Securities Client Memorandum

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FEBRUARY 10, 2011

Preparation for 2010 Fiscal Year SEC Filings and 2011 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 (the 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 2011.[1] A summary of key changes and considerations for 2011 appears immediately below, followed by a more detailed exploration of the changes and general year-end considerations.

Say-on-Pay Has Arrived. As required by Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) and related SEC rulemaking, public companies, other than smaller reporting companies, will be required to include two new, nonbinding resolutions in their proxy statements for shareholder meetings taking place on or after January 21, 2011.

The first resolution, the "say-on-pay" vote, will allow 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, will ask shareholders how often they want to conduct future say-on-pay votes: once a year, once every two years, or once every three years. In addition, companies engaging in business combination transactions will be required to include a nonbinding vote in proxy statements filed beginning April 25, 2011, in which shareholders will vote on any "golden parachute" compensation to be received by executive officers of the issuer in connection with the transaction.

Companies that qualify as "smaller reporting companies," as of January 21, 2011, will not be required to conduct the say-on-pay or say-on-frequency votes until the first annual meeting or other meeting of shareholders at which directors are to be elected that occurs on or after January 21, 2013, but they will be required to conduct say-on-golden parachute votes and provide related disclosure at the same time as all other filers.[2]

As noted in more detail below, the advent of say-on-pay will require companies to write the compensation-related disclosure in their proxy statements, in particular the Compensation Discussion and Analysis (CD&A) section, with both advocacy and disclosure in mind. As of the date of this memorandum, several companies have already failed to receive a majority vote in favor of their executive compensation payments and practices, suggesting that executive compensation may be more vulnerable than initially thought at some companies.

In addition, shareholder votes, as of the date of this memorandum, suggest a strong preference in favor of annual votes on say-on-pay, as opposed to either of the other possible choices.

Proxy Access Is on Hold—for Now. 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 has been indefinitely placed on hold, pending the outcome of litigation brought in the United States Court of Appeals for the District of Columbia Circuit challenging the authority of the SEC to issue such rules. Assuming that the challenge is resolved and the rules are ultimately allowed to take effect, we understand that the earliest these rules would likely take effect would be for the 2012 proxy season. Accordingly, most companies do not appear to be taking any steps in preparation for the changes that will be brought about by these rules at this time, but rather they are waiting to see what form the final rules take after resolution of the litigation.

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 these sections, and those additional rules will not be issued in time to take effect for the 2011 proxy season. In addition, the SEC has issued proposed rulemaking 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, on which the SEC has received hundreds of comments. These rules are not expected to be finalized until April 2011, at the earliest. We will update our clients and friends separately as these rules are proposed and issued.

Ongoing Focus on MD&A. During 2010, in light of the impact of the credit and financial markets' crises of recent years on public companies, the SEC issued an interpretive release on presentation of liquidity disclosures in the Management's Discussion and Analysis (MD&A) section of annual reports and other filings.[3] In this release, the SEC calls on issuers to focus specifically on disclosure relating to available sources of liquidity and risks that may impact those sources, as well as their cash management and risk management policies. Given the importance ascribed by the SEC to issuers' MD&A disclosures, we recommend reviewing this interpretive release as you begin to draft MD&A this year.

E-Proxy Rules: Year Three and "Proxy Plumbing." The 2011 proxy season represents the third year that all public companies, regardless of size, are required to comply with the SEC's electronic proxy delivery rules, referred to as the "e-proxy" rules, in distributing their proxy materials. Under these rules, all companies must make their proxy materials available on an Internet website, regardless of the method that they select for delivery of their proxy materials.

Companies have two choices for the method of delivery, which are described in further detail below: the "notice only" model, in which shareholders receive only a notice that the proxy materials are available on the Internet and must either log in to view the materials or request a paper copy to be delivered, or the "full set delivery" model, which is the traditional method of delivery of the materials through the mail. Under either model, companies must follow detailed procedural and notice requirements in distributing their proxy materials, including the annual report to shareholders.

In July 2010, the SEC issued a concept release on the U.S. proxy system.[4] 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:

1. Whether the SEC should take steps to enhance the accuracy, transparency, and efficiency of the voting process;
2. Whether the SEC's rules should be revised to improve shareholder communications and encourage greater shareholder participation in the shareholder meeting process; and

3. 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.

Internal Control Over Financial Reporting. One positive development for smaller reporting companies contained in the Dodd-Frank Act is the 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. The SEC had extended the compliance date for smaller reporting companies with this requirement on several occasions, and now the requirement has been eliminated through Congressional legislation. Other companies are still required to include those reports, pursuant to Section 404 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley). 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.

We look forward to working with you to make this year's annual reporting process as smooth as possible.

Say-on-Pay Rules: In Effect for 2011 Proxy Season

Say-on-pay and say-on-frequency votes are required to be included in a proxy statement for a company's first annual meeting or other meeting of shareholders at which directors are to be elected, taking place on or after January 21, 2011. Smaller reporting companies are not required to include say-on-pay and say-on-frequency votes in proxy statements for annual or other meetings at which directors are to be elected, taking place prior to January 21, 2013. This temporary exemption does not apply to the votes on or disclosures regarding golden parachute compensation arrangements.

New Section 14A of the Securities Exchange Act of 1934, as amended (the Exchange Act), added by Section 951 of the Dodd-Frank Act, also requires public companies to provide disclosure regarding certain so-called "golden parachute" compensation arrangements, when engaged in mergers or similar transactions, and, in most circumstances, to conduct a separate, nonbinding shareholder advisory vote to approve the golden parachute compensation arrangements.

Unlike the say-on-pay and say-on-frequency votes, which are automatically effective on January 21, 2011, under the Dodd-Frank Act, companies are not required to solicit shareholder votes on golden parachute compensation arrangements and include disclosures regarding golden parachute compensation in applicable filings until April 25, 2011. The final rules take effect on April 4, 2011.

For further detail, please review our client alert on the final say-on-pay rules.

SEC Observations on Disclosure Concerning Executive Compensation and Governance

Proxy statements for the 2010 season were required to include additional disclosure regarding risk, governance and director qualifications, and compensation. Below are summaries of these requirements and some observations from SEC comment letters, issued during the past year, on these new disclosure requirements, which may assist you in your preparation of 2011 SEC filings.

Narrative Disclosure of Compensation Practices and Policies Relating to Risk Management

Item 402(s) of Regulation S-K requires a company to describe its compensation policies and practices for *all* of its employees, including nonexecutive officers, if those compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the company. This disclosure is not required within the CD&A section, but rather forms a separate narrative within a company's other Item 402 disclosures.[5]

Item 402(s) contains a nonexclusive list of the following compensation policies and practices that may trigger disclosure:

- At a business unit that carries a significant portion of the company's risk profile;
- At a business unit with compensation structured significantly differently from the other units within the company;
- At a business unit that is significantly more profitable than others within the company;
- At a business unit where compensation expenses are a significant percentage of the unit's revenues; and
- Vary significantly from the overall risk and reward structure of the company, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the company from the task extend over a significantly longer period of time.

If a company concludes that it does have compensation policies or practices that create risks that are reasonably likely to have a material adverse effect on the company, the SEC has provided a nonexclusive list of issues that the company may need to address regarding its compensation policies or practices:

- The general design philosophy of the company's compensation policies for employees whose behavior would be most affected by the incentives established by the policies, as those policies relate to or affect risk-taking by those employees on behalf of the company, and the manner of their implementation;
- The company's risk assessment or incentive considerations, if any, in structuring its compensation policies or in awarding and paying compensation;
- How the company's compensation policies and practices relate to the realization of risks, resulting from the actions of employees in both the short term and the long term (for example, policies requiring claw backs or imposing holding periods);
- The company's policies regarding adjustments to its compensation policies to address changes in its risk profile, and any material adjustments made as a result of those policies; and
- The extent to which the company monitors its compensation policies to determine whether its risk management objectives are being met with respect to incentivizing its employees.

If a company concludes that its compensation policies and practices are not reasonably likely to have a material adverse effect on the company, the rule does not require companies to make an affirmative statement to that effect. This disclosure is not required to be provided by smaller reporting companies.

> Comment Letter Tip: Based on SEC comments, we recommend adding a brief discussion of the process undertaken by the company to arrive at the conclusion that its compensation policies and practices are not reasonably likely to have a material adverse effect on the company. This discussion is not required by the rule, but will likely prevent the company from drawing an SEC comment.

As is the case with MD&A disclosure, the analysis, as to whether any disclosure would be required, should initially be determined through an internal assessment by either the individuals who perform the internal risk function at a company or the individuals who administer a company's compensation policies, such as the head of the human resources department or general counsel's office.

Once that initial assessment is completed, the findings should be presented to the compensation committee for final review and discussion. Your compensation committee charter should be updated to provide the committee with the authorization to assess and determine whether there should be any disclosure with regard to these risks.

Enhanced Director and Nominee Disclosure and Board Diversity

Item 401 of Regulation S-K has been revised to require disclosure of the particular *experience, qualifications, attributes, or skills* that led a company's board to conclude that each director and director nominee should serve as a director of the company, as of the time that the proxy statement is filed with the SEC. This disclosure is required for all nominees and all directors, even those who are not standing for reelection at a particular meeting.

Companies are not required to disclose specific experience, qualifications, or skills for individual directors relating to *committee* service. However, if particular skills or attributes that are relevant to service on a specific committee form the basis for the reason an individual was selected to serve on the board, then those skills or attributes should be identified in the disclosure. Note that this disclosure may not be provided on an aggregate or group basis: each director's or nominee's experience, qualifications, attributes, or skills must be described individually.

> Comment Letter Tip: Based on SEC comments, we recommend that companies address *very specifically* the reasons why particular experiences, qualifications, skills, and attributes support a specific director's candidacy. The SEC has issued comments to provide more detailed disclosure if a company's reasons are too vague or general in nature, and do not tie the director's qualifications, skills, and attributes directly enough to a company's own needs. For example, stating that a director is "well-regarded in the industry in which the company operates" may not be sufficiently specific to explain why the company believes that this particular director should serve as one of its directors.

Last year, the SEC also adopted an amendment to Item 407(c) of Regulation S-K to require disclosure of whether, and if so how, a board's nominating committee considers issues of diversity in identifying nominees for director. The SEC deliberately did not define "diversity" for these purposes, noting that "some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin," and that "for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate."

If a nominating and governance committee does have a policy with respect to consideration of diversity in identifying director nominees, the company must disclose how the policy is implemented and how the committee, or the full board, assesses the effectiveness of the policy. For companies that do not currently have a diversity policy in place, the nominating and governance committee should consider whether to add a diversity policy and how diversity should be defined. Any new or revised diversity requirement should be added to the company's policy regarding qualification of directors and proxy disclosure of these requirements.

> Comment Letter Tip: If your nominating and governance committee does not consider diversity in identifying director nominees, specify that fact in the disclosure. If the company remains silent, it may prompt a comment asking the company specifically to state that it does not consider diversity.

Disclosure About Board Leadership Structure and the Board's Role in Risk Oversight

Companies are also now required, pursuant to Item 407(h) of Regulation S-K, to provide additional disclosure about the leadership structure of their boards of directors, and the role of their boards in the risk management process.

These rules require companies to explain why they believe that the board leadership structure they have chosen is the most appropriate structure as of the time of filing the disclosure, and whether and why they have chosen to combine or separate the principal executive officer and board chair positions. Companies that have a single person serving as both principal executive officer and chairman of the board are required to disclose whether and why they have a lead independent director and describe the specific role played by the lead independent director in the leadership of the company.

The additional disclosure is intended to provide investors with insights about why a company has chosen a particular leadership structure and is also intended to increase transparency into how boards function. The nominating and governance committee should discuss the leadership structure of the board and determine whether any changes are necessary in light of these disclosure requirements.

Second, companies are required to provide additional disclosure about the board's role in a company's risk management process, such as how the board administers its oversight function and the effect it has on the board's leadership structure. The intended purpose of the additional disclosure is to provide investors with information about how a company perceives the role of its board and the relationship between the board and senior management in managing the material risks facing the company.

Many companies already require the audit committee to oversee general risk management. The nominating and governance committee and the full board should determine whether any changes to its processes should be made in light of these disclosure requirements.

> Comment Letter Tip: Be sure to indicate what impact or effect, if any, the board's role in risk oversight had on the leadership structure of the board. If there was no impact, include a statement to the effect that there was no impact, rather than remaining silent.

Reporting of Shareholder Voting Results on Form 8-K

Item 5.07 of Form 8-K requires companies to report preliminary results of their shareholder votes within four business days after the end of the meeting at which the vote was held, and to file an amended report on Form 8-K within four business days after the final results are known. However, if the final results are known within four business days after the end of the meeting, the final results should be reported on the original Form 8-K.

In addition, under the new say-on-pay rules, companies will be required to amend their Form 8-K reports filed under Item 5.07 to report their decision as to how frequently the say-on-pay vote will be held, no later than 150 calendar days after the date of the annual meeting or other meeting at which the say-on-frequency vote was taken, but in no event later than 60 days prior to the deadline for the submission of shareholder proposals, under Rule 14a-8 under the Exchange Act, for the subsequent annual meeting.

Compensation Disclosures Continue to Take Center Stage

The staff of the SEC's Division of Corporation Finance continues to emphasize the importance of clear and comprehensive executive compensation disclosures, with the CD&A as the focal point of the SEC's ongoing scrutiny. The staff continues to note, in speeches, at conferences, and in comment letters, that issuers' efforts must be redoubled in this area in order to provide disclosure that is responsive to the requirements.

Compensation Discussion and Analysis

Most companies are required to provide a CD&A in their proxy statements or Form 10-Ks, discussing a company's philosophy on executive compensation for their named executive officers (NEOs).[6] Comparable to the MD&A, the CD&A is viewed as the centerpiece of the SEC's principles-based reporting approach to executive compensation.

The CD&A must discuss the six explicit items set forth below, and must also discuss and analyze other information that a company's directors considered in determining the amounts and types of compensation paid to the NEOs, during the most recently completed fiscal year.

1. What are the objectives of the company's compensation programs?
2. What is the compensation program designed to reward?
3. What is each element of compensation?
4. Why does the company choose to pay each element?
5. How does the company determine the amount (and, where applicable, the formula) for each element?
6. How do each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?

The staff has emphasized repeatedly that CD&A disclosure needs to be focused on *how* and *why* a company arrives at specific compensation decisions and policies, including discussions of the following:

- *How* the company determined the amounts of specific compensation elements;
- *How* the company arrived at the particular levels and forms of compensation paid to their NEOs;
- *Why* the company pays that compensation; and
- *How* and *why* the determinations the company made with regard to one compensation element for a particular NEO may or may not have influenced decisions it made with respect to other compensation elements that were awarded to that NEO.

As you prepare the CD&A to analyze compensation decisions made during 2010, in light of the say-on-pay votes that are now required for all companies, other than smaller reporting companies, we encourage you to consider writing the CD&A as both an advocacy piece and a disclosure piece. It will be more important than ever to create a compelling rationale for compensation decisions that were made, in light of your company's and executives' performance during the past year, since the CD&A forms a large component of the disclosure on which your shareholders will be voting to approve or not approve.

In addition, we recommend that you read the following documents, which are available on the SEC's website:

- A speech by Shelley Parratt, deputy director of the Division of Corporation Finance, called "Executive Compensation Disclosure: Observations on the 2009 Proxy Season and Expectations for 2010;"
- *Staff Observations in the Review of Compensation Disclosure*, by the staff of the Division of Corporation Finance; and
- A 2007 speech and 2008 speech by John W. White, former director of the

> SEC's Division of Corporation Finance, in which he discussed the staff's observations and expounded upon his own thoughts and reactions to the first and second years of the CD&A disclosure regime.[7]

In Ms. Parratt's speech, she emphasized the staff's position with regard to the CD&A, which is that it "is essential to providing investors with meaningful insight into the compensation policies and decisions of the companies in which they choose to invest. The CD&A is where a company tells its story about why it made the decisions it made."

She also observed that the staff had undertaken a review of the comments that it had issued to companies regarding their compensation disclosures, and noted that there appeared to be a marked difference in the quality and detail of the disclosure provided by companies whose disclosures had been the subject of a staff review, and those whose disclosures had not yet been reviewed by the staff. This led to the staff's conclusion that companies that had not been reviewed were likely waiting to provide disclosure that was fully compliant with the rules until their filings were selected for review, even though ample guidance is available to all companies with regard to the compensation disclosure requirements and the staff's expectations regarding those requirements.

As a result, in order to encourage companies strongly to avoid this practice of waiting for a staff review to provide fully compliant disclosure, Ms. Parratt notes that companies need to "take a proactive approach" to their CD&A disclosure. If they do not, they may be required to amend their proxy statements *before* the annual meeting takes place in order to address comments on the disclosure, instead of simply agreeing to provide responsive disclosure in their future proxy statements. The need to respond to comments and provide such an amendment could result in a delay to the shareholder meeting, if the comments are not resolved with sufficient time to spare before the meeting is scheduled to occur.

Ms. Parratt also noted two areas in particular on which companies should concentrate when preparing their CD&As for this year: the level of *analysis* in their disclosure, and the use of and disclosure surrounding *performance targets*.

1. ***Analysis***. Ms. Parratt noted that many CD&A disclosures have become extremely lengthy and full of detail, but that this does not by itself satisfy the requirement to analyze *how* and *why* compensation decisions were made. She noted:

   > A company's analysis of its compensation decisions should present shareholders with meaningful insight into its compensation policies and decisions, including the reasons behind them…. Factual statements about what the company or compensation committee did or did not do are not enough. It isn't sufficient for a company to state that its compensation committee used tally sheets, wealth accumulation analyses, or internal pay equity analyses in making compensation decisions. The company should discuss how the committee used these tools to determine compensation amounts and structures, and explain why it reached its decisions.

   This theme of insufficient analysis has been touched upon by several other SEC staff members, including in the speeches referenced above. We encourage you to take a fresh look this year at the amount of analysis in your CD&A disclosure, and consider whether your compensation information has not merely been presented in great detail, but most importantly has been thoughtfully analyzed.

2. ***Performance Targets***. Ms. Parratt observed that the staff has issued more comments in the area of performance targets than in any other part of the CD&A. She noted that each company must determine whether corporate or individual performance targets are material to its compensation policies and decisions. Given recent negative economic conditions, many companies have set performance targets that were not achieved. Even if this is the case, the staff believes that disclosure of

performance targets in the CD&A may still be material, in that the targets indicate how a company intended to incentivize its management.

If the performance targets are deemed by a company to be material, they must be disclosed, with one exception: If a company believes that disclosure of those performance targets will result in competitive harm, and seeks to omit those targets as a result, the company will be asked to provide a justification for the omission, using the same standard that would be required in a confidential treatment request. The company's rationale for claiming such an exception should be developed prior to making a filing that excludes specific performance targets, so that the analysis can be sent promptly to the staff in the event the filing is reviewed.

Please refer to our 2010 year-end kickoff memo for a further description of the specific requirements of the CD&A.

Continued Erosion of Broker Discretionary Voting on Director Elections

Continuing the trend in recent years to narrow the circumstances in which brokers have the ability to vote their clients' shares at shareholder meetings on matters as to which the clients have not provided specific voting instructions, New York Stock Exchange (NYSE) Rule 452 has been amended once again to provide that brokers do not have the ability to vote clients' uninstructed shares on any of the new say-on-pay votes. Last year, NYSE Rule 452 was amended to eliminate broker discretionary voting in uncontested elections of directors.

As we stated last year, with the election of directors now treated as a "nonroutine" matter, companies should consider placing a matter on the ballot that will be considered "routine" under Rule 452 in order to preserve the ability of brokers to vote uninstructed shares on at least one matter at the meeting, and thereby contribute to the quorum. The most common shareholder meeting matter that is still considered "routine" for this purpose is the ratification of a company's independent registered public accounting firm.

Our recommendation for any company that is concerned about achieving a quorum at a meeting is to include a proposal for shareholders to ratify the company's accounting firm. Many companies already do this as a matter of course. Companies may also want to consider hiring a proxy solicitor in order to help ensure that a quorum and necessary votes are achieved.

Electronic Delivery of Proxy Materials

The year 2011 is the third year that all public companies, regardless of size, are required to comply with the SEC's "e-proxy" rules, which require that all annual meeting materials be posted electronically on a publicly available Internet site, which must be different from the SEC's website.[8] The annual meeting materials to be posted include the proxy statement, the proxy card, and the annual report to shareholders required by Rule 14a-3 under the Exchange Act (sometimes referred to as the "glossy" annual report, as distinct from the annual report on Form 10-K). These rules took effect for all proxy solicitations, other than those relating to a business combination transaction, commencing on or after January 1, 2009.

While all proxy materials must now be made *available* electronically, issuers have a choice as to the means of *delivery* of those materials. As the SEC notes in its release on adopting these rules, these changes "are intended to provide all shareholders with the ability to choose the means by which they access proxy materials, to expand use of the Internet potentially to lower the costs of proxy solicitations, and to improve the efficiency of the proxy process and shareholder communications." Also, issuers will still be required to have a supply of proxy materials available in paper copies for those shareholders who request them.

Under the e-proxy rules, issuers can elect the "notice only" option, under which the issuer will send a notice to its shareholders that the annual meeting materials are available on the Internet, and not deliver paper copies of those materials unless requested to do so by shareholders, or the “full set delivery” option, under which the issuer will continue to deliver paper copies of all proxy materials to shareholders, but must still post those same materials on an Internet site and tell shareholders how they can access the materials on the Internet. Issuers do not need to choose only one of the options for all of their shareholders and may choose different delivery options for different groups of shareholders.

In light of observations that the e-proxy rules have negatively impacted the rates of voting in elections by retail shareholders, the SEC has slightly revised the mechanics of the e-proxy process, with a goal of encouraging greater voting participation.[9] These revisions, among other things, amend Rule 14a-16 under the Exchange Act to allow companies to include an explanation of the e-proxy process in the notice that is distributed to shareholders, and provide for a format of the notice that the staff believes will be easier for shareholders to follow.

Companies may want to analyze the makeup of their shareholder base, and if necessary or desirable, adopt a hybrid approach to distributing proxy materials, in which retail shareholders receive a paper distribution and institutional shareholders receive a “notice only” distribution. Companies considering a notice only distribution of their proxy materials this year should consult, well in advance of the scheduled annual meeting date, with legal counsel and with their transfer agents, in order to ensure that all applicable deadlines for delivery of proxy materials are being met.

Notice Only Option

An issuer that chooses the notice only delivery model will be required to send a Notice of Internet Availability of Proxy Materials (Notice) to all shareholders *at least 40 calendar days* before the meeting date or, if no proxies are being solicited, before the date on which votes will be used to take a corporate action. This timing requirement will mean, for most issuers choosing to rely on this option, that they will need to prepare and distribute the Notice well in advance of 40 days prior to the meeting date because the rules also provide that issuers must provide *intermediaries* (such as brokers who hold securities on behalf of their clients) with information necessary for the intermediary to prepare and distribute its own notice at least 40 calendar days before the meeting date (or shareholder action date).

The Notice must also be filed with the SEC, as additional soliciting material, on the first date that the issuer sends the Notice to its shareholders, and no other proxy materials may be sent along with the Notice. If a shareholder who receives the Notice requests delivery of a paper copy of the proxy materials before the meeting has occurred, the issuer must respond to the request by sending a copy of the materials by first class mail, within three business days of receipt of the request.[10] A shareholder’s request for delivery of a paper copy of the proxy materials shall continue with respect to subsequent proxy materials, unless it is revoked by the shareholder.

A company may only send the Notice to shareholders by electronic delivery instead of mail if the shareholder has previously consented to receiving proxy materials by e-mail (or the individual is an employee and the employee uses the e-mail system in the normal course of his or her employment and routinely logs on to a computer to receive e-mail and other communications or does not routinely log on to a computer, but has access to alternative ways of receiving e-mail messages, such as printouts from a secretary or access to a computer kiosk). A company’s transfer agent should be able to confirm how many shareholders have signed up for electronic delivery; in our experience, this number is usually small.

In addition, the Notice must also satisfy the company’s shareholder notice obligations under its by-laws and state corporate law, as the company may not be allowed to rely upon the notice set forth in the proxy statement to satisfy its corporate law requirements as such notice will only be posted electronically. For example, Section 232 of the Delaware General Corporation Law (DGCL) prohibits the mailing of the Notice to shareholders electronically without the shareholder’s prior consent to receive notices electronically.

Issuers relying on the notice only option may follow up the delivery of a Notice with a paper or e-mail mailing of a proxy card, but must wait to do so until at least 10 calendar days from the mailing of the

Notice, unless the proxy card is accompanied or preceded by a copy of the proxy materials. If the issuer is providing telephone voting as a means for executing a proxy, the Notice must not include the telephone number to use for voting, since the shareholders will not, as of the time of receipt of the Notice, necessarily have reviewed the proxy materials themselves.

The notice only delivery option may not be used for proxies related to business combination transactions.

Full Set Delivery Option

If the issuer elects to continue to deliver all proxy materials in paper form, it will nonetheless still be required to (1) post its proxy materials on a publicly available Internet website (not including the SEC's website), and (2) include information regarding access to the proxy materials that are posted on the Internet and other information regarding the meeting, either by preparing and sending a separate Notice or by including the information in the proxy materials themselves.

Although the full set delivery option requires the traditional printing and mailing of all of the proxy materials to shareholders, this option requires only one mailing to shareholders, and, assuming the company does not have many shareholders that have consented to receiving proxy materials via e-mail, may turn out to be similar from a cost perspective to the notice only option.

In addition, the full set delivery option does not impose the requirement on companies to deliver the Notice at least 40 calendar days before the meeting, and does not even require that companies deliver a separate Notice, as the information required to be contained in the Notice may be included in the company's proxy statement.

Because the notice only option has resulted in a significant decrease in the voting by retail shareholders, many proxy solicitors are suggesting that companies considering switching to notice only delivery for the first time this proxy season may want to reconsider this decision, in light of the elimination of the ability of brokers to vote in their discretion for the election of directors, as this double effect will likely have a larger negative impact on shareholder voting.

Internal Control Over Financial Reporting

Companies that qualify as large accelerated filers and accelerated filers have now experienced four years of compliance with the requirements of Section 404 of Sarbanes-Oxley, concerning internal control over financial reporting (ICFR). As a reminder, those filers are required to include the following in their annual reports:

- An evaluation by management of the effectiveness of the company's ICFR, and
- An attestation report from the company's independent accountants with respect to the effectiveness of the company's ICFR.[11]

Management must also evaluate any change in a company's ICFR that occurs during a fiscal quarter and that has materially affected, or is reasonably likely to materially affect, the company's ICFR.

The Dodd-Frank Act contained one significant benefit to smaller reporting companies: a permanent exemption from the requirement to include the attestation report of the company's independent accountants with respect to the effectiveness of the company's ICFR. Smaller reporting companies are, however, still required to include an evaluation by management of the effectiveness of ICFR in their annual reports.

The SEC has also made it significantly easier for companies that have had declines in the market value of their public float to exit accelerated filer status. An accelerated filer whose public float has dropped below $50 million, as of the last business day of its second fiscal quarter, may cease to report as an accelerated filer at the end of the fiscal year in which its public float fell below $50 million, and may therefore file its Form 10-K for that year and subsequent periodic reports on a nonaccelerated basis.

The rules also contain similar requirements for exiting large accelerated filer status, permitting a large accelerated filer whose public float dropped below $500 million, as of the last business day of its second fiscal quarter, to cease reporting as a large accelerated filer as of the end of the fiscal year in which its public float fell below $500 million, and to file its Form 10-K for that year and subsequent periodic reports as an accelerated filer, or a nonaccelerated filer, as appropriate. Prior to these changes, companies that had become accelerated filers could only cease to report as accelerated filers if they became eligible to report as small business issuers.

Management's annual report on ICFR and the attestation report, provided by the company's auditors, which are required pursuant to Item 308 of Regulation S-K, should appear either in close proximity to the MD&A section of the Form 10-K or immediately preceding the company's financial statements. In addition, the SEC has indicated that companies should include both management's report on ICFR and the auditors' report on ICFR in the annual report to shareholders when audited financial statements are included in that report.

The SEC has also noted that, if management states in the report that the company's internal controls are ineffective, or the auditors' report includes anything other than an unqualified opinion, and those reports are *not* included in the annual report to shareholders, the company would have to consider whether the failure to include those reports constitutes an omission of a material fact, rendering the annual report to shareholders misleading.

If you receive any indication from your accountants that a qualified report will be issued, or that there are material weaknesses or significant deficiencies in your internal controls, you should consult with the Mintz Levin attorney with whom you work as soon as possible to determine any disclosure ramifications.

The 2011 Periodic Report Filing Deadlines

For companies that qualify as large accelerated filers and have fiscal years ending on December 31st, annual reports on Form 10-K are due 60 days after fiscal year-end (Tuesday, March 1, 2011).[12] Form 10-K reports continue to be due 75 days following fiscal year-end for accelerated filers[13] (Wednesday, March 16, 2011 for December 31st year-end companies), and 90 days after fiscal year-end for nonaccelerated filers (Thursday, March 31, 2011 for December 31st year-end companies).

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

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 changes to the listing requirements of Nasdaq, NYSE, and NYSE Amex, relating to board and committee membership requirements, all impact who may serve.[14] 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, promptly following the 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; and in certain situations relating to an acquisition or merger.

An exemption from the shareholder approval requirement is also available for certain tax-qualified, nondiscriminatory 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, increases in the numbers of shares available under old plans, option-repricing programs, or material plan amendments.

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, which may require shareholder approval. Some items to consider are as follows:

- 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, which would require shareholder approval?
- Has the company reviewed its charter and by-laws to assess any antitakeover 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 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 nonexecutive 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?
- How frequently does the company want to recommend to shareholders that they vote on pay: once every year, once every two years, or once every three years?

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, which 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?

Management:

- Update the company's director and officer questionnaire to elicit additional information from directors regarding legal proceedings, public company directorships, and other information that the company believes is necessary to gather the information regarding the increased disclosure that is required.

- Update disclosure controls and procedures to reflect the requirement to report shareholder meeting results in a Form 8-K, within four business days of the end of the meeting, and to amend the Form 8-K to report the company's decision regarding how frequently it will conduct the say-on-pay votes, in light of the outcome of the say-on-frequency vote described above.
- Is the company using a compensation consultant for which disclosure would be required?
- Update disclosure controls and procedures to ensure that the reporting of stock and option awards reflects the aggregate grant date fair value as calculated in accordance with Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) 718.
- Update disclosure controls and procedures to ensure that the company keeps track of how often the say-on-frequency vote is being held (i.e., at least once every six years).

Mintz Levin Website: Client Publications

We would also like to call your attention to the many client 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.

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Click here to view Mintz Levin's Corporate and Securities attorneys.

Endnotes

1 We invite you to review our memorandum from last year, which analyzed regulatory changes that were new for fiscal year 2009, 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 *Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis*, Release No. 33-9144, dated September 17, 2010.

4 *Concept Release on the U.S. Proxy System*, Release No. 34-62495, dated July 14, 2010.

5 Note that the SEC stated in the release that under the current CD&A disclosure rules, to the extent that risk considerations are a material aspect of the company's compensation policies or decisions for its named executive officers, the company is required to discuss them as part of the CD&A and will continue to be required to discuss them in the CD&A after the adoption of these amendments.

6 The CD&A is not required for smaller reporting companies and foreign private issuers.

7 The text of the speech by Ms. Parratt is available at http://www.sec.gov/news/speech/2009/spch110909sp.htm . The Staff Observations are available at http://www.sec.gov/divisions/corpfin/guidance/execcompdisclosure.htm. The text of the 2007 speech by Mr. White is available at http://www.sec.gov/news/speech/2007/spch100907jww.htm, and the text of the 2008 speech by Mr. White is available at http://www.sec.gov/news/speech/2008/spch102108jww.htm.

8 *Shareholder Choice Regarding Proxy Materials*, Release No. 34-56135, dated July 26, 2007. See also *Internet Availability of Proxy Materials*, Release No. 34-55146, dated January 22, 2007.

9 *Amendments to Rules Requiring Internet Availability of Proxy Materials,* Release No. 33-9108, dated February 22, 2010. Of companies adopting the notice only model from July 2007 to June 2008, only approximately 16.6% of retail shareholders voted their shares, as compared to approximately 34.3% of such retail shareholders in the year prior to the implementation of the e-proxy rules.

10 If the request for copies of proxy materials is received after the conclusion of the meeting, the materials must still be sent, but they do not need to be sent by first class mail nor do they need to be sent within three business days.

11 Previously, the attestation report from a company's independent accountants was required to address both the accountants' views as to the company's ICFR and also the accountants' views as to the company's evaluation of its own ICFR. The SEC has revised this requirement to provide that the attestation need only cover one topic: the accountants' views as to the effectiveness of the company's ICFR. See http://www.sec.gov/rules/final/2007/33-8809.pdf.

12 "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, 2010);
- 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 small business issuers under SEC rules.

13 "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, 2010).

14 Please see our Client Advisory, dated November 2003, entitled "Nasdaq Corporate Governance Rules," for a further description of these changes.

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0918-0210-NAT-SEC