

Looking Forward to September Governance Activities

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The end of summer is being marked by expectations of a busy month. First, several rules come into effect. On September 9, swap clearing is required under the Dodd-Frank Act unless an exception is available. Public companies often use swaps to mitigate risks, such as interest rate or foreign currency fluctuations. A company would be eligible for an exception to the clearing and trade execution requirements if it is not a financial entity, uses the particular swap to hedge or mitigate commercial risk, and notifies the CFTC as to how it meets its financial obligations associated with entering into non-cleared swaps. This exception applies on a per-swap basis, not an overall program, and the hedging activity must not be speculative in nature and done in the ordinary course to mitigate risks from changes in the value of assets or liabilities. The board of directors or an appropriate board committee must review and approve to elect the exception and set appropriate policies governing the company's use of swaps subject to the end-user exception, and review those policies at least annually. We describe the requirements [here](#).

In addition, amendments to Regulation D and Rule 144A private-placement safe harbors to eliminate the prohibition on widespread advertising and other forms of "general solicitation" or "general advertising" in private offerings under certain Securities Act rules become effective on September 23, as we discussed [here](#).

Opposition to the SEC conflict minerals rules continues, as documents related to the appeal of the court decision to uphold the rules are due on September 12. Meanwhile, a group of 44 investors, including many socially responsible funds, has sent a [letter](#) to Chair White urging the SEC to defend the resource extraction rules that were struck down by the courts. The press has reported that the SEC intends to rewrite the rules instead.

Finally, the ISS policy [survey](#) ends on September 13. But the subject of the most intense speculation has been whether we will see the SEC propose the pay ratio rules required under Dodd-Frank this month, now that the two new SEC commissioners are firmly ensconced in their positions.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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