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THE IMPACT OF THE DODD-FRANK ACT ON THE PROXY AND ANNUAL REPORT SEASON

The say-on-pay and say-when-on-pay rules (including golden parachute disclosure) are final and apply to the 2011 proxy season. On most of the other corporate governance and disclosure requirements of the Dodd-Frank Act, the SEC has issued proposed rules or has scheduled proposed rules for issuance later this year. The author surveys the field, describing the Act's requirements, the Commission's proposals, and, in each case, its timetable for further action.

By Laura D. Richman *

The Dodd-Frank Consumer Protection and Wall Street Reform Act (the "Dodd-Frank Act") became law on July 21, 2010.[1] Many of its corporate governance provisions will impact proxy statements, and annual and other periodic reports. While some of the provisions of the Dodd-Frank Act are self-executing, extensive rulemaking is required to implement many of its provisions. The Securities and Exchange Commission has begun issuing Dodd-Frank required regulations and has published a calendar of its upcoming Dodd-Frank rulemaking activity. This article discusses the extent to which the Dodd-Frank Act impacts the 2011 proxy and annual report season and beyond.

SAY-ON-PAY AND SAY-WHEN-ON-PAY

Under the Dodd-Frank Act, public companies must include a non-binding say-on-pay proposal in their proxy statements for meetings held on or after January 21, 2011. Thereafter, non-binding say-on-pay proposals must be included in proxy statements at least once every three years. In addition, the Dodd-Frank Act requires issuers to provide a separate advisory vote at least once every six years to determine whether shareholders want the say-on-pay vote for executive compensation to occur every one, two, or three years.

The SEC adopted final say-on-pay and say-when-on-pay rules on January 25, 2011.[2] As a technical matter, these rules become effective April 4, 2011. However, because the Dodd-Frank Act requirement is already in effect, the SEC's final say-on-pay and say-when-on pay-rules should be treated as though they are immediately effective.

The SEC has granted a two-year exemption for smaller reporting companies so that they will not have to

[1] Pub. L. 111-203, 124 Stat. 1376 (2010).

[2] Rel. Nos. 33-9178; 34-63768 (2011).

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conduct the advisory vote on executive compensation until their first annual meeting (or other meeting at which directors are to be elected and executive compensation is to be disclosed) occurring on or after January 21, 2013. This temporary exemption for smaller reporting companies does *not* apply to a shareholder advisory vote on golden parachute compensation, discussed below.

New Rule 14a-21(a) under the Securities Exchange Act implements say-on-pay under the Dodd-Frank Act, requiring a separate advisory vote on executive compensation at least once every three calendar years. The vote must relate to all named executive officer compensation (rather than director or other employee compensation) that is disclosed pursuant to Item 402 of Regulation S-K. Rule 14a-21(a) does not mandate the form or language of the approving resolution, but an instruction provides the following non-exclusive example of a resolution that satisfies the requirements of the rule:

> RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion is hereby APPROVED.

In addition, if a say-on-pay vote is on the agenda, new Item 24 of Schedule 14A under the Exchange Act requires issuers to disclose that they are providing a separate shareholder vote on executive compensation and to explain the general effect of the say-on-pay vote, such as whether the vote is non-binding.

Companies must address in their Compensation Discussion and Analysis ("CD&A") whether, in determining their compensation policies and decisions, they have considered the results of previous say-on-pay votes required by either the Dodd-Frank Act, as implemented through Rule 14a-21(a) under the Exchange Act, or for companies that have received financial assistance under the Troubled Asset Relief Program ("TARP"), pursuant to Rule 14a-20 under the Exchange Act. TARP companies that conducted a say-on-pay vote previously will need to discuss in their CD&A for 2011 proxy statements how this prior vote impacted compensation decisions. Other companies are not required to include such disclosure in their 2011 proxy statements, although they may want to consider discussing how the compensation committee plans to take the advisory vote on executive compensation into account, if known.

New Rule 14a-21(b) implements the Dodd-Frank Act say-when-on-pay requirement. Because the frequency vote is an advisory vote, the proposed rules do not prescribe a standard for determining which frequency has been "adopted." As with say-on-pay, this frequency vote requirement is required to be included in proxy statements for annual meetings held on or after January 21, 2011. Thereafter, the frequency vote will be required at least once every six calendar years.

Issuers are required to provide four choices for the frequency vote on their proxy card: one year, two years, three years, or abstain. Boards of directors may (but are not required to) make a recommendation as to how frequently shareholders should vote on executive compensation. However, proxy cards cannot be set up as approving or disapproving of this recommendation. As a transitional matter for meetings held on or before December 31, 2011, if a proxy service provider is unable to program its services to accommodate four choices, the SEC will not take action if shareholders are provided only the choice of one-, two-, or three-year frequencies (without the abstention choice), as long as shares are not voted in cases where the shareholder did not select one of these three choices.

For the 2011 proxy season, companies should consider whether they want to recommend to shareholders one of the three frequencies for the say-on-pay vote and, if so, which one. Some companies are recommending annual say-on-pay votes, believing that an annual vote will make the proposal appear routine, similar to ratification of independent auditors. Also, having an annual advisory vote on pay provides a mechanism for shareholders to express concerns about pay without withholding votes from compensation committee or other board members. ISS, an influential proxy advisory firm, has issued a policy recommending that the say-on-pay vote be submitted to shareholders

every year and some companies may choose to follow ISS's recommendation. Companies that want to use the executive compensation say-on-pay method as a "pre-approval" of golden parachute compensation (recognizing that this requires additional disclosures) may find it useful to have an annual say-on-pay vote to minimize compensation that could be the subject of a golden parachute say-on-pay vote in the context of a change in control transaction. Companies with classified boards may prefer an annual or biennial approach to avoid the same class of directors always being up for election during the year of the say-on-pay vote.

Some companies are recommending triennial (or biennial) say-on-pay votes because they believe that since performance is measured over longer periods of time, evaluation of compensation is best considered taking into account performance over several years. Also, the longer period between advisory votes gives the company more time to consider the results and determine how best to take them into account when making compensation decisions. Some companies may feel that an annual vote on pay distracts the company from its business. To the extent that a company expects investor support for its current compensation program, it may seem unnecessary to recommend annual say-on-pay votes.

Finally, some companies are choosing to leave the frequency decision entirely to the shareholders, making no recommendation with respect to the say-when-on-pay proposal. If a company chooses not to make a recommendation as to frequency, it will not be able to vote uninstructed proxy cards.

If a frequency vote is on the agenda, Item 24 of Schedule 14A, requires issuers to disclose in their proxy statements that this advisory vote is occurring, and to explain the general effect of the frequency of the say-on-pay vote, such as whether the vote is non-binding. When neither an advisory vote on executive compensation nor a frequency vote is on the agenda, Item 24 requires issuers to specify in their proxy statements the current frequency of say-on-pay votes and when the next say-on-pay vote will occur.

An issuer must include the results of its say-on-pay and frequency votes (detailing the number of votes for each of the alternatives on the proxy card) on the Form 8-K it files pursuant to Item 5.07(b) within four business days after its annual shareholders meeting to report its voting results. In addition, pursuant to new paragraph (d) of Item 5.07 of Form 8-K, the issuer must amend the Form 8-K in which it reported its voting results to disclose its decision as to how frequently its proxy material will include a shareholder vote on the compensation of executives before the next required vote on say-on-pay frequency. This amendment must be filed no later than 150 calendar days after its annual shareholders meeting, but at least 60 calendar days prior to the company's deadline for submission of shareholder proposals under Rule 14a-8. This is a change from the proposed rules, which would have required companies to provide this information in the Form 10-Q for the period in which the vote occurred (or on a Form 10-K for meetings held in the fourth quarter).

Rule 14a-8(i)(10) allows an issuer to exclude from its proxy statement a shareholder proposal to the extent that the proposal has been substantially implemented. A note has been added to this rule to clarify the status of shareholder proposals requesting either advisory votes on executive compensation or frequency of say-on-pay votes. This note specifies that a company may exclude such shareholder proposals as substantially implemented if in the most recent frequency vote required by Rule 14a-21(b) one of the specified intervals (*i.e.*, one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent frequency vote. This represents a change from the rules which the SEC initially proposed, which based such policy on the frequency receiving a plurality of the votes cast.

Rule 14a-6(a) under the Exchange Act has been amended so that preliminary proxy filing requirements are not triggered by any shareholder advisory vote on executive compensation or by the frequency vote. As a transitional matter, the adopting release indicates that the SEC will not take action if, before the final rules become effective, companies do not make preliminary filings for proxy statements with say-on-pay proposals or frequency proposals, so long as a preliminary filing is not required as a result of some other proposal contained in the proxy statement.

Many companies have already filed proxy statements reflecting the Dodd-Frank Act say-on-pay and say-when-on-pay requirements. These filings (as well as prior year say-on-pay proposals for TARP companies and prior year voluntary management say-on-pay proposals) can provide useful precedents in this area. Companies that hold their shareholder meetings later in the season may want to consider the frequency vote results of companies whose meetings are held earlier when deciding on which frequency to recommend in their 2011 proxy statements.

GOLDEN PARACHUTE DISCLOSURE AND SAY-ON-PAY

The Dodd-Frank Act required the SEC to adopt disclosure rules for "golden parachute" arrangements. The SEC determined that the existing disclosure requirement of post-termination payments pursuant to Item 402(j) of Regulation S-K is not sufficient to satisfy the mandate of the Dodd-Frank Act. Therefore, the SEC adopted new Item 402(t) of Regulation S-K to require, in both tabular and narrative formats, disclosure of agreements or understandings, whether written or unwritten, between each such named executive officer and the acquiring company or the target company concerning any type of compensation, whether present, deferred, or contingent, that is based on or otherwise relates to an acquisition, merger, consolidation, or sale, or other disposition of substantially all of the assets of the issuer.

Item 401(t) provides for a new Golden Parachute Compensation Table that requires disclosure of the aggregate dollar value of the following individual elements of golden parachute compensation, as well as total dollar values:

- cash severance payments (*e.g.*, base salary, bonus, and pro-rata non-equity incentive plan payments);
- accelerated stock awards, in-the-money option awards for which vesting would be accelerated, and payments in cancellation of stock and option awards;
- pension and non-qualified deferred compensation benefit enhancements;
- prerequisites and other personal benefits, and health and welfare benefits;
- tax reimbursements (*e.g.*, tax gross-ups); and
- "other" additional elements of compensation not otherwise specifically includable.

The golden parachute narrative disclosure must identify the specific circumstances that would trigger payment. This disclosure has to state whether the payments would (or could) be lump sum or annual, and would have to disclose the duration of the payments and by whom they would be provided. The narrative also has to describe any material conditions or obligations applicable to the receipt of payment or benefits, including but not limited to non-compete, non-solicitation, non-disparagement, or confidentiality agreements. The discussion must address the duration of such agreements and provisions regarding waiver or breach.

In addition to golden parachute disclosure, the Dodd-Frank Act requires a non-binding advisory vote on golden parachutes. The SEC has adopted Rule 14a-21(c) to implement this requirement. A golden parachute advisory vote is not required if the compensation was the subject of a prior executive compensation say-on-pay vote, regardless of whether the shareholders approved such compensation. In order to use this exception, however, the proxy statement for the prior say-on-pay vote must have included the golden parachute disclosure required by Item 402(t) of Regulation S-K. Accordingly, some issuers may choose to voluntarily include that disclosure in their annual meeting proxy statements when obtaining an executive compensation say-on-pay vote. However, companies considering including the new golden parachute disclosure in their annual proxy statements should note that if changes are made to golden parachute arrangements that were submitted for shareholder approval prior to a transaction, those changes will be highlighted by the inclusion of a separate table in the proxy statement for the subsequent transaction and will be subject to a golden parachute advisory vote, even though the original arrangements had previously been included in an executive compensation say-on-pay vote. It is also possible that including the new golden parachute disclosure in an annual proxy statement will cause ISS to focus more intently on golden parachute compensation when making its voting recommendation with respect to the executive compensation say-on-pay vote.

The golden parachute disclosure requirement is not limited to transactions requiring proxy statements or a golden parachute advisory vote. To make the disclosure applicable, regardless of the form of the extraordinary transaction, the SEC also requires golden parachute disclosure in:

- information statements filed pursuant to Regulation 14C;
- proxy or consent solicitations that do not contain merger proposals but require disclosure of information under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A;
- registration statements on Forms S-4 and F-4 containing disclosure relating to mergers and similar transactions; and

- going private transactions on Schedule 13E-3.

Unless the transaction is also a going-private transaction, bidders in third-party tender offers do not have to provide the golden parachute disclosure, but target companies will have to provide such information in their Schedule 14D-9. There is an exception for agreements and understandings with senior management of a foreign private issuer.

Companies must comply with the golden parachute disclosure and golden parachute say-on-pay requirements in proxy statements, and other schedules and forms initially filed on or after April 25, 2011.

VOTE REPORTING BY INSTITUTIONAL INVESTMENT MANAGERS

In October 2010, the SEC proposed rules requiring institutional investment managers to disclose on Form N-PX how they voted on executive compensation.[3] Final rules are planned for the January-to-March 2011 time frame, but, at the time of this writing, they are not yet available. Such reports are to be made by August 31 of each year for the most recent 12-month period ended June 30. This reporting of executive compensation votes can be an important resource for public companies, especially since a negative say-on-pay vote will not indicate which components of executive compensation the shareholders found objectionable. Form N-PX reports will enable public companies to determine how these institutional shareholders feel about the company's executive compensation program. A review of these reports, when available, may suggest where targeted investor out-reach on executive compensation issues may be productive.

CHANGES IN BROKER DISCRETIONARY VOTING

The Dodd-Frank Act prohibits brokers from voting uninstructed shares in the election of directors, executive compensation matters, and other matters that the SEC determines to be significant. The NYSE and NASDAQ adopted rules last year prohibiting broker discretionary voting in the election of directors, so public companies have had one year's experience in assessing the impact of brokers not having the discretion to vote uninstructed shares in the election of directors. To comply with the Dodd-Frank Act, the NYSE and NASDAQ broker voting rules have been revised again to provide that brokers do not have discretionary voting rights on matters relating to executive compensation. Companies may therefore want to identify and contact investors holding shares in street name to explain compensation and recommend that they instruct their brokers to cast favorable say-on-pay votes. The SEC has the authority to require brokers to be precluded from voting uninstructed shares in other significant matters. It currently plans to propose such rules in the April-to-July 2011 time frame.

COMPENSATION COMMITTEE INDEPENDENCE

The Dodd-Frank Act requires the SEC and the stock exchanges to adopt rules regarding compensation committee member independence. These rules will prohibit the listing of any class of equity security of a company unless each member of the compensation committee of a listed company's board of directors is independent. The Dodd-Frank Act requires that the definition of independence for these rules consider all relevant factors, including the source of compensation, such as any consulting, advisory, or other compensatory fee paid by the company to the director, and whether the director is otherwise affiliated with the company or a subsidiary of the company, or an affiliate of a subsidiary of the company.

The SEC has scheduled these proposed rules for issuance in the January-to-March 2011 time frame, but they are not yet available at the time of this writing. Final rules must be adopted by mid-July 2011. Although these rules will not be effective until after most calendar-year companies have completed their 2011 annual meetings, nominating and governance committees would be well advised to consider the proposed rules when recommending board nominees and board committee assignments.

COMPENSATION CONSULTANT CONFLICTS

Under the Dodd-Frank Act, compensation committees of a listed company will only be permitted to select a compensation consultant, legal counsel, or other adviser (collectively, "consultant") after considering any independence factors identified by the SEC. The Dodd-Frank Act specifies that the independence factors must be competitively neutral among categories of consultants and preserve the ability of compensation committees to retain the services of members of any such category. According to the Dodd-Frank Act, these independence factors include:

- the provision of other services to the company by the person that employs the consultant;

[3] Rel. Nos. 34-63123; IC-29463 (2010).

- the amount of fees received from the company by the person that employs the consultant as a percentage of the total revenue of the person that employs the consultant;
- the policies and procedures of the person that employs the consultant that are designed to prevent conflicts of interest;
- any business or personal relationship of the consultant with a member of the compensation committee; and
- any stock of the company owned by the consultant.

At the time of this writing, the SEC has not yet proposed compensation consultant conflict rules. The SEC has indicated that it plans to issue its proposed factors affecting consultant independence and disclosure rules on consultant conflicts in the January-to-March 2011 time frame. Like the compensation committee independence rules, the final rules regarding consultant conflicts must be effective by mid-July 2011. Close attention should be paid to the proposed rules, when issued, to allow time to react and adjust to the pending rules in this area. While these consultant rules do not affect 2011 proxy statements for calendar year companies, proxy or consent solicitation material for meetings occurring on or after July 21, 2011 will need to disclose whether the compensation committee retained or obtained the advice of a consultant and whether the work of the consultant has raised any conflict of interest. If there is a conflict, such proxy or information statement must disclose the nature of the conflict and how the conflict is being addressed.

SEC'S WHISTLEBLOWER PROGRAM

The Dodd-Frank Act also requires the SEC to establish a whistleblower program requiring it to pay awards to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of federal securities laws that leads to the successful enforcement of a covered judicial or administrative action. In November 2010, the SEC issued its proposed regulations for such a program.[4] The SEC currently intends to adopt final rules in the January-to-March 2011 time frame, but the final rules are not available at the time of this writing.

The SEC recognizes the important role played by corporate compliance departments and has indicated that it is not trying to undermine internal reporting programs. In fact, the SEC has proposed – as a consideration in determining the amount of a whistleblower award – whether, and the extent to which, a whistleblower reported the potential violation through the company's internal compliance procedures before reporting the violation to the SEC. While such internal reporting is not proposed to be a requirement under the SEC's whistleblower bounty program, the Commission has indicated that it will consider higher-percentage awards for whistleblowers who first report violations through their compliance programs.

In light of this upcoming Dodd-Frank Act-mandated government whistleblower program, public companies may want to evaluate their existing internal compliance programs and consider whether they should reference, or otherwise be modified to be in alignment with, the SEC's program.

LEADERSHIP STRUCTURE

The Dodd-Frank Act requires the SEC to issue rules to require public companies to disclose why they have chosen the same person or separate persons to serve as chief executive officer and chairman of the board of directors. Because the SEC adopted final rules requiring such disclosures last year, there is no real change for the upcoming proxy season with respect to this requirement.[5]

PAY-FOR-PERFORMANCE, INTERNAL PAY COMPARISON, HEDGING, AND CLAWBACKS

The Dodd-Frank Act requires the SEC to adopt rules regarding pay-for-performance pursuant to which companies will have to disclose material information that shows the relationship between executive compensation actually 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. In addition, the Dodd-Frank Act requires an internal pay comparison, disclosing the median of the annual total compensation of all employees of the company except the CEO, the annual total compensation of the CEO, and the ratio of the two numbers. Under the Dodd-Frank Act, each public company will have to disclose whether employees or directors are permitted to purchase financial instruments designed to hedge market value of equity securities granted as compensation, or held directly or indirectly. The Dodd-Frank Act also requires the SEC to direct the

[4] Rel. No. 34-63237 (2010).

[5] Rel. Nos. 33-9089; 34-61175; IC-29092 (2009).

national securities exchanges to prohibit the listing of any security of a company that does not develop and implement a clawback policy with respect to the recovery of incentive-based compensation.

The Dodd-Frank Act did not provide a specific effective date for the pay-for-performance, internal pay comparison, hedging, or clawback rules. The SEC plans to propose rules regarding disclosure of pay-for-performance, pay ratios, and hedging sometime between August and December 2011. In that same time frame, the SEC plans to issue a proposal to implement the Dodd-Frank Act requirement that the SEC and the stock exchanges adopt rules regarding incentive pay clawback provisions.

While these new disclosure requirements and rules will not impact the 2011 proxy and annual report season, they are matters that companies and compensation committees in particular, should be aware of at this time. For example, although the exact mechanics of these disclosures are not yet available, it may be worthwhile for companies to determine on a preliminary basis, for internal use, what pay-for-performance or internal pay ratios disclosures would reveal, even though this information is not needed in the 2011 proxy statement. Also, the board and the compensation committee should be prepared to consider clawback and hedging policies once final rules are available.

CONFLICT MINERALS

The Dodd-Frank Act requires the SEC to adopt rules requiring annual and website disclosure when "conflict minerals" are necessary to the production or functionality of a product manufactured by a company that files periodic reports under the Exchange Act. Conflict minerals are defined as columbite tantalite (also known as coltan and from which tantalum is extracted), cassiterite (from which tin is extracted), gold, wolframite (from which tungsten is extracted), or their derivatives, or any other mineral or its derivatives determined to be financing conflict in the Democratic Republic of Congo or an adjoining country (together, the "DRC countries").

The SEC issued its proposed rules on conflict minerals on December 15, 2010.[6] Comments are due by March 2, 2011. The conflict mineral disclosure requirements will apply to foreign private issuers, as well as U.S. issuers and smaller reporting companies. The Dodd-Frank Act requires that the SEC adopt final conflict mineral rules by mid-April 2011. While the rules therefore do not impact disclosures in annual reports for the year ended December 31, 2010, it will take some time for issuers to make the determinations that they will need to comply with this regulation. It is therefore important that issuers analyze the extent to which these new rules will apply to them and put applicable due diligence procedures in place.

Under the proposed rules, if conflict minerals are necessary for a reporting company's products, it will have to conduct a reasonable country-of-origin inquiry (which term is not defined) with respect to its conflict minerals. It will also have to include a separate heading entitled "Conflict Minerals Disclosure" in its annual report under which it must disclose whether any of its conflict minerals originated in DRC countries or that it is not able to determine that its conflict minerals did not originate in DRC countries. Conflict minerals information must also be posted on the company's website, with the Internet address disclosed in its annual report. Companies will be required to keep any conflict minerals disclosures on their website at least until they file their next annual report. The level of the required disclosure will depend on the origin of the conflict minerals and a company may have to report conflict minerals falling under more than one disclosure category.

If the issuer determines that the conflict minerals it uses did not originate in the DRC countries, it will have to disclose that conclusion in its annual report and describe the process it undertook to reach this determination. This information will also have to be posted on its website.

If the issuer determines that its conflict minerals did originate in the DRC countries, or is unable to conclude that its conflict minerals did not so originate, it will have to disclose that conclusion in its annual report, state that it has furnished a Conflicts Minerals Report as an exhibit to its annual report, and post its Conflict Minerals Report on its website. A Conflict Minerals Report must describe the measures the issuer has taken to exercise due diligence on the source and chain of custody of its conflict minerals, such as whether they used any nationally or internationally recognized standards or guidance of supply chain due diligence. A critical component of this due diligence is a certified independent private sector audit. The Comptroller General of the United States will establish standards for this audit. The issuer must certify that it obtained such audit and identify the entity that conducted the audit. The Conflict Minerals Report must also describe the issuer's products manufactured or contracted to be manufactured containing conflict minerals that are not

[6] Rel. No. 34-63547 (2010).

"DRC conflict free," the facilities used to process those conflict minerals, the country of origin of the conflict materials, and the efforts to determine the mine or location of origin with the greatest possible specificity.

If an issuer determines that its conflict minerals originated from recycled or scrap sources, it will have to disclose that fact in its annual report and it will also need to furnish a Conflicts Minerals Report, including the independent private sector audit, as an exhibit to its annual report and post that report on its website. However, conflict minerals originating from recycled or scrap sources are deemed to be "DRC conflict free" under the SEC's proposed rules. Therefore, the Conflict Minerals Report relating to recycled or scrap materials will not need to disclose the information that is specific to minerals that are not "DRC conflict free," such as description of products, processing facilities, country of origin, and the efforts to determine the location of origin.

The conflict minerals disclosure will not be deemed to be "filed" with the SEC or subject to liability under Section 18 of the Exchange Act unless the issuer specifically incorporates the information by reference into a document filed under the Securities Act or the Exchange Act.

MINE SAFETY

The Dodd-Frank Act requires companies that filed periodic reports under the Exchange Act to disclose mine safety and health standards in their annual and quarterly reports filed with the SEC. In addition, mining companies that are subject to Form 8-K requirements must file a Form 8-K when they receive certain notices from the Mine Safety and Health Administration ("MSHA"). This Dodd-Frank Act disclosure requirement is already in effect. On December 15, 2010, the SEC issued proposed rules to address the scope and application of the mine safety disclosure requirements.[7] Comments on these proposals are due by March 2, 2011, and the final rules are expected to be adopted in the April-to-July time frame. However, because the Dodd-Frank Act requirements for mine safety are already in effect, mining companies will need to include the applicable disclosures in upcoming annual and quarterly reports.

Under the proposed rules, mining companies are required to provide an exhibit to their annual and quarterly reports reporting the following for each mine:

- the total number of significant and substantial violations of mandatory health or safety standards under section 104 of the Federal Mine Safety and Health Act (the "Mine Act") for which the operator received a citation from MSHA;
- the total number of orders issued under section 104(b) of the Mine Act;
- the total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health and safety standards under section 104(d) of the Mine Act;
- the total number of flagrant violations under section 110(b)(2) of the Mine Act;
- the total number of imminent danger orders issued under section 107(a) of the Mine Act;
- the total dollar value of proposed assessments from MSHA; and
- the total number of mining-related fatalities.

These companies must also disclose a list of their mines that have been notified by MSHA of a pattern of violations or a potential to have a pattern of violations under section 104(e) of the Mine Act. In addition, they also have to disclose pending legal actions before the Federal Mine Safety and Health Review Commission involving such mines. The proposed rules require mining companies to provide a brief description of each category of violations, orders, and citations they are reporting.

The annual and quarterly reporting requirements apply to U.S. companies and foreign private issuers, but only with respect to mines that are located in the U.S. However, if mine safety is a material issue, disclosure could be required under existing management discussion and analysis, risk factor, description of business or legal proceeding requirements, regardless of whether the mine is located in the United States.

The proposed rules also add a new Item 1.04 to Form 8-K, requiring the reporting of an imminent danger order under section 107(a) of the Mine Act, written notice of a pattern of violations under section 104(e) of the Mine Act, or written notice of the potential to have a pattern of such violations. A Form 8-K under this item is due within four business days of the triggering event. However, a late filing of the Form 8-K would not cause a company to lose eligibility to register securities under

[7] Rel. Nos. 33-9134; 34-63548 (2010).

the Securities Act on a Form S-3 (short-form) registration statement.

RESOURCE EXTRACTION ISSUERS

The Dodd-Frank Act requires resource extraction issuers to include in their annual reports information regarding payments to a foreign government or the U.S. federal government for commercial development of oil, natural gas, or minerals. The SEC also issued proposed rules relating to resource extraction issuers on December 15, 2010.[8] Comments are due by March 2, 2011. The Dodd-Frank Act requires the SEC to adopt final rules by mid-April 2011.

Under the proposed rules, issuers that are required to file an annual report with the SEC and that engage in the commercial development of oil, natural gas, or minerals will have to disclose under an appropriately captioned section of their annual reports non-*de minimis* payments made to a foreign government, including sub-national governments or the U.S. federal government that are made to further the commercial development of oil, natural gas, or minerals. Commercial development of oil, natural gas, or minerals is defined to include exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity.

Resource extraction issuers will be required to disclose payments made directly or by a subsidiary or another entity controlled by the issuer. While a resource extraction issuer would need to make a factual determination as to whether it has control of an entity based on a consideration of all relevant facts and circumstances, at a minimum it would be subject to the new disclosure requirement if it otherwise must provide consolidated financial information for the subsidiary or other entity in its financial statements included in its Exchange Act reports.

The types of payments related to commercial development activities that must be disclosed include taxes, royalties, fees (including license fees), production entitlements, and bonuses. Disclosure will have to be made of the:

- type and total amount of payments made for each project;
- type and total amount of payments made to each government;
- total amounts of the payments by category;
- currency used to make the payments;
- financial period in which the payments were made;
- business segment of the resource extraction issuer that made the payments;
- the government that received the payments and the country in which the government is located; and
- the project of the resource extraction issuer to which the payments relate.

As proposed, the resource extraction information will be included in two exhibits. One exhibit will be provided in text format, while the other will be provided in interactive financial data format, tagged in eXtensible Business Reporting Language (known as XBRL).

The resource extraction information will not be deemed to be “filed” with the SEC or subject to liabilities under Section 18 of the Exchange Act unless the issuer specifically incorporates such information into a document filed under the Securities Act or the Exchange Act.

CONCLUSION

The SEC will continue to propose and finalize regulations to implement the Dodd-Frank Act throughout the 2011 proxy and annual report season and beyond, much of which will impact proxy statement and annual report disclosures at this time or in the future. Therefore, it is particularly important for public companies to stay current with SEC developments to properly comply with new requirements during the current proxy season and to be aware of how actions they take this year will affect disclosure in 2012 proxy statements and annual reports, by which time additional Dodd-Frank Act regulations will be effective. ■

[8] Rel. No. 34-63549 (2010).

CLE QUESTIONS on Richman, *The Impact of the Dodd-Frank Act on the Proxy and Annual Report Season* (Vol. 44, No. 5, March 9, 2011). Please circle the correct answer to each of the questions below. If at least four questions are answered correctly, there is one credit for New York lawyers (nontransitional) for this article. Complete the affirmation and evaluation and return it by fax to RSCR-CLE, 212-876-3441, or by e-mail attachment to rscrpub@att.net. The cost is $40, which will be billed to your firm. To request financial aid, contact us by e-mail or fax, as provided above.

1. The SEC has granted smaller reporting companies a temporary exemption so that they will not have to conduct an advisory vote on executive compensation until meetings held after January 21, 2013. **True** **False**

2. An issuer need not report the results of its say-on-pay and frequency votes on its Form 8-K filed after the meeting, but only on its Form 10-K for the period in which the vote occurred. **True** **False**

3. To comply with Dodd-Frank, NYSE and NASDAQ have revised their broker voting rules to provide that brokers have discretionary authority to vote on matters relating to executive compensation. **True** **False**

4. Dodd-Frank requires the SEC to direct national securities exchanges to prohibit the listing of any security of a company that does not have a clawback policy with respect to incentive-based compensation. **True** **False**

5. Under Dodd-Frank, mining companies that must file Forms 8-K must file such a form when they receive certain notices from the Mine Safety and Health Administration. **True** **False**

A F F I R M A T I O N

____________________________, Esq., an attorney at law, affirms pursuant to CPLR
[Please Print]
2106 and under penalty of perjury that I have read the above article and have answered the above questions without the assistance of any person.

Dated: ________________

____
[Signature]

____
[Name of Firm] [Address]

E V A L U A T I O N

This article was (circle one): Excellent Good Fair Poor