WHITE & CASE

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New Considerations for the 2011 Annual Reporting and Proxy Season

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), related rulemaking initiatives and guidance issued in 2010 by the US Securities and Exchange Commission (the "SEC") will impact the upcoming 2011 annual reporting and proxy season for all public companies. This client alert summarizes the key new developments that public companies should consider in preparing their disclosures and reviewing their existing corporate governance policies and procedures.[1]

What Requirements are in Effect for the Upcoming Annual Reporting and Proxy Season?

Say-on-Pay, Say-on-Frequency, and Say-on-Golden Parachutes—What Should Companies Do?

All issuers with an annual meeting occurring on or after January 21, 2011 are required to include on the ballot a non-binding proposal on executive compensation ("say-on-pay") and the desired frequency of the say-on-pay votes ("say-on-frequency"). Specifically, companies must seek a non-binding shareholder vote not less frequently than once every three years at any annual or other meeting of shareholders for which the SEC requires compensation disclosure, to approve the compensation of the named executive officers, as disclosed under Item 402 of Regulation S-K. Additionally, not less frequently than once every six years, companies must seek a non-binding shareholder vote to determine whether the say-on-pay vote will occur every one, two or three years. On October 18, 2010, the SEC proposed rules to implement say-on-pay and say-on-frequency. Those rules have not yet become effective.[2] Because the inclusion on the ballot of say-on-pay and say-on-frequency is a requirement of the Dodd-Frank Act, it will be effective for all issuers with an annual meeting occurring on or after January 21, 2011 even if the proposed SEC rules are not yet effective. The SEC has indicated that it will not object if issuers do not file a preliminary proxy statement if the only matters that would require a filing in preliminary form are the say-on-pay vote and the say-on-frequency vote.

1 For a detailed discussion of the corporate governance and executive compensation provisions of the Dodd-Frank Act, refer to our July 2010 client alert Corporate Governance and Executive Compensation Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

2 See our November 2010 client alert SEC Proposes Rules on Say-on-Pay and Related Matters.

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In light of these new requirements, companies should consider the following steps in preparing for the say-on-pay regime.

- **Review Existing Compensation Programs.** In light of the say-on-pay regime, companies should review their executive compensation programs carefully to identify any arrangements that shareholders may consider to be poor or problematic pay practices. Examples include egregious employment contracts containing multi-year guarantees for salary increases, non-performance based bonuses, and equity compensation; excessive perquisites; excessive severance and/or change in control provisions; or tax reimbursements on certain executive perquisites or other payments. Even at this stage, it may still be possible to engage in dialogue with major shareholders to address areas of concern on a prospective basis in order to forestall a negative vote on the company's existing practices.

- **CD&A as Investor Communication Tool.** The CD&A will become an investor communication tool supporting the say-on-pay proposal and serving as a platform to solicit a favorable say-on-pay vote. As a result, it is especially important to ensure that the CD&A clearly and effectively explains the company's executive compensation program and the philosophy behind it. Proxy timelines should be drafted to allow for additional time to enable comprehensive and careful review of the CD&A disclosures by management and the compensation committee in light of increased sensitivities. Executive summary sections of the CD&A should be used to highlight to shareholders the principal aspects of executive compensation programs. Many early filers who did not include an executive summary section in last year's proxy statement have added such a section to their CD&A's this season. The best CD&A disclosures will focus on the company's links between pay and performance, briefly set out the company's results for the prior year and tie them to the performance measures used to determine compensation, summarize key accomplishments of NEOs and the CEO in particular, highlight any compensation policy changes and explain any aspects of compensation policies that may be unique to the company. Companies should use graphical presentations and tables where appropriate.

- **Decide on the Frequency of Say-on-Pay Votes—Determine Board Recommendation.** Although each company will be required to offer four choices to shareholders on a say-on-frequency proxy card—one year, two years, three years or abstain—the board may make a recommendation as to whether shareholders should approve one, two or three years. So far, only a handful of companies have opted not to recommend to shareholders how they should vote on the "frequency" vote. Most companies are making a recommendation on the preferred frequency of the say-on-pay vote and explaining the basis for that recommendation as part of the proposal or in the CD&A. Companies should be aware that Institutional Shareholder Services, Inc. ("ISS") is recommending an annual say-on-frequency vote. However, despite ISS's position, most definitive or preliminary proxy statements for annual meetings of shareholders to be held on or after January 21, 2011 filed to date contain a triennial say-on-frequency proposal. Of the companies that have opted for an annual vote, most are large, prominent companies. Companies should consider whether the company's specific compensation structure makes a biennial or a triennial vote more appropriate. Proactively reaching out to major shareholders to survey their preferences may be desirable.

- **Drafting Your Say-on-Pay Resolutions and Proxy Statement Proposal.** While the proposed rules do not prescribe a specific form of a say-on-pay resolution, the SEC notes that such resolution is required to cover all compensation required to be disclosed in the proxy statement pursuant to Item 402 of Regulation S-K. Therefore, the say-on-pay resolution should specifically refer to compensation disclosures covered by Item 402 of Regulation S-K. While most early filers chose to include their say-on-pay proposals in the section outlining other management proposals, companies may choose to include their say-on-pay proposals close to the CD&A and other compensation disclosures. Most early filers included a statement in their say-on-pay and say-on-frequency resolutions indicating that the vote is advisory; some also stated that to the extent there is any significant vote against named executive officer compensation, the board will decide whether any action is appropriate.

- **Including Enhanced Disclosure to Ensure Golden Parachute Approval.** All issuers filing proxy statements related to an acquisition, consolidation, or proposed sale or disposition of all or substantially all assets of the issuer, will be required to seek a non-binding shareholder vote on payments to named executive officers in connection with the change of control transaction (unless previously approved by a say-on-pay vote) ("say-on-golden-parachutes"). Unlike say-on-pay and say-on-frequency votes, say-on-golden-parachute votes will only be required following the effectiveness of the SEC's proposed rules. Under the proposed rules, if a company chooses to hold a golden parachute vote and include corresponding disclosure as part of its say-on-pay vote at an annual meeting, no separate advisory vote will be required at the time of a transaction (i.e., if such compensation was previously subject to a say-on-pay vote). Therefore, companies may wish to consider the advantages and disadvantages of holding a golden parachute vote at the time of the annual meeting and including the golden parachute disclosures in their annual meeting proxy statements. However, we believe that companies are unlikely to take advantage of such votes at annual meetings because any subsequent changes to golden parachute arrangements would make any earlier vote ineffective for purposes of avoiding

the vote in the acquisition context. In addition, the SEC stated in its proposed rules that the level of disclosure required for say-on-golden-parachutes was higher than that required under existing Item 402(j) and has proposed a new Item 402(t) which is not yet effective. Nevertheless, companies may wish to consider whether expanding existing golden parachute disclosures in annual meeting proxy statements may be advisable in order to set the stage for any future votes. The golden parachute advisory vote will become effective after the SEC adopts the proposed rules, which is still expected to occur during January 2011.

- **Related Form 10-Q and Form 10-K Disclosure.** The proposed rules would impose additional disclosure obligations on companies with respect to the effects of the say-on-frequency vote, including whether the vote is non-binding and whether the company intends to follow the results of the advisory vote. Amended Item 9B of Form 10-K and new Item 5(c) of Part II of Form 10-Q would require an issuer to disclose during the period in which an advisory vote was held its decision regarding how frequently it will conduct a say-on-pay vote in light of the results of the say-on-frequency vote.

Prohibitions on Broker Discretionary Voting

Pursuant to Section 957 of the Dodd-Frank Act, each national securities exchange is required to adopt rules prohibiting brokers from voting uninstructed shares in connection with a shareholder vote on the election of directors, executive compensation or any other "significant matter" (as determined by the SEC). It should be noted that NYSE Rule 452 was already amended effective January 2, 2010 when the Dodd-Frank Act was adopted to prohibit brokers from voting uninstructed shares in connection with uncontested elections of directors. In September 2010, the SEC approved, on an expedited basis, amendments to NYSE Rule 452 and NASDAQ Rule 2251. The amended rules provide that executive compensation matters, including say-on-pay, say-on-frequency and say-on-golden-parachutes, are non-routine matters. As a result, broker discretionary voting on such matters is now prohibited. The SEC's future rules implementing Section 957, which are scheduled to be released between April 2011 and July 2011, may focus on "significant matters" beyond executive compensation, as to which national securities exchanges must prohibit broker discretionary voting. The inability of brokers to vote uninstructed shares will make it harder for most companies to achieve majority support for say-on-pay and say-on-frequency votes. This is because brokers voting uninstructed shares traditionally supported management proposals. Conversely, institutional investors are more likely to vote their shares and to do so in a manner critical of management.

Additional Form 10-Q, Form 10-K, Form 20-F, Form 40-F and Form 8-K Considerations

- **Liquidity, Capital Resources and Short-Term Borrowings Disclosures in MD&A.** In September 2010, the SEC issued interpretive guidance relating to companies to improve the discussion of their liquidity and capital resources in MD&A (i.e., including liquidity disclosure, leverage ratio disclosure and contractual obligations table disclosure) and a proposal requiring detailed disclosure about short-term financing arrangements.[3] The interpretive guidance is applicable to both Form 10-Qs and 10-Ks. As a result, for the upcoming annual reporting season, companies should review how they present information regarding their liquidity and capital resources when preparing their annual reports and subsequent filings with the SEC. Furthermore the SEC proposed new disclosure rules for short-term borrowings. While new rules on this topic will not be effective for the upcoming proxy season, it is almost certain that new disclosure rules in this area will be adopted. Companies should therefore monitor this area closely.

- **XBRL.** In November 2010, the staff of the SEC's Division of Risk, Strategy and Financial Innovation completed a review of the Interactive Data Financial Statement submissions from June through August of 2010 under the SEC's rules relating to interactive data for financial reporting and posted its observations in its report titled, "Staff Observations From Review of Interactive Data Financial Statements." The staff identified common issues in filings with eXtensible Business Reporting Language (XBRL) exhibits (e.g., incorrectly entering negative values; extending an element where an existing US GAAP Taxonomy element is appropriate; extending because of relatively minor additions to or deletions from the US GAAP taxonomy standard definition and extending because of the context of an element, to name a few) and encouraged companies to review their future XBRL filings to ensure they are prepared consistently with the staff's observations. The report also reminded companies of the existence of frequently asked questions on XBRL. The rule's limited liability provisions expire two years after a company's initial XBRL submission, so the company's liability for that information increases. Both companies that already are required to prepare an XBRL exhibit for their upcoming annual reports and companies that will be required to first provide interactive data exhibit for the fiscal periods ending on or after June 15, 2011 should consider the staff's comments when they tag their interactive financial statement data.

3 See our September 2010 client alert SEC Issues New Guidance and Proposes Rules to Improve Disclosure of Liquidity and Funding Risks.

- **Extractive Industries and Conflict Minerals Disclosure.** On December 15, 2010, the SEC proposed rules to implement provisions of the Dodd-Frank Act relating to: (1) mine safety matters; (2) conflict minerals; and (3) resource extraction issuer payments to governments. Of the three, only the disclosure requirements relating to mine safety matters set forth in the Dodd-Frank Act are currently in effect. In its December 15, 2010 release the SEC proposed to codify the requirements in order to facilitate consistent compliance by reporting companies. The conflict minerals and the resource extraction issuer payments disclosures will not be in effect for the upcoming reporting season. The conflict minerals disclosure will be required after the first full fiscal year following the promulgation of the final rules; the resource extraction issuer payments disclosure will be required in annual reports relating to the fiscal year ending on or after April 15, 2012.

  - **Mine Safety.** The Dodd-Frank Act imposes certain disclosure obligations in both periodic reports on Form 10-Q, Form 10-K, Form 20-F and Form 40-F, as applicable, and current reports on Form 8-K on any SEC reporting company that is an operator, or that has a subsidiary that is an operator, of a "coal or other mine", including a tabulation of certain violations under the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), the total dollar value of proposed assessments from the Mine Safety and Health Administration ("MSHA"), the total number of mining-related fatalities, a list of mines that have received notice from MSHA of an actual or potential pattern of certain violations, and any pending legal actions before the Federal Mine Safety and Health Review Commission. A Form 8-K filing is required in connection with the receipt of an imminent danger order issued under Section 107(a) of the Mine Act, receipt of written notice from MSHA of a pattern of violations under Section 104(e) of the Mine Act, or receipt of written notice from MSHA of a potential pattern of violations under Section 104(e) of the Mine Act. Under the proposed rules, disclosure would be required in Part II of Form 10-Q, Part I of Form 10-K and Forms 20-F and 40-F, with a note stating that the issuer has mine safety violations or other regulatory matters to report in accordance with Section 1503(a), and that the required information is included in an exhibit to the filing. There is no exemption for smaller reporting companies or foreign private issuers (except a foreign private issuer will not be required to provide a Form 8-K disclosure and will not have to provide disclosures regarding foreign mines; however, to the extent mine safety issues are material, disclosure could be required in MD&A, risk factors, description of business or legal proceedings sections of annual reports). It should be noted that some mine operators are concerned that the proposed rules do not contemplate any materiality standard with respect to a Form 8-K filing requirement which has already resulted in an increase in Form 8-K filings to, for example, report issuances of imminent danger orders that were cancelled immediately upon issuance.

  - **Conflict Minerals.** Companies that file reports with the SEC under the Securities Exchange Act of 1934 (the "Exchange Act") would be required to disclose annually whether they use "conflict minerals" that originate from the Democratic Republic of the Congo or adjoining ("DRC") countries that are "necessary to the functionality or production" of a product that they either manufacture or contract to be manufactured. If a company concludes that the enumerated minerals it uses (which are commonly used in a number of industries, most notably in the jewelry and electronics industries) did not originate in the DRC countries, the company would disclose its conclusion in its annual report and on its website, including the reasonable country of origin inquiry process it used in reaching this determination. If a company concludes that its conflict minerals did originate in the DRC countries, or is unable to conclude that its conflict minerals did not originate in the DRC countries, such company would disclose this conclusion, furnish a conflict minerals report as an exhibit to its annual report and make it available on the company's website. The requirements would apply equally to domestic and foreign issuers and to smaller reporting companies. It should be noted that while the Dodd-Frank Act does not impose any penalty on companies that report taking no action to avoid using conflict minerals, it does require companies to make the required disclosures publicly available on their websites, the clear intention of which is to allow the public marketplace to "judge" such companies.

  - **Payments by Resource Extraction Issuers.** Natural resource companies that engage in the commercial development of oil, natural gas or minerals will be required to disclose in their annual reports information relating to any payments made by the resource extraction issuer, or its subsidiaries or entities under the control of the resource extraction issuer, to foreign governments or the federal government for the purpose of the commercial development of oil, natural gas or minerals. The new disclosure must be provided in an interactive data format and the SEC is required to make this information publicly available on the Internet to the extent practicable.

- **Attestation Report Not Required for Non-Accelerated Filers.** Section 404(a) of the Sarbanes-Oxley Act of 2002 ("SOX") requires annual reports on Form 10-K and Form 20-F to contain a report from management on the effectiveness of a company's internal control over financial reporting. Separately, Section 404(b) requires the company's regular auditor to attest to and report on management's assessment. Section 989G(a) of the Dodd-Frank Act, effective immediately upon enactment, permanently exempts non-accelerated filers from having to

include an attestation report of the filer's registered public accounting firm. Although the Dodd-Frank Act does not provide non-accelerated filers with relief from Section 404(a), it should still significantly reduce their costs of being public companies. It should be noted that certain non-accelerated filers may still wish to consider whether obtaining an auditor's attestation is desirable (e.g., filers engaging in capital raising activities or filers whose non-accelerated filer status is either temporary or is likely to change in the near future).

- **General Dodd-Frank Related Disclosures.** Companies should consider whether adding the Dodd-Frank Act related disclosure language to the forward-looking statements, risk factors, business and regulatory matters and MD&A sections of the Form 10-K and/or Form 20-F may be appropriate. For example, some early filers have included a statement in their risk factors or forward-looking statements sections addressing the possible impact of the Dodd-Frank Act. We generally believe that such specific disclosures are more appropriate for companies whose business is directly impacted by the Dodd-Frank Act, such as financial institutions or companies engaging in derivatives activities.

2010 Postseason Considerations

While companies are likely to be focusing on the new requirements related to the Dodd-Frank Act and various recent rulemaking initiatives in preparation for the upcoming annual reporting and proxy season, appropriate consideration should be afforded to lessons learned from the 2010 proxy season largely triggered by the December 2009 amendments to the proxy disclosure rules as well as interpretive guidance relating to climate change matters. Below is a brief summary of items that should be considered when drafting this year's disclosures:[4]

Director Qualifications. Amended Item 401(e) of Regulation S-K requires disclosure of the specific experience, qualifications, attributes or skills that led to the conclusion that each director or nominee should serve as a director. In its comment letters, the SEC echoed its release implementing the amendments and requested specificity cautioning against generalized boilerplate disclosures. Companies should consider whether amending annual Director and Officer Questionnaires to incorporate this requirement may be desirable.

4 For a more detailed overview of the December 2009 amendments and the climate change guidance, refer to our December 2009 client SEC Adopts Enhanced Compensation and Governance Disclosure Requirements client alert and our February 2010 client alert SEC Adopts Interpretive Guidance on Climate Change Disclosure Obligations.

Diversity. Amended Item 407(c)(2)(vi) of Regulation S-K provides that if the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, the company must describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy. The SEC's comment letters specifically focused on the latter portion of the requirement, requesting a description of how the diversity policy is implemented.

Risk Management and Compensation Risk Assessment. Amended Item 402(s) and Item 407(h) require certain disclosures relating to risk management. In effect, these rules encourage companies to engage in a risk assessment process, but do not expressly impose any disclosure requirements if the company concludes that its compensation practices do not promote risk-taking behavior. However, while the rules do not expressly require an affirmative statement that a company's compensation policies and practices are not reasonably likely to have a material adverse effect on the company and only require disclosure if compensation was determined reasonably likely to have a material adverse effect, companies which remained silent in their proxy statements during the 2010 proxy season received comment letters asking them to "confirm that your policies and practices are not reasonably likely to have a material adverse effect." Companies who included an affirmative statement in their disclosures were asked to explain "the substantive basis for the board's conclusion that your compensation policies and practices are not reasonably likely to have a material adverse effect "and "describe the process undertaken to reach that conclusion". For these reasons, companies should consider including a statement confirming that the company engaged in a risk assessment process, briefly outlining the conclusions, and discussing mitigating factors such as claw-backs and stock retention policies that led the board and management to believe it did not face any material risk.

Compensation Consultants. Amended Item 407(e)(3) of Regulation S-K requires disclosure relating to compensation consultant compensation. The requirement is intended to elicit disclosure necessary to evaluate advisor independence. As discussed below, the Dodd-Frank Act further focused on this area with its new compensation committee and advisor independence requirements. Disclosure rules to be adopted by the SEC will likely draw upon current disclosure requirements amending Item 407(e)(3) of Regulation S-K.

Board Leadership Structure. Amended Item 407(h) of Regulation S-K requires proxy statement disclosure about a company's board leadership structure, such as whether the company has chosen to combine or separate the chairman and CEO positions and why such leadership structure is appropriate. In its comments issued in response to this disclosure, the SEC generally focused on requesting an explanation regarding the reasons why the company's specific leadership structure is in the best interest of such company's shareholders. As discussed below, new Section 972 of the Dodd-Frank Act does not change the existing disclosure regime. Therefore, the SEC will likely issue rules implementing Section 972 as an amendment to Item 407(h) of Regulation S-K or may determine that no amendment is required because the existing rules already require the disclosure called for under the Dodd-Frank Act.

Climate Change. On February 2, 2010, the SEC issued interpretive guidance clarifying the disclosure obligations of publicly-traded companies with respect to material climate change information. The guidance highlights four areas as examples of situations where climate change disclosure may be required, including (1) impact of legislation and regulation, (2) international accords, (3) indirect consequences of regulation or business trends, and (4) physical impact of climate change. While the guidance does not create new legal requirements, it highlights the SEC's increased focus on climate change disclosure and indicates that reporting companies will need to be especially sensitive to climate change disclosure in their annual reports on Form 10-K and Form 20-F, as applicable. The October 12, 2010 report by ISS, "Disclosing Climate Risks: How 100 Companies Are Responding to New SEC Guidelines," suggests that the volume of climate change disclosure did not meaningfully increase as a result of the SEC's guidance. Companies should continue to monitor their disclosures not only in light of the SEC's stated focus on this issue, but also because social responsibility issues are likely to gain greater importance in light of the proxy access regime which may be in place in 2012.

Dodd-Frank Rulemaking Schedule—Looking Ahead

While many of the Dodd-Frank Act's executive compensation, corporate governance and other provisions will not be in effect for the upcoming 2011 reporting season, companies should be aware of the SEC's rulemaking agenda for the rest of the year to assess whether early actions in preparation for the 2012 reporting season may be warranted. Below is a brief summary of the upcoming initiatives.

Compensation Committee and Compensation Advisor Independence.

- **Compensation Committee Independence.** The Dodd-Frank Act requires the SEC to issue rules no later than July 16, 2011 directing each national securities exchange to require each member of a listed company's compensation committee to be independent, taking into account factors such as advisory, consulting or other compensatory fees and affiliate status. It remains to be seen whether large shareholders will be precluded from compensation committee membership because of their affiliate status although this appears likely. The definitions for "non-employee directors" under Section 16 of the Exchange Act or "outside directors" under Section 162(m) of the Internal Revenue Code remain unchanged, resulting in a regime under which companies will have to evaluate the qualifications of their compensation committee members under the standards for governance, securities law and tax law.
- **Compensation Advisor Independence.** The Dodd-Frank Act requires the SEC to issue rules no later than July 16, 2011 directing each national securities exchange to require each list company's compensation committees to have authority and funding to engage a compensation advisor. The SEC is also required to issue rules regarding proxy statement disclosures for annual meetings occurring on or after July 22, 2011 regarding the use of an advisor and if any conflicts of interests were raised, how those conflicts were addressed. The provisions relating to independent advisors are consistent with the December 2009 proxy disclosure enhancements, requiring additional disclosure with respect to compensation consultants, including fees and scope of engagement, in light of perceived conflict of interest issues. Therefore, the changes further heighten the focus on compensation committees and will force such committees to consider and document carefully the independence of their advisors. The new requirements will also likely result in compensation committees of larger companies considering whether to engage separate legal counsel.

  Once the SEC adopts rules requiring the national securities exchanges to implement this provision of the Dodd-Frank Act, updates to Director and Officer Questionnaires and compensation committee charters to reflect the new independence standards will be required. Companies may also wish to begin proactively evaluating backgrounds of their current compensation committee members and review their current advisor relationships.

  The SEC intends to issue proposed rules between January and March 2011, with final rules scheduled to be adopted between April and July 2011.

Clawback Policies. The SEC is required to issue rules directing each national securities exchange to require listed companies to develop a policy requiring (1) disclosure of the company's policy on incentive-based compensation based on financial information that is required to be reported under the securities laws; and (2) clawback of incentive-based compensation from current or former executive officers following a restatement triggered by material noncompliance with any financial reporting requirements under securities laws. The Dodd-Frank Act sets no deadline for the issuance of these rules. The amount subject to recoupment is tied to compensation during the three-year period preceding a restatement. The new provisions expand the reach of SOX Section 304, which applies only to principal executive officers and principal financial officers, requires misconduct and covers 12 months following public issuance or filing with the SEC of the financial document embodying the financial reporting requirement with which issuer did not comply. The SEC intends to issue proposed rules for comment between April and July 2011.

Employee and Director Hedging. The SEC is required to issue rules requiring companies to disclose in their annual proxy statements whether their employees or directors (or their designees) may purchase financial instruments designed to hedge equity securities of the company that the employee or director holds. The Dodd-Frank Act sets no deadline for the issuance of these rules. The final rules will likely result in amendments to the insider trading policies of many companies in order to minimize the need for disclosure regarding non-compliance with the precise statements in the Dodd-Frank Act. Companies should consider waiting until the final rules are issued to ensure compliance with the new requirements. The SEC intends to issue proposed rules for comment between April and July 2011.

Pay-for-Performance. The SEC is required to issue rules requiring companies to include in their annual proxy statements, a clear description of any executive compensation, including information that shows the relationship between executive compensation paid and the financial performance of the company, taking into account any change in the value of the shares of stock and dividends of the company and any distributions. The Dodd-Frank Act sets no deadline for the issuance of these rules. The SEC intends to issue proposed rules for comment between April and July 2011.

Internal Pay Equity: Compensation Ratios. The SEC is required to amend Item 402 of Regulation S-K to require a company to disclose: (1) the median of the annual total compensation of all employees of the issuer, except the CEO, (2) the annual total compensation of the CEO, and (3) the ratio of its CEO's compensation to the median compensation of all other employees. The potential impact of the requirement is significant as it applies to the entire employee base. The SEC staff has indicated in conferences that it is aware of the corporate community's concerns relating to this requirement. The ultimate impact of the provision will depend on the SEC's final rule. The Dodd-Frank Act sets no deadline for the issuance of these rules. The SEC intends to issue proposed rules for comment between April and July 2011.

Whistleblower Program. In November 2010, the SEC issued proposed rules to implement the Dodd-Frank Act mandate to set up a bounty program to pay awards to eligible whistleblowers reporting federal securities law violations.[5] Under the proposed rules, the SEC will pay monetary awards of between 10 and 30 percent to persons who voluntarily provide original information to the SEC that leads to successful enforcement actions by the SEC or the US Commodity Futures Trading Commission resulting in monetary sanctions totaling more than US$1 million. The proposed rules reach beyond the whistleblower protections of SOX, False Claims Act and the Exchange Act and its implications are significant and far-reaching, potentially capable of undermining corporate efforts undertaken to establish effective internal compliance systems. In light of the increased protections afforded to whistleblowers under the Dodd-Frank Act whistleblower regime, companies should reexamine their compliance programs and take steps necessary to respond to the realities of the new regime, ranging from enhanced employee communications to training programs. The public comment period on the whistleblower proposal closed on December 17, 2010. Final regulations must be adopted by the SEC no later than April 21, 2011.

Board Leadership Structure. The SEC is required to issue rules that will require a company to explain in its annual proxy materials why it has either chosen to combine or separate its chairman and CEO positions. The SEC rules must be issued no later than January 17, 2011. The new provision of the Dodd-Frank Act does not alter the existing disclosure requirements of Item 407(h) of Regulation S-K which became effective in February 2010 and which substantially address this already.

5 For a detailed discussion of the proposed rules, please refer to our December 2010 client alert SEC Proposes New Whistleblower Program Under Dodd-Frank Act.

Proxy Access. On August 25, 2010, the SEC adopted fundamental changes to the federal proxy rules that will require public companies subject to the proxy rules to include director nominees by shareholders in their proxy materials.[6] The Chamber of Commerce and Business Roundtable filed a suit on September 29, 2010 challenging the proxy access rules and seeking a temporary injunction staying effectiveness of the rules until determination of the case. On October 4, 2010, the SEC determined to exercise its discretion to stay the rules pending resolution of petitioners' petition for review by the US Court of Appeals for the DC Circuit. The new rules are not expected to be effective for the upcoming proxy season. Nevertheless, companies may wish to take proactive steps to prepare for the proxy access regime, including evaluating their shareholder base to determine whether they have any shareholders who meet the eligibility requirements to submit a nominee, identifying any large and most active shareholders and determining what issues they care about, educating nominating committees and other board members, and evaluating director qualifications and advance notice bylaws.

6 See our September 2010 client alert Explanation and Practical Tips Regarding the SEC's New Proxy Access Regime.

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