PREPARATION FOR 2008 FISCAL YEAR SEC FILINGS AND 2009 ANNUAL SHAREHOLDER MEETINGS

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Preparation for 2008 Fiscal Year SEC Filings and 2009 Annual Shareholder Meetings

Heightened Compensation Disclosures—"Say on Pay" To Come?

2009 represents the third year that companies are required to comply with the SEC's revised and expanded compensation-related disclosure requirements, including the CD&A. As we have described previously, in response to widespread demand from institutional and retail stockholder groups, on August 29, 2006, the SEC adopted rules that require extensive additional and revised detail on issuers' compensation practices, and require that this disclosure be presented in "plain English"[1]. After reviewing and evaluating issuers' ongoing attempts to comply with the rules, the SEC has issued a series of comment letters and provided additional interpretive guidance setting forth ways in which companies must improve their compensation disclosures, as described in more detail below.

Compensation Discussion and Analysis

The rules require most companies to provide a CD&A in their proxy statements or Forms 10-K, discussing the company's philosophy on executive compensation for its named executive officers ("NEOs").[2] Comparable to the Management's Discussion and Analysis of financial disclosure, or 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 which the directors considered in determining the amounts and types of compensation paid to the NEOs during the most recently completed fiscal year.

- What are the objectives of the company's compensation programs?
- What is the compensation program designed to reward?
- What is each element of compensation?
- Why does the company choose to pay each element?
- How does the company determine the amount (and, where applicable, the formula) for each element?

[1] The final rules are available at http://www.sec.gov/rules/final/2006/33-8732a.pdf, and the amendments to the final rules are available at http://www.sec.gov/rules/final/2006/33-8765.pdf.

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

- 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?

As you prepare the CD&A to analyze compensation decisions made during 2008, we encourage you to read the following documents made available on the SEC's website: Staff Observations in the Review of Compensation Disclosure, by the Division of Corporation Finance, and two speeches 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 both the first and second years of the CD&A disclosure regime.[3]

In the Staff Observations, the Staff summarized and analyzed the principal comments it had provided to issuers, based on a review of the executive compensation and other related disclosure of 350 public companies. That review had been conducted by the Staff in order to evaluate compliance with the revised rules and provide guidance on how companies could improve their executive compensation disclosure. In its discussion, the Staff emphasized that CD&A disclosure needs to be focused on *how* and *why* a company arrives at specific compensation decisions and policies.

The Staff explained that in many of the CD&As it reviewed, companies provided a great deal of detail regarding their compensation polices and decisions, but did not analyze sufficiently or at all the material factors underlying those policies and decisions. The Staff emphasized that under the principles-based disclosure regime of the CD&A, companies need to enhance their disclosure to include explanations of the following matters, rather than simply listing numbers and stating policies:

- *how* they determined the amounts of specific compensation elements;
- *how* they arrived at the particular levels and forms of compensation that they chose to award to their NEOs;
- *why* they pay that compensation; and
- *how* and *why* the determinations they made with regard to one compensation element for a particular NEO may or may not have influenced decisions they made with respect to other compensation elements they contemplated or awarded to that NEO.

In Mr. White's 2007 speech, he gave his reaction to the first year of disclosures under the revised compensation disclosure requirements. The title of his speech - "Where's the Analysis?" - sums

[3] 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.

up his basic response to many companies' attempts and echoes the messages conveyed in the Staff Observations. Themes Mr. White emphasized in his speech include the following:

- The CD&A is a principles-based disclosure requirement. This means that companies are not required to discuss every example set forth in the compensation disclosure in the CD&A - only those that are material to the company.

- Meaningful analysis of compensation decisions is required. Mr. White observed that too frequently a detailed discussion of the components of a compensation package took the place of a discussion of how and why a company's compensation philosophies resulted in the compensation that was paid.

- Mr. White echoed the Staff Observations in pointing out that specific areas in which companies frequently fell short in their analyses were benchmarking, differences in compensation among executive officers, change-in-control arrangements and, in particular, performance targets.

These themes have been repeated in a series of comment letters received by issuers over the past year regarding their CD&A disclosures. The comment letters have focused primarily on the following areas, in which disclosure was found to fall short:

- *analysis* of the elements of compensation,

- use of *performance targets*, and

- *benchmarking* against other companies' compensation arrangements.

The importance to the SEC of analysis in the CD&A has been described in detail above. In terms of the other two themes:

Where companies note in their CD&A disclosure that executives' compensation is tied to the achievement of performance targets, the SEC requires disclosure of the specific targets. 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 arguments similar to those that would be required in a confidential treatment request.

If a company's compensation committee sets material elements of executives' compensation using benchmarking of compensation against a peer group of companies, the CD&A must identify those other companies, and must explain the rationale for the selection of those companies. The CD&A must also describe how the data obtained from the benchmarked companies were used.

Mr. White's 2008 speech noted in particular that, if compensation committees take corporate risk into account as a factor when establishing compensation levels for named

executive officers, that fact should be disclosed in the CD&A. This is a direct result of the concerns that led to the Emergency Economic Stabilization Act of 2008 (the "EESA") and related regulations, which, as a technical matter, only apply to financial institutions that are participating in the national financial bailout. The EESA includes a limitation on compensation arrangements that could lead a financial institution's senior executive officers to take "unnecessary and excessive risks that could threaten the value of the financial institution." Despite the applicability of this limitation only to companies that are directly subject to the EESA's provisions, Mr. White noted:

> "Would it be prudent for compensation committees, when establishing targets and creating incentives, not only to discuss how hard or how easy it is to meet the incentives, but also to consider the particular risks an executive might be incentivized to take to meet the target—with risk, in this case, being viewed in the context of the enterprise as a whole? I'll let you think about what Congress might want."

In addition, to the extent that the current economic recession and negative stock market conditions have affected 2008 compensation decisions, or are anticipated to affect 2009 compensation decisions, these matters should be addressed in the CD&A. These discussions may include changes in peer group analysis, salary freezes or cutbacks, changes in performance targets, shifts in the types of compensation paid and stock option repricings.

Please refer to our 2008 year-end kickoff advisory[4] for a further description of the specific requirements of the CD&A.

Summary Compensation Table

Now that the revised compensation disclosures have been in effect for three years, compensation data in the various tables is required for three fiscal years, as had been required under the pre-2006 executive compensation rules. Note however that footnote disclosure to this table need only address the most recent fiscal year unless the company believes providing information as to prior years would assist shareholders in understanding the information presented. In contrast, footnote disclosure with respect to equity award assumptions by reference to financial statement footnotes must include references to financial statements for all grants that were expensed in the prior fiscal year.

As we go into the third year of reporting under these rules, please contact the Mintz Levin attorney with whom you work if you have any questions on how to treat elements of compensation under these disclosure requirements.

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[4] Our year-end advisory from last year is available at http://www.mintz.com/publications.php?PublicationID=1382.

Say on Pay

As of the date of this advisory, it remains to be seen whether rules requiring companies to provide their stockholders with the opportunity to cast an advisory vote on executive compensation (a so-called "say on pay" vote) will take effect for future proxy seasons. The concept has gained the support of such influential lawmakers as Congressman Barney Frank and Senator John McCain, particularly in light of the recent troubles in the financial services and banking industries. These votes, which would be non-binding from a legal perspective on the companies themselves but which would clearly indicate the preferences of stockholders as to the appropriate levels of compensation of the companies' executives, also are strongly supported by institutional stockholder advisory groups such as the RiskMetrics Group Inc. If the current financial upheaval continues, it may simply be a matter of time before "say on pay" becomes a reality. Mintz Levin will continue to advise its clients as to developments in this area.

Electronic Delivery of Proxy Materials

The primary regulatory change for the 2009 proxy and reporting season is that all public companies, regardless of size, must now 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.[5] 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 Securities Exchange Act of 1934, as amended (the "Exchange Act") (sometimes referred to as the "glossy" annual report, as distinct from the Annual Report on Form 10-K). These rules are in 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 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 either 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

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[5] *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.

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.

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 (a "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 only delivery option may not be used for proxies related to business combination transactions.

A company may only send the Notice to stockholders by electronic delivery instead of mail if the stockholder 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 stockholders have signed up for electronic delivery; in our experience, this number is usually small.

In addition, care should be taken to ensure the Notice satisfies the company's stockholder notice obligations under its by-laws and state corporate law. This is because, under some state business corporation laws, a company may not be allowed to rely upon the notice set forth in the proxy statement to satisfy its corporate law requirements if such notice will only be posted electronically. For example, Section 232 of the Delaware General Corporation Law prohibits the mailing of the Notice to stockholders electronically without the stockholder's prior consent to receive notices electronically.

The Notice must be written in plain English and must contain the following information:

- A prominent legend in bold-face type that states:

  "Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].

  - **This communication presents only an overview of the more complete proxy**

materials that are available to you on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.

- **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**

- **If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date] to facilitate timely delivery."**

- The date, time, and location of the meeting or the earliest date on which the corporate action may be effected;

- A "clear and impartial" identification of each separate matter to be acted on, and any recommendations of the issuer regarding those matters (only if the issuer chooses to make a recommendation, which is not required), without any supporting statements;

- A list of the proxy materials that are being made available at the specified website;

- A toll-free telephone number; an e-mail address; and a website address where shareholders can request a copy of the proxy materials, both for all meetings of the issuer and for the particular meeting to which the Notice relates;

- Any identification numbers that the shareholder needs to use to access his or her proxy card on the website;

- Instructions on how to access the proxy card, which may not enable a shareholder to execute a proxy without having access to the proxy statement; and

- Information about attending the shareholder meeting and voting in person.

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.[6] 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.

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.

Issuers relying on the notice only option may follow up the delivery of a Notice with a paper mailing or e-mail of a proxy card, but they must wait to do so until at least ten calendar days have passed since the mailing of the Notice, unless the proxy card is accompanied or preceded by a copy of the proxy materials.

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 of Internet Availability of Proxy Materials 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 stockholders, this option requires only one mailing to stockholders, and, assuming the company does not have many stockholders 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.

The information that must be provided in a Notice under the full set delivery option includes the following information:

- A prominent legend in bold-face type that states:

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[6] 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.

> **"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].**
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> - **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**

- The date, time, and location of the meeting or the earliest date on which the corporate action may be effected;
- A "clear and impartial" identification of each separate matter to be acted on, and any recommendations of the issuer regarding those matters (only if the issuer chooses to make a recommendation, which is not required), without any supporting statements;
- A list of the proxy materials that are being made available at the specified website;
- Any identification numbers that the shareholder needs to use to access his or her proxy card on the website; and
- Information about attending the shareholder meeting and voting in person.

Design of Internet Site at which Materials are Posted

Whether the issuer is using the notice only option or the full set delivery option, the website at which the proxy materials are posted must:

- 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."

Hybrid of Notice Only and Full Set Delivery Options

According to data reported in a survey released by Broadridge Financial Solutions in June 2008, the notice only model may actually negatively impact retail stockholder voting rates. Of companies adopting the notice only model from July 2007 to June 2008, approximately 16.6% of retail stockholders voted their shares, as compared to approximately 34.3% of such retail stockholders in the prior year before the implementation of e-proxy. The experience of companies that complied with the e-proxy rules last year suggests that companies may find it desirable to analyze the make-up of their stockholder base, and if necessary, adopt a hybrid approach to distributing proxy materials in an attempt to secure more retail voting participation.

Companies considering electronic delivery 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 are being met.

Internal Control Over Financial Reporting

Companies that qualify as large accelerated filers and accelerated filers have now experienced three 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 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.[7]

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.

Starting with fiscal years ending on or after December 15, 2007, non-accelerated filers are also required to include an evaluation by management of the effectiveness of ICFR. Non-accelerated filers are not, however, required to include the attestation report from

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[7] 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.

their auditors on ICFR until their annual reports for fiscal years ending on or after December 15, 2009. This date represents a further extension by the SEC, for non-accelerated filers, of the filing of the auditor attestation report, and is currently expected to be the last such extension.

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 non-accelerated 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 non-accelerated 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.

Scaled Disclosure Requirements for Smaller Reporting Companies

Effective February 4, 2008, the SEC adopted amendments to its disclosure and reporting requirements under both the Securities Act of 1933, as amended, and the Exchange Act to expand the number of companies that qualify for its scaled disclosure requirements for smaller reporting companies. Specifically, the SEC has eliminated the category of a "small business issuer" and created a new category - "smaller reporting company" - that

will encompass more companies than previously fell under the definition of a small business issuer. In addition, the amendments have integrated Regulation S-B, with its scaled disclosure requirements for small business issuers, into Regulation S-K and, with regard to preparation of financial statements, into Regulation S-X. Finally, the Forms 10-QSB and 10-KSB have been phased out and are no longer available for reporting purposes.

Companies that have less than $75 million in public float are considered "smaller reporting companies" and qualify for the scaled disclosure requirements. The definition of smaller reporting company parallels the definition of accelerated filer as to the process of determining that status: a company that, as of the last business day of its second fiscal quarter, has less than $75 million in public float may opt for the scaled disclosure requirements beginning with the Form 10-Q covering the second fiscal quarter corresponding to the measurement date establishing its eligibility as a smaller reporting company. A smaller reporting company will be required to exit the scaled disclosure system for the fiscal year after its public float rises above $75 million as of the last business day of its second fiscal quarter, and the Company will not be eligible to re-enter the scaled disclosure system unless its public float falls below $50 million as of the last business day of its second fiscal quarter in a subsequent year. All companies that qualify as smaller reporting companies are required to check a box on all of their filings, noting that they qualify as such, regardless of whether or not a particular company chooses to rely on the scaled disclosure requirements.

Smaller reporting companies can opt to comply with the scaled disclosure requirements on an "a la carte" basis with regard to each filing, to the extent that their disclosure remains consistent and permits investors to make period-to-period comparisons, and to the extent that they include all disclosure necessary to make statements in those documents not misleading. Also, smaller reporting companies must comply with smaller reporting company requirements where those requirements are more stringent than the requirements for larger companies.[8]

Foreign Issuer Reporting Enhancements

Effective December 5, 2008, the SEC revised the filing and disclosure requirements applicable to foreign private issuers[9] who report to the SEC on an ongoing basis, known as the foreign issuer reporting enhancements, or FIRE.[10]

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[8] The SEC noted one particular example where this is the case: under Item 404 of Regulation S-K, smaller reporting companies are required to report transactions with related persons that exceed the lesser of 1% of the average of the smaller reporting company's total assets *or* $120,000, which may impose a higher disclosure burden depending on the amount of the company's total assets.

[9] The definition of "foreign private issuer" is set forth in Exchange Act Rule 3b-4(c).

[10] *Foreign Issuer Reporting Enhancements*, Release Nos. 33-8959; 34–58620 (September 23, 2008).

The FIRE amendments, which have different effective dates for each requirement change, enable foreign issuers to test their eligibility to use the special forms and rules available to foreign private issuers just once a year, rather than continuously; shorten the deadline for annual reports filed on Form 20-F by foreign private issuers from six months to four months after fiscal year-end; and revise the annual report and registration statement forms used by foreign private issuers to improve certain disclosures provided in these forms.

Specifically, the amendments will accomplish the following and be phased in as follows:

- Permit foreign issuers to test their qualification to use the forms and rules available to foreign private issuers on an annual basis on the last business day of their most recently completed second fiscal quarter, rather than on a continuous basis. This requirement is consistent with the testing and transition requirements for domestic companies in determining accelerated filer and smaller reporting company status. If an issuer determines that it no longer qualifies as a foreign private issuer, it will not be subject to the rules applicable to domestic companies right away, but rather will become so on the first day of the following fiscal year, giving the issuer six months to transition to the domestic reporting requirements. For example, a foreign private issuer that does not qualify as a foreign private issuer as of the end of its second fiscal quarter in 2009 would file a Form 10-K in 2010 for its 2009 fiscal year. The issuer would also be required to begin complying with the proxy rules and Section 16 of the Exchange Act, and would file current reports on Form 8–K and quarterly reports on Form 10-Q beginning on the first day of its 2010 fiscal year. However, during the six-month transition period, the company may elect to begin filing disclosure documents under the domestic reporting system.

  Conversely, if a company that previously did not qualify as a foreign private issuer is able to attain foreign private issuer status, it may begin to take advantage of the foreign private issuer regime as soon as it has made the determination, as of the end of the second fiscal quarter, that it qualifies as a foreign private issuer. Although there is no requirement that an issuer notify the market of a change in status, some issuers that change reporting status under these rules may make a public announcement in a press release or in their SEC filings to avoid investor confusion. This amendment is effective immediately, so after December 5, 2008, issuers should review their status as of the last business day of their second fiscal quarter, in order to determine whether they continue to qualify as a foreign private issuer.

- Accelerate the filing deadline for filing annual reports filed on Form 20-F with the SEC by shortening the filing deadline from six months to four months after the foreign private issuer's fiscal year-end. Foreign private issuers have a significant transition time to prepare for this change, as it

will be effective for annual reports filed on Form 20-F for first fiscal years ending on or after December 15, 2011.

- Add new Item 16G of Form 20-F, which requires foreign private issuers to provide a summary in their Forms 20-F of how their corporate governance practices differ significantly from the practices of U.S. companies listed on the same exchange under the relevant exchange's listing standards. A foreign private issuer must comply with this additional disclosure requirement for its first fiscal year ending on or after December 15, 2008. This additional disclosure requirement should not be burdensome for most foreign private issuers because the NYSE, NASDAQ and NYSE Alternext (formerly known as AMEX, which was acquired by NYSE in October 2008) currently require foreign private issuers to disclose this information in either their annual reports to shareholders, on their web sites, or in their Forms 20-F filed with the SEC, depending on the U.S. exchange on which their stock is listed.

- Add new Item 16F of Form 20-F, which requires disclosure in annual reports filed on Form 20-F regarding changes in the registrant's certifying accountant, including any disagreements about the application of accounting principles. This will require foreign private issuers to report substantially similar information to what is required of domestic issuers. However, foreign private issuers will not be required to make the disclosure as quickly as a domestic issuer, since the disclosure is only required once per year, as opposed to within four business days of the change for domestic issuers (under Item 304 of Regulation S-K and Item 4.01 of Form 8-K). A foreign private issuer must comply with this reporting requirement for its first fiscal year ending on or after December 15, 2009.

- Eliminate the availability of the limited U.S. GAAP reconciliation option that is contained in Item 17 of Form 20-F. Foreign private issuers that do not prepare financial statements in accordance with U.S. GAAP or IFRS will be required to provide full U.S. GAAP reconciliation in all Form 20-F filings, including all registration statements and annual reports in accordance with Item 18 of Form 20-F. This rule change is significant to those issuers that are required to reconcile to U.S. GAAP and that relied upon the less burdensome reconciliation requirements of Item 17. This change will be effective for foreign private issuers in annual reports on Form 20-F for fiscal years ending on or after December 15, 2011.

- Eliminate Instruction 3 to Item 17 of Form 20-F that permitted certain foreign private issuers to omit segment data from their U.S. GAAP financial statements. The SEC noted that only approximately five foreign private issuers have used this accommodation during the past few years.

This change takes effect for fiscal years ending on or after December 15, 2009.

- Amend Form 20-F to require disclosure regarding fees and charges paid by holders of American Depositary Receipts ("ADRs") to depositories and the payments made by depositories to foreign private issuers whose securities underlie the ADRs. Although this disclosure is often available from other publicly available sources, such as the deposit agreement, which is a required exhibit to a Form F-6 for an ADR program, the SEC determined that better and more convenient disclosure of this information would be helpful to investors. A foreign private issuer must comply with this disclosure requirement for its first fiscal year ending on or after December 15, 2009.

Review of Advance Notice By-laws

Most public companies have provisions in their corporate by-laws requiring all stockholders to provide advance notice to the company of any proposals that stockholders would seek to bring before meetings of stockholders. Such provisions require stockholders to comply with very specific disclosure and procedural requirements relating to the proposals. Two recent cases in Delaware courts indicate that, if such provisions are challenged by stockholders, the courts appear likely to construe any ambiguity in the by-law provisions in favor of the challenging stockholders and against the defending corporation.

In *JANA Master Fund Ltd. v. CNET Networks, Inc.,* the Delaware Chancery Court interpreted the advance notice provision set forth in CNET's by-laws to apply only to proposals intended to be included in that company's proxy statement pursuant to Rule 14a-8 under the Exchange Act, and not to proposals for which the stockholder intended to prepare and circulate its own proxy statement.[11] Rule 14a-8 requires specific procedural and substantive requirements applicable to stockholder proposals to be included in a company's proxy statement. If stockholders are willing to do so, however, stockholders may also prepare their own, separate proxy statements and proxy solicitations for actions to be taken at a meeting. The court based its decision in part on the fact that the advance notice deadline in CNET's by-laws was linked to the anniversary of the mailing date for the company's proxy statement for the prior year's annual meeting, which is the same deadline for stockholder proposals intended to comply with the restrictions of Rule 14a-8.

In *Levitt Corp. v. Office Depot, Inc.,* the Delaware Chancery Court held that a stockholder was permitted to nominate a separate slate of candidates for election as Office Depot directors at the company's annual meeting, even though the stockholder had

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[11] The text of this opinion is available at http://courts.delaware.gov/opinions/download.aspx?ID=104050.

not complied with the advance notice provisions set forth in Office Depot's by-laws.[12] That provision stated that stockholders could bring proposals for business to be conducted at a meeting if such business was "specified in the notice of meeting." The court in this case found that Office Depot had, by proposing its own slate of directors for election at the meeting, made the election of directors an item of business to be conducted, and that as a result stockholders did not have to provide advance notice to the company that they were intending to nominate their own candidates for election.

In response to these cases, we recommend that all companies review their advance notice by-laws to ensure that the following provisions are included:

- Explicit and separate procedural requirements governing director nominations and all business other than director nominations.
- Notice requirements that are linked to the date of the previous year's annual meeting, instead of the date on which the company mailed its proxy materials for the previous year's annual meeting.
- A clear and specific statement that the advance notice requirements apply both to proposals that are intended to be included in the company's proxy statement and that are intended to be included in a separate proxy statement to be prepared and circulated by the dissident stockholder.

2009 Periodic Report Filing Deadlines

For companies that qualify as large accelerated filers and have fiscal years ending on December 31, annual reports on Form 10-K are due 60 days after fiscal year-end (Monday, March 2, 2009).[13] Form 10-K reports continue to be due 75 days following fiscal year-end for accelerated filers[14] (Monday, March 16, 2009, for December 31 year-

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[12] The text of this opinion is available at http://courts.delaware.gov/Opinions/download.aspx?ID=105260.

[13] *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, 2008);
- 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 for smaller reporting company status.

[14] *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

end companies) and 90 days after fiscal year-end for non-accelerated filers (Tuesday, March 31, 2009, for December 31 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 non-accelerated filers continues to be 45 days after the close of the fiscal quarter.

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

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 Alternext relating to board and committee membership requirements all impact who may serve.[15] 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.

Director Independence

The rules of NASDAQ, NYSE and NYSE Alternext (i) require each listed company to have a majority of independent directors serving on its board and (ii) define who qualifies as an independent director. Mintz Levin's updated form of *Director and Officer Questionnaire* includes questions designed to help companies determine whether a particular director will qualify as independent under the listing requirements. During 2008, NASDAQ, NYSE and NYSE Alternext amended their respective listing requirements to raise the dollar threshold for determining whether a transaction with a director will cause the director to fail to satisfy the independence requirements from $100,000 during any period of twelve consecutive months to $120,000 during such period.

In addition, NASDAQ, NYSE and NYSE Alternext require companies to disclose which directors have been affirmatively determined by the board of directors to have no

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recently completed second fiscal quarter (*i.e.*, for calendar fiscal year-end companies, this test would be applied as of June 30, 2008).

[15] Please see our advisory, dated November 2003, entitled "Changes to Corporate Governance Standards for NASDAQ-Listed Companies," for a further description of these changes.

relationship with the company that would interfere with the exercise of independent judgment in carrying out their responsibilities as a director.

Audit Committee Membership

In addition to the independence requirements imposed by NASDAQ, NYSE and NYSE Alternext for members of the board of directors, members of the audit committee are required to have greater knowledge of accounting matters and comply with even stricter independence standards. Rule 10A-3 under the Exchange Act provides that audit committee members may not be considered independent if they (i) directly or indirectly accept *any* consulting, advisory or other compensatory fee from the issuer other than in their capacity as a member of the board or a committee thereof or (ii) are affiliated persons of the issuer or any subsidiary. In addition, no audit committee member may have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years. Each audit committee member must be able to read and understand fundamental financial statements, including a company's balance sheet, income statement and cash flow statement at the commencement of the audit committee member's term instead of within a reasonable time thereafter, as was previously permitted. In addition, any partner in a law firm that receives payments from the issuer is ineligible to serve on that issuer's audit committee.

In response to the directive of Rule 10A-3, NASDAQ, NYSE and NYSE Alternext prohibit the listing of any security of an issuer if each member of its audit committee is not independent under Rule 10A-3, subject to certain limited exceptions.

Compensation Committee Membership

Under NASDAQ, NYSE and NYSE Alternext corporate governance requirements, compensation of the chief executive officer and all other executive officers must be determined, or recommended to the board for determination, either by a majority of the independent directors, or by a compensation committee that is comprised solely of independent directors. In addition, the chief executive officer may not be present at the deliberations of, or voting by, the compensation committee with respect to his or her own compensation.

Additional considerations affect the composition of a public company's compensation committee in connection with other statutory and regulatory requirements. Under Section 162(m) of the Internal Revenue Code, in order for a public company to derive a federal tax deduction for performance-related compensation expenses which result in more than $1 million of compensation being earned by an executive officer subject to Section 162(m), including the recognized gain arising from stock option grants, the company's compensation committee which authorized the compensation must be comprised entirely of "outside directors," as defined in Section 162(m). In addition, Rule 16b-3 under the Exchange Act provides that one way of exempting stock option grants from the short-

swing trading restrictions of Section 16(b) of the Exchange Act is to have stock option grants approved by a compensation committee that is comprised solely of at least two "non-employee directors," as defined in Rule 16b-3. We recommend that public companies make every effort to have all members of their compensation committees qualify as "outside directors" for purposes of Section 162(m) and "non-employee directors" for purposes of Rule 16b-3.

Nominating Committee Membership

The listing standards of NASDAQ, the NYSE and the NYSE Alternext provide that the nomination of directors must be determined either by a majority of independent directors or by a separately constituted committee. These listing standards do not require listed companies to consider shareholder nominees, although issuers must certify that they have adopted either a formal written charter or board resolutions addressing the nominations process. Nominating committees must also nominate the candidates for election at the company's annual meeting of shareholders, and those nominations must be accepted by the company's full board of directors.

Stockholder Approval of Equity Compensation Plans

NASDAQ, NYSE Alternext and NYSE 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 stockholder 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 stockholder approval requirement is also available for certain tax-qualified, non-discriminatory employee benefit plans (such as plans that meet the requirements of Section 401(a) of the Internal Revenue Code and Employee Stock Purchase Plans meeting the requirements of Section 423 of the Internal Revenue Code), provided that such plans are approved by the issuer's compensation committee or a majority of the issuer's independent directors. Equity plans adopted prior to June 30, 2003 are unaffected under this rule, until a material modification is made to such a plan.

As noted above, companies considering option repricing programs in light of significant declines in their stock prices should note that such programs 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.

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 that may require stockholder approval. Some items to consider are:

- Does the company have enough shares authorized under its certificate of incorporation to achieve all of its objectives for the year, including acquisitions for which it may want to use its stock as currency?
- Does the company have adequate shares available under its equity compensation plans to last throughout the year?
- Are there other material changes that should be made to the company's equity compensation plans that would require shareholder approval?
- Has the company reviewed its charter and by-laws to assess any anti-takeover measures in place?
- To the extent that a company expects any proposal in its proxy statement to create controversy among its stockholder base, it may want to consider hiring a proxy solicitor to assist with the process of seeking the requisite stockholder vote.

Mintz Levin Website: Client Publications

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

Please contact the Mintz Levin attorney who is responsible for your corporate and securities law matters if you have any questions or comments regarding this information.