

## Securities Law Advisory: Preparation for 2008 Fiscal Year SEC Filings and 2009 Annual Shareholder Meetings

2/5/2009

As our clients and friends know, each year Mintz Levin provides a summary of the regulatory developments that impact public companies as they prepare for their fiscal year-end filings and annual shareholder meetings. This advisory discusses key considerations to keep in mind as you embark upon the year-end reporting process in 2009.<sup>1</sup> A summary of key changes and considerations for 2009 appears below. A more detailed exploration of the changes and general year-end considerations can be found in the [full advisory](#).

### Impact of the Global Financial Crisis

To say that 2008 was a challenging year for most public companies is a vast understatement. Especially in the life sciences industry, the capital-raising environment was nothing short of hostile, and the market for new offerings of any kind is effectively closed. Most companies have experienced a dramatic decrease in their market capitalizations, and many are in the mode of conserving cash until the ability to access the public markets resumes.

The Securities and Exchange Commission (the "SEC") has recently provided a degree of benefit in the form of scaled disclosure requirements for companies that qualify as smaller reporting companies (generally, issuers having less than \$75 million in public float as of the last business day of their second fiscal quarter), and for issuers whose public float values have fallen below \$50 million, some relief from the internal control requirements of Section 404 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") may be available. For those companies whose securities are traded on the NASDAQ Stock Market, NASDAQ has extended its suspension of the bid price and market value of public shares requirements through April 19, 2009.<sup>2</sup> In addition, for those companies whose securities are traded on the New York Stock Exchange (the "NYSE"), the NYSE has temporarily lowered its listing standard relating to minimum global market capitalization of listed securities. This standard requires prompt delisting of any issuer that has an average global market capitalization over a consecutive 30 trading-day period of less than \$25 million. Through April 22, 2009, this threshold has been lowered to \$15 million.

A negative consequence of sharply lower market capitalizations is that many companies are no longer eligible to use registration statements on Form S-3 to conduct primary offerings of their securities without limitations on the amount they can issue. If your company has a universal shelf registration statement filing effective with the SEC, and your company's public float is less than \$75 million on the date of filing of your upcoming Annual Report on Form 10-K, the company will become subject to a limitation prohibiting the issuance of more than one-third of the company's public float in any twelve-month period, until such time as the company's public float is greater than \$75 million.<sup>3</sup>

Companies must also give some thought to changes in their year-end disclosures to address the impact on their businesses of the current situation in the economy and the financial markets. Discussions in the Risk Factors and Management's Discussion and Analysis ("MD&A") sections of the Annual Report on Form 10-K and in financial statements as to liquidity, available cash resources, cash runway, the lack of available credit and other forms of financing, possible impairments of goodwill, and related risk factors should all be reviewed and the disclosure strengthened, as necessary. In addition, in a recent speech by John W. White, former Director of the SEC's Division of Corporation Finance, Mr. White recommended that all companies consider the impact of the financial crisis on their executive compensation arrangements for the coming fiscal year, and address any relevant issues in their Compensation Discussion and Analysis ("CD&A") disclosures. Further details of Mr. White's speech are discussed in the [full advisory](#).

### E-Proxy Rules Take Effect

The 2009 proxy season marks the first year that all public companies, regardless of size, are required to comply with the SEC's new electronic proxy delivery rules (referred to as the "e-proxy" rules) in distributing proxy materials. These changes require that companies follow new procedural and notice requirements in distributing their proxy materials, including the annual report to shareholders, which will necessitate adjustments to companies' time and responsibility schedules for the annual meeting process. In order to comply, a company must:

- provide stockholders with a notice of the Internet availability of its proxy materials (the "e-proxy notice"); and
- by the time the e-proxy notice is first sent to stockholders, post its proxy materials on an Internet website that satisfies the following criteria:
  - be in a format that is "convenient for both reading online and printing on paper,"
  - remain available through the conclusion of the shareholder meeting, and
  - "not infringe on the anonymity" of the persons accessing the website. This means that issuers must refrain from using "cookies" or other features that could track the identity of those persons accessing the website to review the proxy materials, and may not disclose a shareholder's e-mail address. The SEC notes that this may "require segregating those pages [on which the proxy materials are posted] from the rest of the company's regular website or creating a new website."

**These criteria must be satisfied regardless of how a company chooses to satisfy the e-proxy requirements.**<sup>4</sup> Companies that currently post their proxy materials on their website should confirm that their existing method of website posting of their proxy materials and annual report meets the criteria set forth in the e-proxy rules, and if it does not, modify their website so that the criteria are met. Most transfer agents will, for a fee, host the company's proxy materials in compliance with SEC rules.

The e-proxy rules are summarized in the [full advisory](#).

### Compensation Disclosures and Related Considerations

Another consequence for many companies of the prolonged downturn in the equity markets is that many employee stock options are now underwater. Companies have begun to explore ways in which options can be repriced or exchanged to reflect current market conditions. Companies considering option repricing or exchange programs should note that such programs typically require compliance with the SEC's tender offer rules, and may also require stockholder approval, depending on the terms of the equity compensation plan under which the options were granted. In the event that stockholder 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. Please contact us if you are considering an option repricing or exchange program, as we have advised several companies on such programs and have addressed the related SEC disclosure and accounting issues.

Executive compensation disclosure requirements remain a primary focus area this reporting season. The SEC's revised disclosure requirements for executive compensation arrangements took effect for annual reports and proxy statements covering fiscal years ending on or after December 15, 2006.<sup>5</sup> These requirements, including in particular the CD&A section, have shifted the time frame for preparation of executive compensation disclosures to earlier in the year-end reporting process than ever before, due in part to the increasing number of individuals within and outside companies whose input is required to draft the required disclosures. Following its review of companies' continuing efforts to prepare compliant CD&A disclosure, the SEC has issued additional valuable sources of guidance on the CD&A section, which we recommend all companies refer to prior to drafting the CD&A this year to cover compensation actions and decisions, as discussed in more detail in the [full advisory](#).

### Internal Control over Financial Reporting

Companies continue to cope with the rigorous disclosure requirements that accompany internal control reporting obligations under Section 404 of Sarbanes-Oxley. The SEC has extended once again, for an additional year, the requirement that non-accelerated filers include an attestation report of their auditors with respect to their internal control over financial reporting. During 2007, the SEC issued interpretive guidance on internal control reporting for those smaller companies, including an approach that will permit a more "scalable and flexible" approach to internal control reviews.<sup>6</sup> As noted by the SEC in its press release regarding the interpretive guidance, "...smaller public companies often have less complex

internal control systems than larger public companies, [and] this proposed approach would enable smaller public companies in particular to scale and tailor their evaluation methods and procedures to fit their own facts and circumstances."<sup>7</sup>

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

[Click here to read the full advisory.](#)

---

#### Endnotes

<sup>1</sup> We invite you to review our year-end advisory from last year, which described regulatory changes that were new for fiscal year 2007. The advisory is available at <http://www.mintz.com/publications.php?PublicationID=1382>.

<sup>2</sup> Please see our alert on this topic at <http://www.mintz.com/publications.php?PublicationID=1677>.

<sup>3</sup> Please see our alert on this topic at <http://www.mintz.com/publications.php?PublicationID=1490>.

<sup>4</sup> Our advisory regarding the e-proxy rules is available at <http://www.mintz.com/publications.php?PublicationID=1342>.

<sup>5</sup> Our advisories regarding the executive compensation disclosure rules are available at <http://www.mintz.com/publications.php?PublicationID=874> and <http://www.mintz.com/publications.php?PublicationID=893>.

<sup>6</sup> This guidance is available at <http://www.sec.gov/rules/interp/2007/33-8810fr.pdf>.

<sup>7</sup> The text of this press release is available at <http://www.sec.gov/news/press/2006/2006-206.htm>.

---

*Please contact one of the Mintz Levin attorneys listed below or the person who normally handles your corporate and securities law matters if you have any questions or comments regarding this information.*

**Megan N. Gates**  
(617) 348-4443  
[MN Gates@mintz.com](mailto:MN Gates@mintz.com)

**Jonathan L. Kravetz**  
(617) 348-1674  
[JLKravetz@mintz.com](mailto:JLKravetz@mintz.com)

**Pamela B. Greene**  
(617) 348-1623  
[PBGreene@mintz.com](mailto:PBGreene@mintz.com)

**James C. Chicoski**  
(617) 348-1738  
[JCChicoski@mintz.com](mailto:JCChicoski@mintz.com)

---

© 1994-2009 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo P.C. All Rights Reserved.

This website may constitute attorney advertising. Prior results do not guarantee a similar outcome. Any correspondence with this website does not constitute a client/attorney relationship. Neither the content on this web site nor transmissions between you and Mintz Levin Cohn Ferris Glovsky and Popeo PC through this web site are intended to provide legal or other advice or to create an attorney-client relationship. Images or photography appearing on this website may not be actual attorneys or images associated with Mintz Levin.