Securities Memorandum

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JANUARY 19, 2012

Preparation for 2011 Fiscal Year SEC Filings and 2012 Annual Shareholder Meetings

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As our clients and friends know, each year Mintz Levin provides an analysis of the regulatory developments that impact public companies as they prepare for their fiscal year-end filings with the Securities and Exchange Commission (SEC) and their annual shareholder meetings. This memorandum discusses key considerations to keep in mind as you embark upon the year-end reporting process in 2012.[1]

Year 2 of Say-on-Pay. As required by Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and related SEC rulemaking, public companies other than smaller reporting companies were required to include two new, non-binding resolutions in their proxy statements for their first shareholder meetings taking place on or after January 21, 2011. The first resolution, the "say-on-pay" vote, allows shareholders to vote whether to approve executive compensation as disclosed in the proxy statement pursuant to Item 402 of Regulation S-K. The second vote, referred to as the "say-on-frequency" vote, asks shareholders how often they want to conduct future say-on-pay votes: once a year, once every two years, or once every three years. For the 2011 proxy season, shareholders overwhelmingly voted in favor of annual votes on say-on-pay, as opposed to either of the other possible choices, making say-on-pay a yearly event for most companies. However, now that the first year is behind us, companies are not required and not expected to propose another say-on-frequency vote until their shareholder meetings taking place in 2017. Companies that qualify as "smaller reporting companies" will not be required to conduct the say-on-pay or say-on-frequency votes until the first annual or other meeting of shareholders at which directors are to be elected that occurs on or after January 21, 2013.[2]

For further detail on the final say-on-pay rules that were adopted last year, please review our **client alert**.

The advent of say-on-pay has caused companies to revisit how they write their compensation-related disclosure in their proxy statements, in particular the Compensation Discussion and Analysis (CD&A) section, with both advocacy and disclosure in mind. For the year ended December 31, 2011, 46 companies failed to receive a majority vote in favor of their executive compensation payments and practices, suggesting that executive compensation is more vulnerable than initially thought at some companies. While this percentage of failed votes is small compared to the number of companies conducting say-on-pay votes last year, it is still higher than most experts expected. In addition, say-on-pay has resulted in shareholder litigation against many of these companies and such suits name the board, compensation committee members, and executives in their suits.[3] The allegations of several of the complaints filed generally claim that the directors breached their fiduciary duties in three different ways. The first alleged breach arises from allegations that the directors diverted corporate assets to the executives in a manner that put the executives' interests ahead of those of the

shareholders. The second alleged breach arises from allegations that the companies that have adopted "pay-for-performance" compensation policies failed to disclose in their proxy statements that the compensation awards were made notwithstanding or in contravention to the policies. Finally, the complaints also bring claims for corporate waste against the directors based on the alleged excessive size of the executive compensation awards. Given these claims, it is critical for companies to review their CD&A disclosure, especially with regard to a company's pay-for-performance philosophy. Many companies have boilerplate compensation policy language that is vulnerable to being exploited by derivative plaintiffs and which is not necessary to provide an accurate and reasonable basis for a company's compensation decisions. Companies should review the CD&A section of their proxy statements to ensure that it reflects the company's actual executive compensation philosophy and accurately describes the rationale for payment of executive compensation.

The Dodd-Frank Act added a new requirement in the CD&A beginning this year relating to the say-on-pay vote taken last year. Item 402(b)(1) of Regulation S-K was amended to add section vii to the CD&A disclosure requirements to require a discussion as to whether and, if so, how the company has considered the results of the shareholder say-on-pay vote in determining compensation policies and decisions and, if so, how that consideration has affected the company's executive compensation decisions and policies. In preparing for compensation committee meetings, companies should make sure the compensation committee is in a position to discuss and make recommendations on this new disclosure requirement, as the disclosure must specifically address what actions the company has taken to date. Companies should make sure their compensation committees have been provided with the following information well in advance of approving this year's executive compensation:

- the results of the shareholder vote on say-on-pay from the 2011 annual meeting and any information that the company has as to the specific shareholders that voted against say-on-pay; and
- the 2011 Institutional Shareholder Services (ISS) Proxy Advisory Services report discussing its analysis of the company's say-on-pay proposal.

In preparing for this year's say-on-pay vote the compensation committee should consider:

- how it defines "pay-for-performance" and whether the company has a good pay-for-performance story for 2011 backing up its executive compensation decisions;
- whether the company should reach out to shareholders who voted against the company's say-on-pay proposal last year (and who are still shareholders) to determine what issues they had with the company's compensation as many institutional shareholders have expressed their desire to engage with companies regarding their executive compensation policies as long as the discussion is not at the eve of the voting decision and preferably before the proxy season begins in earnest;
- whether the company has had any significant changes to its shareholder base that could change the say-on-pay results for this year; and
- whether ISS changes in how it will be determining whether a company has a pay for performance disconnect this year will have any effect on its recommendations for the 2012 proxy season.

Lastly, as companies enter this proxy season they need to be aware of how ISS will evaluate their say-on-pay proposals this year. ISS expects companies which received the support of less than 70% of the votes cast last year on say-on-pay to take specific action to address the concerns expressed by shareholders and expects to see substantive disclosure regarding the company's response to shareholders' opposition. If ISS is not satisfied with the changes made by the company, they will recommend a vote against compensation committee members as well as a vote against this year's say-on-pay proposal. As it did last year, ISS will continue to review say-on-pay proposals by making a quantitative assessment of the CEO's pay as compared to the company's financial performance to

initially identify underperforming companies. However, ISS has revised its approach and will measure the degree of alignment between the company's total shareholder return rank and the CEO's rank within the peer group[4] as measured over a one-year (40% weight) and three-year (60% weight) period as well as the multiple of the CEO's total pay relative to the peer group median. It will also measure the absolute alignment between the trend in CEO pay and a company's total shareholder return (TSR) over the prior five fiscal years. These quantitative measures are to identify outlier companies that have demonstrated significant misalignment between CEO pay and company performance over time. In cases where alignment appears to be weak, further in-depth analysis will determine causal or mitigating factors, such as the mix of performance- and non-performance-based pay, grant practices, the impact of a newly hired CEO, and the rigor of performance programs.[5]

SEC Rules on Mandatory Proxy Access Have Been Vacated by the Courts but "Private Ordering" Lives On. Despite the mandate provided by Section 971 of the Dodd-Frank Act and subsequent rulemaking by the SEC, shareholders' ability to require companies to include shareholder nominees in companies' own proxy statements was vacated by the United States Court of Appeals for the District of Columbia Circuit in July 2011.[6] However, the amendments to Rule 14a-8 of the Securities Exchange Act of 1934, as amended (the Exchange Act), the rule addressing when a company must include a shareholder's proposal in its proxy statement, were not affected by the court decision and became effective on September 20, 2011. As a result of amendments to Rule 14a-8, shareholders will now be able to propose nominees for director in a company proxy statement provided that a company's by-laws allow for such action. This is known as "private ordering." As a result, proxy access may become a reality if shareholders are successful in requiring companies to add by-law amendments allowing for shareholders to nominate directors in a company's proxy statement. If a company's by-laws allow shareholder proxy access for director nominations, then the same procedures must be followed as those that would have been followed had mandatory SEC proxy access survived under the Exchange Act. These procedures include Rule 14a-18, providing for disclosure regarding nominating shareholders and nominees submitted for inclusion in a company's proxy material pursuant to applicable law or a company's governing documents; Regulation 14N, which requires filings by certain nominating shareholders on a Schedule 14N; and amendments to Rule 14a-2(b) to facilitate shareholder director nominations. As of December 21, 2011, ISS had reported a total of 16 proxy access proposals submitted to companies with varying procedural provisions. It remains to be seen whether any of these proposals for by-law amendments to require proxy access will be adopted by companies or whether any company may instead choose to adopt its own preemptive proxy access by-law amendment to provide procedures more stringent than would be set forth in a shareholder by-law amendment proposal. We expect that like majority voting for directors, the momentum for proxy access will begin with larger companies and will continue to gain traction over the next few years.

SEC Issues Additional Guidance with Respect to Proposals Brought by Shareholders. The SEC staff issued Legal Bulletin No. 14F on October 18, 2011 providing new guidance on topics relating to shareholder proposals under Rule 14a-8 of the Exchange Act that to date had been unclear. The new guidance addresses issues on proof of share ownership for beneficial owners, submission of revised proposals, procedures for withdrawal of a no-action request for a proposal submitted by multiple proponents, and the use of e-mail to transmit information. This SEC Legal Bulletin, together with SEC Legal Bulletins 14-14E, contains important information for any company that receives a shareholder proposal.

Other Sections of the Dodd-Frank Act Are Still Subject to Rulemaking. The Dodd-Frank Act contains several other sections that will impact companies' proxy statements in coming years, including the requirements to provide disclosure on measuring pay for performance, the ratio between CEO compensation and other employees' compensation, hedging of shares by employees and directors, clawback of "erroneously awarded compensation" and rules regarding compensation consultants and compensation committee independence.

However, these sections of the Dodd-Frank Act require that the SEC undertake rulemaking to

implement them, and only the rules with respect to exchange listing standards regarding compensation committee independence and factors affecting compensation adviser independence and disclosure rules regarding compensation consultant conflicts have been proposed to date. The SEC does expect to finalize these proposed rules in the first half of the calendar year but it is unclear whether it will be in time for the 2012 proxy season. The SEC's rulemaking calendar was recently revised to state that it expects to propose the rest of these corporate governance and disclosure rules required by the Dodd-Frank Act in the first half of the 2012 calendar year and adopt them in the July through December 2012 time frame, not within the time to take effect for the 2012 proxy season. We will update our clients and friends separately as these rules are proposed and issued.

Whistleblower Bounty System in Effect. The SEC's rules under Section 922 of the Dodd-Frank Act, relating to bounties to be paid to whistleblowers who report information to the SEC about violations of the securities laws, took effect on August 12, 2011. These rules, which were the subject of hundreds of comment letters, put in place a system under which whistleblowers may benefit financially from contacting the SEC directly with allegations of federal securities fraud and other violations.

A new Office of the Whistleblower has been set up within the SEC, which is charged with receiving and reviewing reports directly from individuals of violations or potential violations of the federal securities laws. These reports can be submitted through a form on the SEC's website, by e-mail, or by telephone.

These regulations have the potential to impact any issuer that has issued a security, regardless of whether that issuer is public, private, foreign, or domestic, or whether the security is equity or debt. As long as the situation about which a whistleblower makes a report constitutes a violation or potential violation of the federal securities laws, a whistleblower may bring a claim to the SEC in an effort to obtain a reward. Companies have expressed serious concerns about these rules, primarily because they are worried that the rules create a financial incentive for employees to circumvent a company's internal compliance procedures and reporting mechanisms and contact the SEC directly with respect to a potential violation.

In order to be entitled to a whistleblower bounty, an individual must provide information that leads to the successful enforcement by the SEC of a matter resulting in sanctions that exceed $1 million. The bounty, by statute, is required to be paid in an amount between 10% and 30% of the funds that are recovered by the SEC in the matter. As a result, a whistleblower complaint needs to involve a reasonably significant claim in order to have the potential to result in a recoverable bounty. Also, the bounty is only available to an individual, and not to an issuer or other entity. Further, some individuals are ineligible to obtain a whistleblower bounty, including those who have client relationships with an issuer, such as an independent public accountant or a lawyer. Interestingly, the SEC does not exclude individuals who are involved in the wrongdoing itself from receiving a bounty, although any participation in the wrongdoing would factor into the determination of the size of the bounty awarded.

Whistleblower information, in order to qualify for the payment of a bounty, has to be submitted on a voluntary basis. Consequently, a person is not eligible for a bounty if he or she produced information as the result of a subpoena or request for information by the SEC. The individual must come forward with the information of their own volition, and the information has to be "original," meaning it (1) must be derived from the independent knowledge or analysis of the whistleblower, (2) is not known to the SEC from any other source, and (3) is not exclusively derived from another public source such as an administrative hearing or news report. Hearsay and other forms of indirect evidence are not acceptable forms of evidence and cannot be used to support a whistleblower's claim.

Other factors besides the culpability of the whistleblower can increase or decrease a whistleblower award pursuant to these rules. First, the information must be significant and not just incremental to information that the SEC already possesses. In addition, the size of an award may be larger if the whistleblower reports the wrongdoing internally through an issuer's own compliance procedures and mechanisms before going to the SEC. There is no requirement, however, for a whistleblower to report internally before reporting to the SEC. A whistleblower may also make an initial report anonymously,

but if the SEC investigation does result in the payment of an award, the person who made the report must reveal his or her identity to the SEC in order to receive the payment.

To protect whistleblowers against retaliation, the regulations contain an express anti-retaliation provision which mandates that an issuer may not retaliate against an employee for coming forward with a whistleblower report. To date, purported whistleblowers have brought a number of anti-retaliation claims as a result of the whistleblower rules, and the number of those claims is likely to increase as whistleblowers become more aware of the existence of these regulations.

Companies should take steps now to ensure that their employees are aware of internal reporting systems and compliance procedures for addressing potential violations of the federal securities laws. Employees should not learn about the concept of whistleblowing for the first time when they hear about the potential to claim a bounty for making a report to the SEC. Rather, they should have their employer's own internal reporting system at the top of their minds, and think of using that system to report a problem if they see one. As part of preparations for fiscal year-end reporting in 2012, companies should remind employees that management is committed to full compliance with the federal securities regulations, and educate them as to the systems in place at the company to report any issues with compliance.

"Proxy Plumbing". In July 2010, the SEC issued a concept release on the US proxy system.[7] This release, which has come to be known as the "proxy plumbing" release, addresses three principal questions regarding the current proxy system in the United States: whether the SEC should take steps to enhance the accuracy, transparency, and efficiency of the voting process; whether the SEC's rules should be revised to improve shareholder communications and encourage greater shareholder participation in the shareholder meeting process; and whether the voting power held by shareholders is aligned with the economic interest of such shares. No rulemaking has yet been issued by the SEC in response to this concept release, but we understand that the SEC is continuing to evaluate the issues it raised in that document. In addition the SEC is also looking at proxy advisory firms and the role they play in shaping shareholder votes. Although the SEC has no ability to regulate these firms, the SEC is concerned about the lack of competition and the sway they seem to have over the voting decisions made by many institutional investors.

SEC Cybersecurity Guidance. On October 13, 2011, the staff of the SEC issued Corporation Finance (CF) Disclosure Guidance on Cybersecurity, a guidance document regarding disclosures of cybersecurity risks that may impact the issuers of securities.[8] There has been an increase in cybersecurity attacks on issuers in many industries in recent years — attacks on an issuer's networks, systems, computers, programs and data that can result in seizure or misappropriation of sensitive information about business partners, customers, and other parties. The Guidance provides direction to companies with regard to when the risks or consequences of those attacks must be disclosed to the public.

An issuer is generally required to disclose any material information related to its business that may impact an investor, including with regard to cybersecurity or cyber attacks. Information is considered to be material if there is a substantial likelihood that a reasonable investor would consider it important when contemplating an investment in a company. With respect to cybersecurity issues, there are certain scenarios in which disclosures may be material to an issuer and its investors. The Guidance notes that public companies are required to evaluate their cybersecurity risks and "consider the probability of cyber incidents occurring and the quantitative and qualitative magnitude of those risks, including the potential costs and other consequences resulting from misappropriation of assets or sensitive information, corruption of data or operational disruption." Therefore, issuers who work with or have access to sensitive customer data or whose businesses would be seriously impacted by a computer security breach should consider disclosing the risk of cyber attacks and similar events in their disclosure documents.

The SEC also provided direction in the Guidance regarding disclosures which reference how an issuer should address potential cyber security risks, and the need to explain why the cost and consequences

associated with doing so represents a material event. The SEC also addressed the need for disclosures if a cyber attack could materially affect the issuer's products or services, customer relationships, and competitive conditions, as well as disclosure in the event of a pending legal proceeding regarding a cyber attack.

Where an issuer is required to incur substantial costs in order to protect against potential cybersecurity risks, the issuer may need to include references to those costs in the Management's Discussion and Analysis (MD&A) section of its filings, as well as in footnotes to financial statements. Likewise, when a cyber attack occurs, litigation involving suppliers and customers could be costly; companies may need to disclose and explain these risks in addition to the consequences of the cyber attack itself. Finally, issuers are required to disclose the effectiveness of their disclosure controls and procedures in SEC filings; to the extent those controls and procedures are impacted by cyber attacks, an analysis of the consequences of those attacks for the controls and procedures may be required.

The Guidance does not impose any new disclosure requirements or make any changes to existing disclosure rules. The Guidance does, however, make it very clear that the SEC is strongly concerned about cybersecurity as a general concept. The purpose of the Guidance is to remind companies that they should be keeping this specific topic in mind when crafting disclosure within the existing framework of the SEC's rules, especially when preparing disclosure in their Forms 10-K regarding risk factors, MD&A, the business description, financial statements, and legal proceedings.

Conflict Minerals Disclosure. Conflict minerals-related disclosure is another highly controversial topic for which the SEC was required to issue rules under the Dodd-Frank Act. Section 1502 of the Dodd-Frank Act provides that the SEC shall require companies to disclose whether or not their products contain so-called "conflict minerals" — i.e., tin, gold, tantalum, or tungsten, from the Democratic Republic of Congo and neighboring countries. This provision was included in the Dodd-Frank Act at the request of legislators who believe that the process of mining for and producing these particular minerals in certain countries is contributing to a grave, ongoing humanitarian crisis in that region of Africa.

The SEC proposed rules on this topic in December 2010, and the Dodd-Frank Act had required the rules to be finalized by April 15, 2011. However, due to the strong resistance to the rules from a broad cross section of the business community, the rulemaking has been delayed and, as of January 2012, is still not yet final. The implementing rules as proposed provide that:

- If "conflict minerals" are necessary to the functionality or production of a product manufactured, or contracted to be manufactured, by an issuer, the issuer would be required to disclose in its annual report whether the conflict minerals originated in the Democratic Republic of the Congo or an adjoining country.
- If the answer is that they do originate in such countries, the issuer must furnish an exhibit to its annual report that includes, among other matters, a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals.
- These due diligence measures would include, but would not be limited to, an independent private sector audit of the issuer's report conducted in accordance with standards established by the Comptroller General of the United States. Any issuer furnishing such a report would be required to certify that it obtained an independent private sector audit of its report, provide the audit report, and make its reports available to the public on its Internet website.

Of particular concern to the business community is the fact that there is no *de minimis* threshold for the disclosure, meaning that the presence of even trace amounts of the conflict minerals would need to be analyzed and reviewed for the purpose of this requirement. Further, from a practical standpoint, commenters have argued that companies with dozens or even hundreds of suppliers may find it unmanageably expensive and burdensome to gather this information from several steps back in the supply or production chain. The SEC convened a roundtable discussion on October 18, 2011 in order to obtain information from companies regarding this issue that could help the agency put some

parameters around the rule to make it realistically manageable. However, as the final rules have not yet been released, we are still waiting to see what the SEC ultimately produces. In the meantime, companies engaged in manufacturing products in the electronics, medical device, aerospace, and computer industries, among others, should give some consideration to how they would address this requirement by reviewing supply contracts to determine the number and locations of suppliers they would need to contact for information in the event that the rules are passed essentially as written.

Internal Control over Financial Reporting. One positive development for smaller reporting companies contained in the Dodd-Frank Act was the permanent elimination of the requirement for such companies to provide an attestation report of their auditors with respect to their internal control over financial reporting in their annual reports on Form 10-K. All other companies have been and are still required to include those reports, pursuant to Section 404 of the Sarbanes-Oxley Act. In addition, all issuers, including smaller reporting companies, are required to include reports of their management as to the effectiveness of internal control over financial reporting.

2012 Periodic Report Filing Deadlines

For companies that qualify as large accelerated filers and have fiscal years ending on December 31, annual reports on Form 10-K are due 60 days after fiscal year-end (Wednesday, February 29, 2012).[9] Form 10-K reports continue to be due 75 days following fiscal year-end for accelerated filers[10] (Wednesday, March 15, 2012 for December 31 year-end companies) and 90 days after fiscal year-end for non-accelerated filers (Friday, March 30, 2011 for December 31 year-end companies).

In addition, Form 10-Q reports filed by accelerated filers and large accelerated filers continue to be due 40 days after the close of the fiscal quarter. The deadline for Form 10-Q reports for non-accelerated filers continues to be 45 days after the close of the fiscal quarter

These changes do not affect the existing proxy statement filing deadline of 120 days after fiscal year-end for companies that choose to incorporate by reference from their definitive proxy statements the disclosure required by Part III of the Form 10-K.

Companies should also note the extra day in the first quarter as this year is a leap year with February 29th as an added date.

Board of Director and Committee Membership

Each year as part of the year-end reporting process, we recommend that companies carefully examine the membership profiles of their board and board committees. Sarbanes-Oxley, the SEC rules issued under Sarbanes-Oxley, and the listing requirements of Nasdaq, NYSE, and NYSE Amex relating to board and committee membership requirements all impact who may serve.[11] Mintz Levin has prepared a director independence and qualification checklist to assist with this analysis, and we encourage you to evaluate each director and director nominee to ensure continued compliance with these requirements.

Shareholder Approval of Equity Compensation Plans

Nasdaq, NYSE, and NYSE Amex all require shareholder approval for the adoption of equity compensation plans and arrangements for employees, directors, and consultants and for any material modification of such plans and arrangements, including the addition of new shares to a plan. Exemptions from the shareholder approval requirement continue to be available for inducement grants to new employees if such grants were approved by a compensation committee or a majority of the company's independent directors, and if, promptly following each grant, a press release is issued specifying the material terms of the award, including the name of the recipient and the number of shares issued. In certain situations, exceptions to the requirement may also be available for a grant relating to an acquisition or merger. An exemption from the shareholder approval requirement is also available for certain tax-qualified, non-discriminatory employee benefit plans (such as plans that meet

the requirements of Section 401(a) of the Internal Revenue Code and Employee Stock Purchase Plans meeting the requirements of Section 423 of the Internal Revenue Code), provided that such plans are approved by the issuer's compensation committee or a majority of the issuer's independent directors. Equity plans adopted prior to June 30, 2003 are unaffected under this rule, until a material modification is made to such a plan.

As noted above, companies considering option repricing programs in light of significant declines in their stock prices should note that such programs may require shareholder approval, depending on the terms of the equity compensation plan under which the options were granted. In the event that shareholder approval is required, the company will need to file a preliminary proxy statement with the SEC, which would not be required for approval of a new plan or an amendment to an existing plan.

Companies should review their existing equity compensation plans as part of their year-end reporting preparation in order to determine whether shareholder approval will need to be obtained for new plans or to determine increases in the numbers of shares available under old plans, option repricing programs, or material plan amendments. Since this is another area where ISS continues to weigh in heavily, both with respect to the number of shares to be authorized under the plan and with respect to some of the substantive disclosure within the plan itself, plenty of time should be allotted to drafting proposals on these matters.

Other Year-End Considerations

We also recommend that companies take the opportunity while planning their year-end reporting to consider what amendments may be necessary or desirable to their corporate documents over the coming year that may require shareholder approval. Some items to consider are:

- Does the company have enough shares authorized under its certificate of incorporation to achieve all of its objectives for the year, including acquisitions for which it may want to use its stock as currency?
- Does the company have adequate shares available under its equity compensation plans to last throughout the year?
- Are there other material changes that should be made to the company's equity compensation plans that would require shareholder approval?
- Has the company reviewed its charter and by-laws to assess any anti-takeover measures in place?

To the extent that a company expects any proposal in its proxy statement to create controversy among its shareholder base, it may want to consider hiring a proxy solicitor to assist with the process of seeking the requisite shareholder vote.

In addition, in light of the say-on-pay, executive compensation, and governance rules described above, management and directors of public companies should annually consider the following questions, with a view to the disclosure that would flow from each answer.

Compensation Committee

» Consider whether the company's compensation policies and practices for *all* of the company's employees, including non-executive officers, create risks that are reasonably likely to have a material adverse effect on the company.

  - Are there business units that carry a significant portion of the company's risk profile?
  - Are there business units with compensation structured significantly differently from the other units within the company?
  - Are there business units that are significantly more profitable or risky than others within the company?

    - Are there business units where compensation expenses are a significant percentage of the unit's overall expenses?
    - Does the company have compensation policies or practices that vary significantly from the overall risk and reward structure of the company and are not in alignment with the timing of the outcome on which the award was based?

» Is the company using a compensation consultant for which disclosure would be required under these rules?

» If the company is currently subject to the say-on-pay rules, is the CD&A written in a sufficiently compelling and persuasive manner?

Nominating Committee

» Consider, for each director and nominee, the particular experience, qualifications, attributes, or skills that led the board to conclude that the person should serve as a director for the company and how the directors' skills and background enable them to function well together as a board, as of the time that a filing containing this disclosure will be made with the SEC. Review the company's current requirements regarding minimum qualifications to serve as a director that are currently set forth in the company's proxy statement to make sure that the disclosure works with the current nominating committee policy.

» Consider whether, and if so how, the nominating committee considers diversity in assessing director nominees. Consider whether to adopt a policy regarding the consideration of diversity in identifying nominees, how to implement the policy, and how to assess its effectiveness.

» Consider the current governing structure of the board. Is it still appropriate for the company? Are revisions necessary or appropriate?

» Revise the nominating committee charter, if necessary, based on the issues discussed above.

Full Board

» Consider the board's role in managing and overseeing the material risks facing a company. Has this role been effectively managed by the board? Should the role be delegated to a committee?

Mintz Levin Website: Publications

We would also like to call your attention to the many advisories and alerts regarding topics of current interest that are available to you on our website, **www.mintz.com**. New alerts and advisories are posted frequently, and we hope that you will find the information to be useful.

Please contact the Mintz Levin attorney who is responsible for your corporate and securities law matters if you have any questions or comments regarding this information. We look forward to working with you to make this year's annual reporting process as smooth as possible.

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Endnotes

1 We invite you to review our memorandum from last year, which analyzed regulatory changes that were new for fiscal year 2010, and we would be happy to provide you with another copy upon request.

2 Smaller reporting companies are those that have less than $75 million in public float as of the last business day of their most recently completed second fiscal quarter.

3 For a further discussion regarding say-on pay litigation see our Client Advisory, dated July 18, 2011, entitled "Lessons

Learned from Initial 'Say-on-Pay' Litigation, Plaintiffs' Attorneys Start Utilizing 'No' Votes as a Basis for Claims Against Directors".

4 The peer group is generally comprised of 14-24 companies that are selected by ISS using market cap, revenue (or assets for financial firms), and GICS industry group, via a process designed to select peers that are most similar to the company, and where the company is close to median in revenue/asset size.

5 The ISS 2012 policy in evaluating say-on-pay is available on the ISS website.

6 Specifically, Exchange Act Rule 14a-11, which sets forth the specific procedures and rules to be used to nominate a director, was vacated.

7 Concept Release on the U.S. Proxy System (Release No. 34-62495, July 14, 2010).

8 Securities and Exchange Commission, *CF Disclosure Guidance: Topic No. 2*, Cybersecurity (October 13, 2011).

9 *Large accelerated filers* are domestic companies that meet the following requirements as of their fiscal year-end:

- have a common equity public float of at least $700 million, measured as of the last business day of their most recently completed second fiscal quarter (i.e., for calendar fiscal year-end companies, this test would be applied as of June 30, 2011);
- have been subject to the reporting requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended, for at least 12 months;
- have previously filed at least one Annual Report on Form 10-K; and
- do not qualify as smaller reporting companies under SEC rules.

10 *Accelerated filers* are those that meet all of the above tests but have a common equity public float of at least $75 million, but less than $700 million, measured as of the last business day of their most recently completed second fiscal quarter (i.e., for calendar fiscal year-end companies, this test would be applied as of June 30, 2011).

11 Please see our Client Advisory, dated November 2003, entitled "Changes to Corporate Governance Standards for Nasdaq-Listed Companies," for a further description of these changes. We would be happy to provide you with a copy upon request.

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1596-0112-NAT-SEC