 13(q) to compel the public disclosure of issuers' reports; and second, the SEC's explanation for not granting an exemption when disclosure is prohibited by foreign governments was arbitrary and capricious.

[16] Imposing a resource extraction reporting requirement on such issuers would go beyond what is contemplated by section 13(q), which defines a "resource extraction issuer" as an issuer that is "required to file an annual report with the SEC".

[17] The proposed rules define "not *de minimis*" as any payment, whether a single payment or a series of related payments, that equals or exceeds US$100,000 during the same fiscal year.

Under the proposed rules, and consistent with the transparency regulations adopted in the EU and Canada, resource extraction issuers are not required to disclose social or community payments, such as payments to build a hospital or school. As the SEC noted, it is unclear whether these types of payments are part of the commonly recognized revenue stream for the commercial development of oil, natural gas or minerals.

In a change from the 2012 rules, the proposed rules define "project" as operational activities governed by a single contract license, lease, concession or similar legal agreement that forms the basis for payment liabilities to a government. Although similar to the EU directives and the Canadian draft definitions, the SEC's proposed definition would allow issuers additional flexibility to treat multiple agreements that are both operationally and geographically interconnected as a single project without the additional requirement that the agreements also have "substantially similar terms" – as required by the EU and Canadian draft definitions. The SEC opted to define "project" using the same core elements used in the EU directives and the Canadian draft definitions to help reduce compliance costs for issuers that are listed in both the United States and the EU or Canada by not requiring different disaggregation standards for project-related costs. In addition, such an approach might enable issuers to take advantage of equivalency provisions available in other jurisdictions.

The proposed rules do not provide for exemptions for countries that prohibit the mandated resource extraction disclosures; however, the SEC noted that it will consider using its existing authority under the Exchange Act to provide exemptive relief at the request of a resource extraction issuer. This case-by-case approach to exemptive relief, according to the SEC, is preferable to either adopting a blanket exemption for a foreign law prohibition (or for any other reason) or providing no exemptions and no avenue for exemptive relief.

In light of similar disclosure laws adopted by other countries and with a view to reducing compliance costs, the SEC proposed a provision that is consistent with the Canadian and EU frameworks. The provision allows issuers to meet the requirements of the proposed rule by providing disclosures that comply with a foreign jurisdiction's rules or that meet the U.S. Extractive Industries Transparency Initiative reporting requirements if the SEC determines that those rules or requirements are substantially similar to the proposed rules.

The SEC has proposed an extensive comment process and expects to vote on the proposed rules in June 2016, although the SEC noted that a number of factors may cause it to depart from this expedited schedule.

Proposed Rule 10D-1: Listing Standards to Recover Erroneously Awarded Executive Compensation

On July 1, 2015, the U.S. Securities and Exchange Commission (SEC) proposed a new rule to implement section 954 of the *Dodd–Frank Wall Street Reform and Consumer Protection Act*. The comment period for proposed Rule 10D-1 of the *Securities Exchange Act of 1934*, as amended (Exchange Act), ended in September 2015; however, to date a final rule has not been released. Under proposed Rule 10D-1, U.S. national securities exchanges must adopt listing rules that will require all listed issuers, including Canadian companies and other foreign private issuers, to adopt, publicly disclose and implement written policies to recover from the issuer's current and former executive officers any incentive-based compensation received that was based on materially erroneous financial information.[18]

The recovery policy would apply to all incentive-based compensation received by executive officers during the three completed fiscal years immediately preceding the date on which the issuer is required to prepare an accounting restatement to correct an error that is material to its previously issued financial statements.[19] The issuer's obligation to prepare the restatement will trigger the application of the recovery policy. Recovery of the excess compensation will be on a pre-tax, no-fault basis and the issuer cannot indemnify or reimburse the affected officers.

"Incentive-based compensation" is defined in the proposed rule as any compensation that is granted, earned or vested wholly or in part upon the attainment of any financial reporting measure. Financial reporting measures are measures that are determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, any measures derived wholly or in part from such financial information, and stock price and total shareholder return, regardless of whether such measures are included in an SEC filing or the issuer's financial statements. In the case of compensation based on stock price or shareholder return, the issuer must calculate the recovery amount by making a reasonable estimate of the accounting restatement's effect on the applicable measure. The recovery policy would not apply to compensation awarded strictly on the basis of discretionary, subjective, operational or strategic measures that are not financial reporting measures.

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[18] Rule 10D-1, as proposed, will apply to all issuers with any securities listed on a U.S. national securities exchange, including issuers with only debt securities listed.

[19] The term "executive officer" is defined to include the issuer's president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Executive officers of the issuer’s parent or subsidiaries are deemed executive officers of the issuer if they perform such policy-making functions for the issuer. The proposed rule would require recovery of excess incentive-based compensation received by an individual who served as an executive officer of the listed issuer at any time during the performance period for that incentive-based compensation. Incentive-based compensation would be subject to the issuer's recovery policy under the proposed rule to the extent that it is received while the issuer has a class of securities listed on an exchange or an association.

Exceptions

The SEC proposed only two exceptions to the mandatory enforcement of the recovery policy. First, listed issuers can decide not to recover excess incentive-based compensation if recovery is impractical because the direct cost of recovery is greater than the recovery amount.[20] Second, foreign private issuers do not have to enforce their recovery policy if it would violate the laws of their home country.[21] Any listed issuer making use of either exception must provide detailed supporting documentation to its listing exchange.

Disclosure Requirements

Rule 10D-1, as proposed, will impose various disclosure obligations on a listed issuer, including the requirement to file its written recovery policy as an exhibit to its Form 10-K (or, in the case of a foreign private issuer, Form 20-F or Form 40-F, as applicable). Each listed issuer will be required to disclose annually how it has applied its recovery policy if at any time during its last completed fiscal year it completed either a restatement that required recovery of excess incentive-based compensation under its recovery policy or there was an outstanding balance of excess incentive-based compensation from the application of that policy to a prior restatement. The required disclosure would include the date of the accounting restatement, the recovered amount and the applicable incentive measure. A listed issuer that decides not to recover excess incentive-based compensation because recovery would be impractical must disclose the name of the applicable officer, the amount that would have been recovered and the issuer's reasons for not recovering such amount.

Domestic listed issuers would include the proposed disclosure in their annual reports on Form 10-K and any proxy and consent solicitation materials that require executive compensation disclosure under Item 402 of Regulation S-K. Foreign private issuers, including Canadian issuers using the multijurisdictional disclosure system, would be required to provide the same disclosure in, and to file their recovery policies as an exhibit to, the annual reports they file with the SEC on Form 20-F or Form 40-F, as applicable. Because foreign private issuers are exempt from section 14(a) of the Exchange Act, they would not be required to disclose the information in any proxy or consent solicitation materials with respect to their securities.

[20] To prevent potential conflicts of interest, any determination that recovery would be impractical would need to be made by the issuer's committee of independent directors that is responsible for executive compensation decisions. In the absence of a compensation committee, the determination would need to be made by a majority of the independent directors serving on the issuer's board of directors. Such a determination, as with all determinations under proposed Rule 10D-1, would be subject to review by the listing exchange.

[21] The relevant home country law must have been adopted in the home country prior to the publication in the Federal Register of proposed Rule 10D-1. Interestingly, there is no corresponding exception for a recovery that would violate the laws of the executive officer's home country.

If you have any questions regarding the foregoing, please contact Jeffrey Nadler (212.588.5505), Paul Watkins (212.588.5547) or Nir Servatka (212.588.5579) in our New York office.

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