Planning for the 2013 Annual Meeting and Reporting Season

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact one of the attorneys listed on pages 16-18 or your regular Skadden contact.

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As companies prepare for the 2013 annual meeting and reporting season, we have compiled an overview of the corporate governance and disclosure matters that companies should consider as they draft this season's disclosure materials. Some of these matters are requirements of new Dodd-Frank Act rules and others are based on lessons gleaned from the 2012 annual meeting and reporting season. The items discussed below will not apply equally to all companies. Whether a particular item applies and how a company should address it will depend on, among other things, the company's business, shareholder base and executive compensation plans and programs.

❑ **Incorporate lessons from 2012 say-on-pay results.** In the 2012 proxy season, approximately:[1]

- 69 percent of say-on-pay proposals passed with more than 90 percent support;
- 21 percent passed with between 70.1 and 90 percent support;
- 7 percent passed with between 50 and 70 percent support; and
- 3 percent (61 companies) obtained less than 50 percent support.

While the overall proportions generally are similar to last year's results, it should be noted that in 2011 only 37 say-on-pay proposals obtained less than 50 percent support.

Based on the insights gleaned from the 2012 proxy season, we have a number of recommendations for companies to consider as they make compensation decisions and plan for the related disclosure. It is important to note, however, that while some of our recommendations are based on the views of Institutional Shareholder Services (ISS), Glass Lewis and other advisory firms, their views are not the only relevant factors (or perhaps not even one of the most relevant factors) in making these decisions. In some cases, the interests of the company and its shareholders may best be served by making a decision that is contrary to the views of the advisory services. This is a complex and nuanced area with a tremendous amount of media scrutiny, and we urge companies to consult with internal and external advisers as early in the process as possible in order to make the most appropriate and strategically intelligent decisions with respect to their executive compensation programs.

As a first step, companies should analyze the reports issued by ISS, Glass Lewis and other advisory firms in 2012 with respect to the company's 2011 executive compensation in order to better understand the concerns of those firms and to consider addressing these concerns. Companies should also consider any feedback they received from their shareholders. If a company makes changes based on the concerns raised, it will be viewed favorably by shareholders and ISS and other advisory firms. Any such changes should be described in some detail in the 2013 proxy materials and explicitly linked to the concerns that were raised. Even if changes are not made in response to any concerns raised, we recommend that companies consider including a description of the concerns, as well as a declaration that the concerns were reviewed and considered, in the 2013 proxy materials.

[1] Percentages follow the (For/(For + Against + Abstain)) formulation and have been rounded to the nearest percentage.

We also believe that companies should consider conducting shareholder outreach to discuss any perceived or noted concerns regarding compensation plans or decisions. ISS made clear that it expects any company whose say-on-pay proposal failed (or passed without extremely strong support) to conduct shareholder outreach efforts and to describe these efforts thoroughly in the next proxy statement. Companies in this situation should engage their largest shareholders to solicit reactions to the company's existing executive compensation program, as well as views regarding any concerns raised by ISS and others. Such outreach could include making presentations via teleconference, providing written materials regarding the company's current program and the proposed changes or holding in-person meetings. Of course, companies should be mindful of SEC rules and regulations, such as Regulation FD and the proxy filing requirements, that may apply to these outreach efforts.

Companies also should consider whether their proxy materials should be revised to better "tell the story" of the company's executive compensation programs in a coherent and compelling manner. Companies should consider using charts, graphs and other reader-friendly tools to achieve maximum clarity of the company's message. One example of a recent change that a number of companies have made is to include a summary section in the proxy statement. These summaries are generally included in the beginning of the proxy statement and highlight key points about the disclosures, such as the date, time and location of the meeting, the agenda for the meeting, the nominees to the board (including summary biographical information for each nominee), business highlights and key compensation elements, features and decisions. As there are a number of individuals, including representatives from legal, human resources, finance, stock administration and other departments, as well as external legal counsel, compensation consultants and accounting firms, that may be necessary to involve in the preparation of proxy materials, it is important to begin the proxy drafting process as early as possible.

In the face of ISS "against" recommendations during the 2012 proxy season, many companies issued supplemental filings as a rebuttal. In 2013, companies should take advantage of the knowledge gleaned from these supplemental filings in order to both preemptively address known ISS concerns with respect to 2012 proxy disclosures and to make effective decisions with respect to 2013 compensation. Some ideas to consider are as follows:

Realizable Pay: Many supplemental filings focused on the perception by companies that ISS had materially overstated CEO pay by focusing on the grant date value of awards. For example, including the full grant date value of a stock option ignores the fact that the option has no actual value unless the company's stock price increases following the date of grant (which would generate gains for stockholders as well). At an extreme, stock options that expire "out of the money" (that is, if the stock price does not increase from the date of grant) would, in fact, expire with no realized value. Companies have noted that ISS's historical methodology allocates to one year (the year of grant) a lump sum amount based on the option's grant value for accounting purposes. This is an amount that potentially is both vastly overstated as well as allocated in a lump sum to a single year prior to the year (if any) that any value is, or can be, realized.

To illustrate these arguments, companies often have presented charts showing realizable pay based on various assumptions. ISS made a brief, general statement in its 2013 policy update that for "large cap" companies it will add consideration of realizable pay to its research reports. At this point, the only details provided by ISS are that realizable pay for a particular performance period will consist of the value of cash and equity-based awards "made" during the performance period being measured according to the following: (i) for actual earned awards, the actual equity award value using the stock price at the end of the period (or cash value, presumably); and (ii) for ongoing awards, the target value, calculated using the stock price at the end of the performance measurement period. In addition, stock options and stock appreciation rights will be subject to revaluation using the remaining term and updated assumptions. Companies should consider whether and to what extent additional disclosure regarding realizable pay will assist in explaining company pay practices, while continuing to monitor how realizable pay is being evaluated as ISS begins issuing reports under its new policies.

Peer Groups: One of the most controversial issues during the past proxy season was the degree to which the peer groups chosen by ISS were different from the peer groups chosen by companies. Company-chosen peer groups tend to be selected based on nuanced analysis that takes into account companies with which the company competes for market share and executive talent. ISS, on the other hand, selected peer groups based on an industry classification code, and in some cases the ISS-selected peer group shared only one or two companies in common with the company-chosen peer group. In its 2013 policy updates, ISS indicated that going forward, and in order to address concerns about the composition of its selected peer groups, it will take into account a company's self-selected peer group when identifying companies to include in the ISS-selected peer group, primarily focusing on whether there are additional Global Industry Classification Standard (GICS) codes that may be relevant.

ISS has stated that its new methodology will prioritize peers that maintain the company near the median of the peer group, are in the company's peer group and also have chosen the company as a peer. In addition, while ISS has indicated that it will continue to use the GICS system to choose peers, its updated selection process will focus initially on the eight-digit GICS sub-code level in order to more precisely target the industry of potential peer group members. As a result, the average company will have more than 80 percent of its peers selected from its eight-digit GICS group or the eight-digit GICS groups of its self-selected peers. No peers will be chosen based on the more general two-digit GICS code. By contrast, under the methodology used by ISS in 2012, only 40 percent of peers were chosen based on an eight-digit GICS code and 12 percent were chosen based on a two-digit code. ISS has also indicated that it will slightly relax its requirements relating to size of companies considered, particularly when constructing peer groups for very large and very small companies, and will use assets instead of revenue for certain financial companies. ISS notes that while under the 2012 methodology 82 percent of peer groups resulted in the subject company falling within 20 percent of the peer group median size by revenue, that number rises to 90 percent under the 2013 methodology.

It is hoped that ISS's changes in peer-group selection methodology will address previous concerns about disparity with company-selected peers. Companies should still consider providing detailed information regarding their peer-selection process, in order to provide meaningful context for shareholders to make decisions regarding say-on-pay proposals.

Bonus Disclosure: A number of negative ISS comments in 2012 addressed disclosure of incentive compensation. ISS indicated that it views vague descriptions of the manner in which annual and long-term bonuses are calculated as problematic, and we recommend that companies take a fresh look at whether the narrative description of such plans is detailed sufficiently. In addition, if the same performance measurement (*e.g.*, earnings per share or EBITDA) has been used for more than one plan, we recommend that the company provide its reasoning for that decision, since the use of the same measure across plans was commented on negatively by ISS in a number of its reports.

A company may wish to consider diversifying the measures used in its incentive plans so as not to give the impression that individuals are being compensated twice for the same performance. In addition, companies should consider whether their incentive plans have multiple performance measures but permit payout if only a subset of those measures are met. ISS was critical of such arrangements during this past proxy season, particularly when the subset of measures that could trigger payout were qualitative rather than quantitative in nature. Finally, it should be noted that ISS has not hesitated to analyze the actual payment thresholds and measurements in plans and deem them insufficiently challenging. Companies should take care to use analytical rigor in setting goals and provide a description of the process via which any payment thresholds were set.

Equity Awards: ISS, despite many complaints by companies in their supplemental filings, does not consider stock options to be performance-based pay, and a large grant of stock options can skew dramatically the ISS determination of CEO pay in the year of grant. Furthermore, equity-based awards with time-based (rather than performance-based) vesting schedules are viewed extremely negatively by ISS, particularly when they comprise all or substantially all of the awards made under a company's equity award program. Companies should keep this fact (among other relevant factors) in mind in considering the terms of future grants.

Total Shareholder Return: ISS considers total shareholder return (TSR) to be the most important measure of a company's performance in determining whether there is a "pay for performance disconnect." A number of companies argued strongly against using a single measure in this manner. If a company believes that measures other than TSR are more relevant to its shareholders — such as quality of assets held (in the case of financial institutions), safety (in the case of industrial companies), or low volatility and consistent dividends (in the case of utilities) it should discuss this point in the CD&A to provide shareholders with that context.

Pay Disparity: ISS indicated to a number of companies that it views a significant disparity between the pay of the CEO and the other executive officers to be problematic because it suggests inadequate succession planning and may impact executive morale. We recommend that companies with significant pay disparity provide disclosure regarding the reasons for the disparity and a general description of any succession planning processes in order to show that the company has considered the issue.

Retention Bonuses: Based on ISS reactions during the 2012 proxy season, we recommend that companies providing retention bonuses, stay bonuses or similar awards, provide a detailed explanation of how it was determined that such an award was appropriate, the conditions under which it was to be paid and any other relevant information.

CEO Transitions and Tenure: For companies that have gone through a CEO transition, we recommend that detailed disclosure be provided as to the rationale for any payments made to the exiting CEO and any special payments or grants made to the new CEO in connection with the transition, together with any relevant factors considered in making any of their payments and grants. Conversely, companies with a long-tenured CEO who is highly compensated should consider highlighting the CEO's years of experience.

Excise Tax Gross-Ups: ISS reserves its most negative comments for "golden parachute" excise tax gross-ups in new or renewed agreements and arrangements. The inclusion of such a provision can be sufficient on its own to draw a negative vote recommendation. In at least one case, the rescinding of the provision was sufficient to trigger a change in the ISS voting recommendation to "for." While most companies are well aware of the issue in the context of new arrangements, they should be careful to monitor the renewal or extension of existing arrangements, without the elimination of any existing provision for an excise tax gross-up.

Corporate Performance: A decline in corporate performance in and of itself is not sufficient to trigger a negative recommendation if pay is decreased, for example by exercising discretion to decrease or eliminate a bonus payout or changing the compensation benchmarking percentage to something lower than 50 percent. ISS provided a "for" recommendation in some cases of poor company performance when accompanied by lower compensation. In some circumstances, ISS provided an "against" recommendation where performance was excellent but pay was too high even given that performance. Accordingly, when making decisions for 2013, companies should consider, as always, the relationship between compensation and the company's historical and predicted performance to avoid the perception of a disconnect.

❑ **Ensure compliance with new proxy disclosure rules concerning use of compensation consultants and related conflicts of interest.** The SEC adopted a new disclosure requirement in June 2012[2] that is applicable to any proxy or information statement for an annual meeting of shareholders (or a special meeting in lieu of the annual meeting) at which directors will be elected occurring on or after January 1, 2013. This new disclosure requirement is generally triggered when a compensation consultant is identified in a company's disclosures because it plays a role in determining or recommending the amount or form of executive and director compensation and that role "has raised any conflict of interest." In those situations, companies will be required to disclose the nature of the conflict and how the conflict is being addressed in the proxy or information statement.

The new disclosure rule does not define "conflicts of interest" and does not specifically dictate the information that a company would be required to provide as to the nature of the conflict or how the conflict is being addressed. The new rule does, however, include an instruction requiring that the following six factors, at a minimum, be considered when determining whether a conflict of interest exists:

- the provision of other services to the company by the person that employs the compensation consultant, legal counsel or other adviser;
- the amount of fees received from the company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;
- the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;
- any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;
- any stock of the company owned by the compensation consultant, legal counsel or other adviser; and
- any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the company.

These six factors were adopted by the SEC as part of the rules that require the national securities exchanges to amend their listing standards to address the role of compensation committees and their advisors (as more fully described below). As a result, any additional factors the exchanges include in the listing standards are among some of the other factors that compensation committees may want to consider when determining whether a conflict of interest exists for purposes of new Regulation S-K Item 407(e)(3)(iv).

Compensation committees should consider whether their existing relationships with any compensation consultants may require disclosure under the new rule and, if so, whether a conflict of interest exists and how any conflict of interest is being addressed. Companies will then need to determine the disclosures required under the new rules. Although not required, companies may want to disclose that they reviewed these relationships and did not identify any conflicts.

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[2] Item 407(e)(3)(iv) of Regulation S-K.

❑ **Comply with IRC Section 162(m).** Internal Revenue Code Section 162(m) generally limits a public company's deduction for compensation paid to its chief executive officer and its next three most highly compensated officers (excluding the CFO) to $1 million each per year. However, performance-based compensation (PBC), which is compensation paid pursuant to a plan or other arrangement and is only payable upon the attainment of objective performance targets set in advance by a committee of two or more outside directors based on shareholder approved performance goals, is not subject to the $1 million cap. Stock options and stock appreciation rights will constitute PBC without satisfying the otherwise applicable rules under Section 162(m) if (i) they are granted by outside directors (as that term is defined in the rule and explained more fully below) under a shareholder-approved plan that contains a limit on the number of awards that an individual can receive in any specified period and (ii) the grants have an exercise price that is not less than the fair market value of the stock subject to the award on the grant date.

Shareholder Reapproval of Section 162(m) Plans Approved in 2008 or Earlier. Importantly, the Section 162(m) regulations require that shareholders reapprove their performance goals every five years with respect to which PBC is paid. This means that companies that obtained shareholder approval of such goals in 2008 or earlier must resubmit their goals for shareholder approval in 2013. This five-year reapproval requirement does not apply to stock options and stock appreciation rights. However, many public companies grant performance-based equity awards, such as restricted stock or restricted stock units, under the same equity incentive plan adopted in 2008 or earlier and used for stock option and stock appreciation right grants. Unless a company's equity incentive plan's performance goals are reapproved in 2013, future performance-based grants of restricted stock or restricted stock units under the plan will not qualify as PBC under Section 162(m). Likewise, performance goals applicable to cash bonus awards intended to qualify as PBC under Section 162(m) (which awards may be authorized under omnibus incentive plans or paid under separate plans) must also be reapproved every five years.

Consider Adopting Section 162(m) Compliant Plans. Companies intending to compensate executives with cash bonuses or equity-based compensation other than options and stock appreciation rights should consider adopting plans designed to comply with the requirements of Section 162(m) and submitting them to shareholders for approval in 2013. If a company is submitting other option equity incentive plan amendments to shareholders for approval in 2013, it should consider adding provisions sufficient to qualify other cash bonuses and equity compensation payable under the plans as PBC under Section 162(m).

Review Outside Director Status. Compensation only qualifies as PBC if it is awarded and administered by outside directors, generally defined as board members who are not employees or current or former officers and who do not receive remuneration other than director compensation from the company (directly or as paid to entities of which such directors are employees or owners), unless it qualifies as "*de minimis* remuneration" under narrow and complex rules. Public companies should make certain at least annually that the directors administering their PBC plans continue to qualify as outside directors.

Review Status of Grandfathered Plans. Under certain circumstances, compensation plans that are effective before a company becomes publicly held are subject to special transition rules that defer compliance with Section 162(m) for between one and three years after the company becomes publicly held, depending on whether the company becomes public through an initial public offering, spin-off or otherwise. Adoption of material amendments to such grandfathered plans can shorten the transition period. Companies that went public in 2012 or earlier should check to see whether compliance is now required for 2013 and thereafter.

❑ **Consider potential impact from proposed revised listing standards related to compensation committees and advisors.** On September 25, 2012, the New York Stock Exchange (NYSE) and the Nasdaq Stock Market (Nasdaq) proposed revised listing standards that largely tracked the SEC's rules requiring the exchanges to revise their standards as mandated by new Exchange Act Section 10C(c)(2).[3] The revised listing standards need to be approved by the SEC before they go into effect, which has not occurred as of the date of this alert and is not expected in time for the revised standards to apply to annual meetings held in the first half of 2013.

When adopted, the new listing standards are expected to require that the compensation committees of companies that need to comply with the standards:

- may, in their sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser;
- shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel or other adviser retained by the compensation committee; and
- may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration the same six factors that the companies should consider when determining whether a conflict of interest exists under Regulation S-K Item 407(e)(3)(iv) (as described above), as well as any other factor(s) identified by the exchange in its revised listing standards.

Companies also are expected to be required to provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or other adviser retained by the compensation committee.

We believe that companies that are required to comply with the exchange listing standards and their compensation committees should consider the proposed revised listing standards to identify any changes that may be necessary to their practices and procedures if the standards are adopted as proposed. For instance, if a compensation committee intends to hire a compensation consultant for a long-term engagement, it would be prudent to consider the factors the exchanges proposed regarding potential conflicts of interest. We believe that companies should refrain from making any changes to a compensation committee's charter that address the proposed changes until after the final revised standards are available.

❑ **Plan for impact of conflict minerals and resource extraction payments disclosure rules.** In August 2012, the SEC adopted the final rules to implement two of the more controversial provisions of the Dodd-Frank Act — the conflict minerals and resource extraction payments disclosure provisions. Although reporting under these rules by public companies will not begin until 2014, we believe it is important to start planning for compliance with these rules now.

We recommend planning for compliance with these disclosure provisions now even though both rules are the subject of legal challenges. Those challenges are proceeding in the U.S. Court of Appeals for the D.C. Circuit and should be monitored for any impact on the implementation dates for the new rules. But hoping for a reprieve from reporting under the new rules could result in a missed opportunity to use the transition time the SEC provided when it adopted the rules to be ready for compliance if the rules are not overturned.

[3] Additional information about the proposed revised listing standards is available here or on our website at: http://www.skadden.com/insights/nyse-and-nasdaq-propose-new-compensation-committee-rules.

Conflict Minerals Disclosure Rules. These new rules will require public companies that manufacture or contract to manufacture a product in which certain minerals (referred to as "conflict minerals"), including gold, tin, tungsten and wolframite, are necessary to functionality or production of the product to conduct diligence regarding the use and source of those minerals and to report certain information on a new Form SD filed with the SEC. The first Form SD is due by May 31, 2014 and will include information regarding calendar year 2013 — regardless of whether the company reports its fiscal results on a calendar-year basis.[4]

A number of key implementation issues have been raised as companies consider whether they will need to report information pursuant to the conflict minerals disclosure rules. Those issues include identifying a company's products and determining whether a company contracts to manufacture a product. Companies also are struggling to determine whether any packaging they use with a product should be considered to be a part of the product. The answers to these questions will impact the level of reporting required under the new rules. Although the SEC provided some guidance in the release it issued when it adopted the conflict minerals disclosure rules, the answers to these and other questions will require companies to conduct a detailed facts-and-circumstances analysis.

The timing on beginning the process for determining whether a company will need to file a Form SD pursuant to the conflict minerals disclosure rules is impacted by two important considerations. First, as noted above, the inaugural reporting year under the new rules is January 1 to December 31, 2013. Companies will need to have procedures in place to begin capturing the information necessary to determine whether compliance with the rules will be required. Second, the SEC provided certain transition relief in the rules that may benefit certain companies. The transition relief allows companies to not have to consider conflict minerals in its analysis under the rules if those minerals are "outside the supply chain" by January 31, 2013. This relief could be helpful for companies that either may have difficulty in determining the source of minerals or that would like to change supply methods to avoid reporting under the new rules.

Resource Extraction Issuer Disclosure Rules. These rules apply to public companies that engage in the commercial development of oil, natural gas or minerals and require disclosure of payments made to foreign governments and to the U.S. federal government for the purpose of commercial development of oil, natural gas or minerals.[5] These disclosures are required to be made on new Form SD and must be filed no later than 150 days after the end of a company's fiscal year, beginning with fiscal years ending after September 30, 2013. As a result, the first Form SD for calendar year resource extraction companies will be due by May 30, 2014.

Similar to the conflict minerals disclosure rules, there are a number of important implementation questions that companies must consider in connection with planning for reporting under the resource extraction issuer disclosure rules. For instance, the rules require that the disclosures regarding payments made must cover those made by the company, any subsidiary of the company and any entity under the control of the company. Determining whether a company controls another entity requires a detailed facts-and-circumstances analysis. This issue is particularly sensitive when the entity is not one in which the company owns 50 percent or more of the outstanding ownership interests. There also are questions about the details of the required information regarding the payments made and whether certain actions by a company should be deemed commercial development activities. We believe that beginning the process of preparing for the potential need to comply with the new rules soon will be beneficial to companies.

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[4] Additional information regarding the conflict minerals rules is available here or on our website at http://www.skadden.com/insights/sec-adopts-conflict-minerals-rules.

[5] Additional information regarding the resource extraction issuer disclosure rules is available here or on our website at http://www.skadden.com/insights/sec-adopts-rules-requiring-disclosure-payments-resource-extraction-issuers.

❑ **Prepare for shareholder proposals.** Submitting proposals for inclusion on the annual meeting agenda and in the company's proxy materials remains a focus of certain shareholders and groups. In the 2012 proxy season, the most common shareholder proposal topics included perennial favorites such as separating the chairman and chief executive officer positions, majority voting, board declassification, repealing supermajority voting requirements and providing shareholders a right to call special meetings or to act by written consent. Political spending also was a common topic for proposals in 2012 (see the additional information on this topic below). The most closely watched topic of the season, however, was the process for nominating and disclosing shareholder candidates (or "proxy access").

The 2012 proxy season was the first during which shareholders were permitted to require companies to include shareholder proposals related to proxy access in company proxy statements because of a change to the Exchange Act Rule 14a-8. There were approximately 24 proxy access proposals submitted to companies in 2012. Companies used a number of procedural and substantive bases under Rule 14a-8 to exclude, with concurrence of the staff of the SEC's Division of Corporation Finance, many of these proposals. As a result, only 12 of the submitted proposals were voted on by shareholders and only two of those proposals were approved by a majority shareholder vote. It is unclear whether we will see an increase in the submission of proxy access proposals in 2013, but companies should be prepared to consider and respond to the proposals.

Shareholder proposals requesting board declassification were also high on the agenda of corporate governance activists in 2012. The Harvard Law School Shareholder Rights Project (SRP) reports that it submitted precatory board declassification proposals during the 2012 proxy season to 89 of the companies in the S&P 500 Index. More than half of the companies receiving such proposals entered into agreements with SRP committing the companies to bring management declassification proposals to a shareholder vote. SRP also reports that 30 of the companies entering into such agreements have already declassified their boards. As there is no indication that SRP is planning to reduce its efforts to declassify boards of public companies, we expect to see more of these proposals during the 2013 proxy season.

The staff of the Division of Corporation Finance released its latest Staff Legal Bulletin concerning the shareholder proposal process governed by Rule 14a-8. SLB 14G clarifies SEC staff positions on three topics arising from last proxy season: (i) who can provide proof of beneficial ownership verifying that a person is eligible to submit a proposal, (ii) what companies must include in their deficiency notices concerning proponents' proof of ownership, and (iii) what limitations apply to website references in proposals and supporting statements. This is essential guidance for companies to consider when determining whether they are able to exclude shareholder proposals under Rule 14a-8.[6]

❑ **Determine impact of SEC staff disclosure initiatives.** The staff of the Division of Corporation Finance recently has been focused on a number of key initiatives when reviewing periodic reports. These initiatives should be considered when preparing disclosures in the company's financial statements and annual reports on Forms 10-K, 20-F or 40-F. The disclosure initiatives include:

Cybersecurity Disclosures. In October 2011, the staff of the Division of Corporation Finance issued guidance related to cybersecurity disclosures.[7] The guidance was intended to assist companies in assessing what disclosures should be provided with respect to

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[6] Additional information about the SLB 14G is available here or on our website at: http://www.skadden.com/insights/new-sec-staff-legal-bulletin-no-14g-shareholder-proposals.

[7] CF Disclosure Guidance: Topic 2 (cybersecurity), Oct. 13, 2011.

cybersecurity risks and cyber-incidents and how cybersecurity risks and their impact should be described in SEC filings. Although there is no SEC disclosure requirement explicitly referring to cybersecurity risks and cyber-incidents, the staff guidance noted that a number of existing disclosure requirements may impose an obligation to disclose such matters. Those requirements could include the disclosures related to risk factors, Management's Discussion and Analysis (MD&A), the business and legal proceedings descriptions, and the notes to the financial statements.

As part of its review of the responses to this new disclosure guidance, the staff has been focused on statements made by companies regarding the risk of potential cyber security-related incidents when the company has a history of such incidents. For instance, if a company disclosed that cybersecurity incidents "could" or "may" have a particular impact, the staff has issued comments asking about whether any such incidents have occurred. If such incidents have occurred, the staff has requested that the company's disclosures be revised to put the potential of an incident in context (*i.e.* not only *may* incidents occur, incidents *have* occurred). The following is an example of the type of corrected risk factor disclosures that companies have included in response to staff comments in this area:

> Our computer systems may be subject to cyber attacks and other cybersecurity incidents. Although the cybersecurity incidents we have experienced to date have not had a material effect on our business, financial condition or results of operations, there can be no assurance that cybersecurity incidents will not have a material adverse effect on us in the future.

Companies should be mindful of this staff focus when reviewing and drafting cybersecurity-related disclosures.

Loss Contingency Disclosures. The accounting staff of the Division of Corporation Finance remains focused on disclosures regarding loss contingencies. Based on public staff statements and comment letters, the staff is focused on disclosures about reasonably possible losses and estimates of such losses. The staff has scrutinized, and viewed skeptically, disclosure that the company is unable to disclose an estimate of a range of reasonably possible losses related to contingencies because such a range cannot be estimated with certainty or with confidence. The staff has stated that it is receptive to having a dialogue with companies with respect to issues related to privileged information — for instance, when requesting that a range of possible losses be disclosed, the staff will accept an aggregate number for all such lawsuits, rather than a dollar disclosure on a case-by-case basis.

Notwithstanding the staff's focus, the accounting provisions do not require that an estimate of a range of reasonably possible losses be disclosed when it cannot be made. The intent of this focus seems to be to ensure that companies make a "strong, diligent effort" to provide the estimate. Companies should consider whether an estimate can be provided and discuss the conclusion with the disclosure team, including the independent auditors and legal advisors.

The staff's focus on this topic followed on the heels of the plans by the Financial Accounting Standards Board's (FASB) to consider changes to the requirements of Accounting Standards Codification Topic 450 (formerly Statement of Financial Accounting Standards No. 5; "Disclosure of Certain Loss Contingencies"). FASB announced its intention to reconsider Topic 450 in 2007 and then, after a number of delays in the timing of the project, announced in July 2012 that the project had been removed from its agenda. This decision by FASB does not appear to have impacted the staff's focus on loss-contingency disclosures.

Segment Reporting. The staff of the Division of Corporation Finance has continued to focus on the proper identification of segments for reporting purposes. Based on comment letters issued over the past year, the staff has focused primarily on whether a company's identification of reporting segments and, in some the cases, the aggregation of multiple operating segments into one reporting segment is consistent with the guidance set forth in Accounting Standards Codification (ASC) 280-10-50. Staff comments often requested supplemental explanations, with a view toward revised future disclosure, in order to better understand the way in which the company's operations are viewed through the lens of its chief operating decision maker(s) and sought enhanced disclosure regarding the factors used to identify reporting segments.

Companies that have not adequately disclosed their rationale for the identification of their reporting segments and companies that have recently completed an acquisition, undergone an internal reorganization, or experienced a change in management appear to be most prone to receiving these comments. Such companies should, therefore, consider revisiting their segment disclosure to ensure that they have properly identified their reporting segments consistent with the applicable accounting guidance.

Goodwill Impairment. Disclosure regarding the testing of goodwill for impairment has remained a focal point for the staff of the Division of Corporation Finance. Staff comments, which have requested enhanced narrative discussions in company filings, have concentrated on obtaining information regarding management's insights concerning the recoverability of goodwill and the methodologies and significant assumptions used in impairment testing. The staff has focused on companies that appear to have one or more reporting units with a carrying value at risk of exceeding fair value and that lack robust disclosure regarding the probability of an impairment charge.

Relevant staff comments typically have requested that companies provide a supplemental analysis of the fair value, taking into account both quantitative and qualitative factors, compared to the carrying value of the goodwill. The staff also has asked companies that face a probability of future charges to enhance their discussion of the same by disclosing;

- the percentage by which fair value exceeded carrying value as of the date of the most recent impairment test;
- the amount of goodwill allocated to the related reporting unit, the methods and key assumptions used in the company's analysis;
- how those assumptions were determined;
- the degree of uncertainty associated with those assumptions; and
- the potential events and/or changes in circumstances that could reasonably be expected to negatively affect those assumptions.

To address these concerns, companies that experience significant declines in operating performance, either directly or through one of their reporting units, should consider providing enhanced disclosure regarding goodwill impairment and the possibility of future charges.

❑ **Note the new potential Iran-related disclosure requirements.** On August 10, 2012, President Obama signed the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITR Act) into law. Among other things, the ITR Act requires public companies to disclose information pertaining to certain Iran-related activities and transactions in their annual and quarterly reports filed on or after February 6, 2013.[8] Companies should review their activi-

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[8] Additional information about the ITR Act is available here or on our website at: http://www.skadden.com/insights/new-requirements-sec-reporting-companies-disclose-certain-iran-related-activities-and-trans.

ties and the activities of their affiliates to determine whether they have engaged in any specified activities or transactions involving Iran and whether disclosures will be required under the new requirements.

A disclosure obligation under the ITR Act will be triggered if, during the period covered by a periodic report, a public company or any of its affiliates knowingly engaged in activities that are sanctionable pursuant to the Iran Sanctions Act of 1996 or the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010, and if they have engaged in any unlicensed transaction with the government of Iran or with persons designated for sanctions pursuant to certain executive orders (a group that includes most Iranian banks and many large commercial enterprises). Sanctionable activities include, among other things, transactions relating to Iran's petroleum industry, the transfer of technology or services to Iran that are likely to be used for human rights abuses against the Iranian people, and certain financial transactions with Iranian financial institutions and other Iranian entities.

Companies that are required to provide disclosure must describe the nature and extent of the subject activity, the gross revenues and net profits, if any, attributable to the activity, and whether the company or any affiliate of the company intends to continue the activity. Each such company also must file with the SEC concurrent with its periodic report a separate notice indicating that the disclosure prompted by the ITR Act has been included in the periodic report and identifying the company and the detailed information described above.

Obtaining the information necessary to determine whether the disclosure provisions of the ITR Act have been triggered may prove difficult, especially from noncontrolled affiliates (*i.e.*, entities that are "affiliates" for securities law purposes, such as parent companies or entities under common control, but with respect to which the company does not have the actual power to compel cooperation). Issues may exist even in obtaining information from controlled affiliates, for example, if there are third-party investors in such affiliates to which fiduciary or contractual duties may be owed. Thus, companies that believe they may be required to provide the new disclosures will need to move quickly to ensure that they are ready to provide them within the timetable for initial reporting. Companies also should be mindful of the fact that the conduct described in this part of the ITR Act may violate other U.S. laws — specifically, the U.S. economic sanctions with respect to Iran, which include criminal penalties — and also may meet the criteria for the imposition of broader economic sanctions against the company.

❑ **Monitor proposed auditing standard relating to communications with audit committees.** On September 10, 2012, the SEC proposed rules that, if adopted, will implement Public Company Accounting Oversight Board (PCAOB) Audit Standard No. 16 (AS 16). If adopted as proposed, AS 16 will be effective for audits of fiscal years beginning on or after December 15, 2012, and related amendments to existing standards will be effective for reviews of fiscal quarters also beginning on or after December 15, 2012.

Under the existing standard, auditors are required to establish an understanding of the terms of their engagement with the client, which could be interpreted to mean the management of the client. AS 16 clarifies that auditors must establish this understanding with the audit committee and requires that this understanding be recorded in an engagement letter. Among other changes to the existing standard, AS 16 also requires the auditor to communicate certain information to the audit committee in a timely manner, once such information has been identified. For example, the auditor must communicate changes in significant accounting policies; misstatements that, either individually or in the aggregate, could have a substantial effect on the company's financial reporting process and nontrivial corrected misstatements that might not have been detected without the audit (including the implications of this for internal control over financial reporting); and uncorrected misstatements aggregated by the auditor that management has determined to be immaterial.

For calendar year companies, if AS 16 is adopted as proposed, the new standard will apply to the auditor's review of financial statements for the first quarter of 2013 and to the engagement of the auditor for 2013. Companies should monitor the progress of the proposed auditing standard and ensure that, if the proposed standard is adopted, audit committee members are aware of the effects of the new standard.

❑ **Assess disclosure policy concerning political contributions and lobbying expenditures.** In the wake of the U.S. Supreme Court's decision in the *Citizens United*[9] case and the record-breaking political spending that took place during the 2012 presidential election cycle, we expect to see heightened interest from shareholders concerning companies' political and lobbying spending and related activities.

Of the groups focusing on political spending, the nonprofit Center for Political Accountability (CPA), which scores the top 200 companies in the S&P 500 Index based on their political accountability disclosure, policies, and compliance and oversight practices, was one of the most active last year. In particular, the CPA submitted over 50 shareholder proposals to companies concerning their political spending during the 2012 proxy season. Some of these proposals focused on indirect political spending by requesting disclosure of trade association dues that went toward political activities. As for its scoring process, the CPA assesses 25 indicators, such as whether companies publicly disclose their political contributions to specific candidates, parties or causes, whether companies have a publicly available policy governing their political contributions and expenditures made with corporate funds, and whether companies have a specific board committee that reviews and approves the political contributions made with corporate funds.

The CPA and other shareholder groups also have requested information about companies' lobbying expenditures, which often occur outside of a campaign season. Shareholder proposals on this topic have sought disclosure on, for example, amounts spent on lobbying legislators and regulators and on trade association dues and membership in tax-exempt policy organizations that draft model legislation. Requests by shareholders for enhanced transparency regarding lobbying expenditures are expected to continue during the upcoming proxy season.

Companies that believe they may be the target of interest concerning disclosure of political and/or lobbying spending should consider taking measures to address these concerns. Best practices in this area include adopting or revising stand-alone political and/or lobbying spending policies and amending appropriate board committee charters to delineate specifically the responsibility for analyzing and determining which political and/or lobbying activities, if any, the company will engage in. It also may be prudent for companies to consider the CPA's 25 indicators when taking steps to implement these measures.

On another front, the Committee on Disclosure of Corporate Political Spending submitted a rulemaking petition to the SEC in August 2011 to require companies to publicly disclose the use of corporate resources for political activities. Bogged down by Dodd-Frank and JOBS Act rulemaking efforts, however, the SEC has not taken any official action in response to the rulemaking petition. Nevertheless, it appears that the petition is not without support at the SEC. In particular, SEC Commissioner Louis Aguilar has been outspoken about the need for such disclosure requirements, and the senior staff in the Division of Corporation Finance indicated as recently as November 2012, that given the more than 300,000 comments submitted in connection with the rulemaking petition, it is considering whether to proceed with drafting a proposed rule. We will continue to monitor these developments and the future impact on public company disclosures.

❑ **Consider policy on hedging and pledging of company stock by officers and directors.** Recently there have been several high-profile instances of public company executives having to dispose of company stock in order to meet margin calls. These

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[9] *Citizens United v. FEC*, 558 U.S. 310 (2010).

instances, combined with the provision in the Dodd-Frank Act that mandates the SEC to adopt rules to require public companies to provide proxy statement disclosures indicating whether they have a policy permitting directors and employees to hedge against decreases in the company stock price, have led to a renewed interest in company policies regarding hedging and pledging of company stock by officers and directors.

ISS has picked up on the interest in this issue and added it as an element of its voting guidelines when considering matters that it believes should be deemed governance failures.[10] In its 2013 voting policy update, ISS explicitly notes that "hedging of company stock and significant pledging of company stock by directors and/or executives are considered failures of risk oversight." ISS may recommend "against" or "withhold" votes for directors individually or for the entire board due to material failures of risk oversight under "extraordinary circumstances." There are no specific guidelines provided to determine what ISS means by extraordinary circumstances.

Companies should consider the application of the revised ISS voting guidelines and the forthcoming Dodd-Frank Act proxy disclosure requirements (which as noted below will not be in effect for the 2013 proxy season) to determine if any changes in their current policies should be made at this time.

❑ **Confirm director nominee compliance with advisory firm policies on overboarding.** Companies should consider whether their CEO or any of their directors may be "overboarded" under the newly revised ISS voting policies. ISS considers directors overboarded if they sit on more than six public company boards or if they serve as the CEO of a public company who sits on the boards of more than two additional public companies. ISS recommends "against" or "withhold" votes for directors it deems to be overboarded. In the past, ISS has counted publicly traded subsidiaries owned 20 percent or more by the parent company as having one board with the parent company. Starting with the 2013 proxy season, ISS will count all subsidiaries with publicly traded stock as separate companies from their parent companies for purposes of determining if an officer or a director is overboarded. Subsidiaries with only publicly traded debt will still be deemed to have one board with the parent company. We do not expect this change to have a significant impact, but companies should confirm compliance with the new policy.

❑ **Comply with the XBRL filing requirements and, if applicable, account for the expiration of the two-year limited liability provisions.** All U.S. domestic companies (other than investment and business development companies) and foreign private issuers that prepare their financial statements in accordance with U.S. GAAP are now required to comply with the XBRL filing requirements. Foreign private issuers that prepare their financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board have been provided relief from the XBRL requirements by the staff of the Division of Corporation Finance until an SEC approved XBRL taxonomy for their financial statements is available. This relief is expected to remain in effect for the 2013 reporting season. Foreign private issuers that prepare their financial statements in accordance with local GAAP are not required to comply with XBRL filing requirements.

Each company that submits interactive data files as part of an XBRL filing enjoys the benefit of certain limited liability protections for a two-year period. The limitations include deeming interactive data files "furnished" and not "filed" or part of a registration statement or prospectus for purposes of the liability provisions in Securities Act Sections 11 and 12 and Exchange Act Section 18, and exempting the interactive data file from the anti-fraud provisions of the securities laws if the company makes a good-faith attempt to comply with the

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[10] Additional information regarding ISS's 2013 voting policies updates is available here or on our website at: http://www.skadden.com/insights/iss-issues-2013-policy-updates.

data-tagging rules and promptly amends any deficiency after becoming aware of it. The two-year limited liability period runs from the due date of the first Form 10-Q — exclusive of the rule-based 30-day grace period for first-time filers — for which a company was required to submit XBRL data.

For the second group of companies that were required to comply with the XBRL requirements, large accelerated filers that did not have a market cap of over $5 billion, these limited liability provisions ended on August 9, 2012. Given the expiration of the limited liability periods, these companies should ensure they are properly evaluating their disclosure controls and procedures for interactive data files. The limited liability provisions ended on August 10, 2011 for the first group of large accelerated filers that had a market cap of over $5 billion.

❑ **Update Form 10-K Items.** The SEC amended certain of its rules and forms to implement the mine safety disclosure provisions that were included in the Dodd-Frank Act that went into effect on January 27, 2012.[11] One of the amendments to the SEC's rules included a new Item 4 (entitled Mine Safety Disclosures) to Form 10-K. Companies should update their Forms 10-K to include new Item 4 and either provide the required disclosures or note that the item does not apply to the company.

❑ **Plan for additional Dodd-Frank Act requirements.** There are a number of corporate governance and disclosure provisions in the Dodd-Frank Act that require SEC action but have not been implemented yet. These provisions include rules related to mandatory compensation claw-back provisions and new disclosure requirements related to compensation matters, such as pay-for-performance, pay ratios, and the hedging activities of company employees and directors. These rules will not be in effect for the 2013 annual meeting and reporting season. However, companies may want to advise their board committee members about these impending rules and their anticipated impact moving forward.

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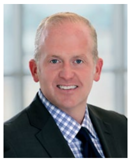
[11] Additional information regarding the SEC's mine safety disclosure rules is available here or on our website at: http://www.skadden.com/insights/sec-adopts-mine-safety-disclosure-requirements.

Attorney Bios

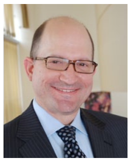


Brian V. Breheny | Mergers & Acquisitions, Securities Regulation, Corporate Finance and Corporate Governance
202.371.7180 | brian.breheny@skadden.com

Brian Breheny concentrates his practice in the areas of mergers and acquisitions, corporate governance, and general corporate and securities matters. Since joining Skadden, Mr. Breheny has advised numerous clients on a full range of SEC compliance and corporate governance matters, including advising clients on compliance with the provisions of the Dodd-Frank Act, the SEC's tender offer rules and regulations and the federal proxy rules.

Prior to joining Skadden in 2010, Mr. Breheny held a number of leadership positions in the Division of Corporation Finance at the U.S. Securities and Exchange Commission. He began as chief of the SEC's Office of Mergers and Acquisitions in July 2003, and in November 2007 he became deputy director, legal and regulatory policy.

Mr. Breheny speaks extensively on topics such as mergers and acquisitions, corporate governance, the federal proxy rules and SEC reporting and compliance matters. He also serves as Chairman of the Proxy Statements and Business Combinations Subcommittee of the American Bar Association's Federal Regulation of Securities Committee, and he was recently recognized by the National Association of Corporate Directors in connection with its announcement of the *Directorship 100*, an annual list that identifies the most influential people in the boardroom community. Before joining the SEC, Mr. Breheny worked at another international law firm in its New York and London offices. He began his career as a certified public accountant with KPMG LLP.

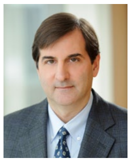


Marc S. Gerber | Mergers & Acquisitions, Corporate Governance, and General Corporate and Securities Matters
202.371.7233 | marc.gerber@skadden.com

Marc Gerber concentrates his practice in the areas of mergers and acquisitions, corporate governance and general corporate and securities matters. He has represented purchasers and sellers in a variety of transactions, including private acquisitions and divestitures, negotiated and contested public acquisitions, and proxy fights. Mr. Gerber also counsels clients in private equity transactions and in cross-border joint ventures and other strategic alliances.

Mr. Gerber advises clients on corporate governance related matters, such as compliance with provisions of the Dodd-Frank Act and the Sarbanes-Oxley Act, the rules and regulations of the SEC and the listing requirements of the NYSE and Nasdaq. He also advises companies, boards of directors and board committees on corporate governance topics such as shareholder rights plans, advance notice bylaws, proxy access, board independence and board self-evaluation.

Some of Mr. Gerber's significant transactions include the representation of: Human Genome Sciences, Inc. in its initially unsolicited, but subsequently agreed upon acquisition by GlaxoSmithKline plc; Alexander & Baldwin, Inc., a real estate, agribusiness and ocean transportation company, in its separation into two public companies, Alexander & Baldwin and Matson, Inc. and The Bureau of National Affairs, Inc. in its acquisition by Bloomberg Inc.



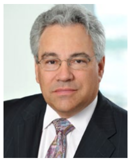
Richard J. Grossman | Mergers and Acquisitions
212.735.2116 | richard.grossman@skadden.com

Richard Grossman focuses his practice on proxy contests, responses to shareholder activists, corporate governance matters, mergers and acquisitions, and leveraged buyouts.

Mr. Grossman has advised many companies with respect to corporate governance issues and responses to shareholder proposals. He also has represented companies in contested proxy solicitations and other contests for corporate control as well as unsolicited acquisition proposals. In addition, Mr. Grossman has advised clients in designing and implementing shareholder rights plans and other corporate protective measures.

His representations have included Anheuser-Busch Companies in its response to the unsolicited proposal and consent solicitation by InBev N.V. and the subsequent $52 billion acquisition of Anheuser-Busch by InBev; Burger King Holdings, Inc. in its $4 billion acquisition by 3G Capital Management, a private equity firm; Chattem, Inc. in its $1.9 billion acquisition by sanofi-aventis; and the board of directors of Questar Corporation in Questar's $6.4 billion spin-off of QEP Resources, Inc. to shareholders.

Attorney Bios



Neil M. Leff | Executive Compensation and Benefits
212.735.3269 | neil.leff@skadden.com

Neil Leff's practice focuses primarily in the context of mergers and acquisitions, public offerings, bankruptcy reorganizations, spin-offs and other corporate restructurings.

Mr. Leff counsels clients on tax planning, securities laws and corporate governance, with emphasis on tax planning with respect to the treatment of deferred compensation arrangements, the excise tax for the "golden parachute payments" and the limitations for the tax deductibility and securities law aspects of executive compensation. He also has advised clients on the application of the special executive compensation rules for companies that have received TARP assets.

His clients include Circuit City Stores, Inc. in its Chapter 11 bankruptcy, including a $1.1 billion debtor-in-possession financing and its $1 billion liquidation; CME Group Inc. in its $9.5 billion acquisition of NYMEX Holdings, Inc.; Deutsche Bank AG in its acquisition of HedgeWorks, LLC; Northern Trust Corp. in its sale of $1.5 billion of prefered stock and warrants to the U.S. Treasury under TARP; and TCF Financial Corp., among others.

Mr. Leff repeatedly has been selected for inclusion in *Chambers USA* and *The Best Lawyers in America*.

Regina Olshan | Executive Compensation and Benefits
212.735.3963 | regina.olshan@skadden.com

Regina Olshan's practice focuses on advising companies, executives and boards on the regulatory complexities of executive compensation and benefits. This includes tax laws (including laws governing deferred compensation, golden parachute arrangements and deduction limitation rules) and securities laws (including reporting and disclosure requirements and registration issues).

In addition, Ms. Olshan regularly advises public companies, boards, private equity clients and members of management on executive compensation and benefits issues arising in the context of mergers, acquisitions, spin-offs, initial public offerings, restructurings and other extraordinary corporate events, including private equity and leveraged buyout transactions. She also regularly advises large public companies and individual senior executives on the adoption, revision, and negotiation of executive employment and severance agreements.

Ms. Olshan is the author and editor of the Section 409A Handbook, which is acknowledged as the premier resource on Section 409A issues.

Ms. Olshan was ranked in Band 1 by *Chambers USA* for New York employee benefits and executive compensation. She also is listed in *The Best Lawyers in America.*

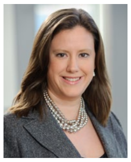
Michael P. Rogan | Mergers & Acquisitions, Securities Regulation, Corporate Finance and Corporate Governance
202.371.7550 | michael.rogan@skadden.com

Michael Rogan, global co-head of the firm's Transactions Practices, is experienced in SEC issues (having served five years on the staff) and provides corporate and securities law advice to a number of public companies on an ongoing basis.

Mr. Rogan has represented bidders, targets and investment bankers in U.S. and cross-border transactions, as well as friendly and hostile situations. He is experienced in asset acquisitions and dispositions, proxy contests, spin-offs and joint ventures. Mr. Rogan regularly advises boards of directors with respect to the Sarbanes-Oxley Act of 2002 and related governance matters. In this context, he is experienced in advising board committees, including audit committees, with respect to compliance matters and internal investigations. Mr. Rogan has represented public and private companies in both debt and equity financings, including venture capital investments and Rule 144A financings.

Mr. Rogan repeatedly has been selected for inclusion in *Chambers USA* and *The Best Lawyers in America*. He also was featured as a "Dealmaker in the Spotlight" in the June 2010 issue of *The American Lawyer*, which highlighted his advice on significant deals in the energy sector.

Attorney Bios



Erica Schohn | Executive Compensation and Benefits
212.735.2823 | erica.schohn@skadden.com

Erica Schohn's practice focuses on compensation and benefits arrangements in the context of corporate transactions (including mergers and acquisitions, public offerings and bankruptcy reorganizations), the negotiation of executive employment and severance arrangements, the SEC rules governing executive compensation disclosure and corporate governance matters relating to compensation practices.

Ms. Schohn also regularly advises clients regarding tax planning with respect to compliance with Internal Revenue Code section 409A and the tax rules relating to deferred compensation, the excise tax on excess parachute payments and limits on the deductibility of executive compensation.

Her experience includes representing companies, private equity funds and individuals in the financial, pharmaceutical, medical supply, energy, entertainment and travel industries.

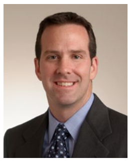
Joseph M. Yaffe | Executive Compensation and Benefits
650.470.4650 | joseph.yaffe@skadden.com

Joseph Yaffe, head of the Executive Compensation and Benefits Group on the West Coast, handles tax and securities law matters in equity compensation arrangements and employee benefits issues arising in corporate transactions, such as mergers and acquisitions.

His experience includes representing companies from the biotechnology, entertainment, Internet, medical supply, retail and software industries. He also counsels senior executives at companies throughout the country in connection with executive compensation matters.

Mr. Yaffe advises on tax-qualified plan issues, including issues relating to 401(k) and 403(b) plans. In addition, he represents clients in negotiations with the IRS and Department of Labor regarding compliance issues under the Internal Revenue Code and ERISA.

Mr. Yaffe is ranked by *Chambers USA* and *The Legal 500* as one of the country's leading benefits and compensation attorneys.



Andrew J. Brady | Mergers & Acquisitions, Corporate Governance, and General Corporate and Securities Matters
202.371.7344 | andrew.brady@skadden.com

Andrew Brady, a counsel in the Corporate Group, focuses his practice on securities regulation, corporate transactions and corporate governance. Prior to joining Skadden, Mr. Brady served as a special counsel in the SEC's Office of Chief Counsel of the Division of Corporation Finance from 2003 to 2007, where he gained extensive experience in a variety of issues arising under the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, as well the Sarbanes-Oxley Act of 2002.

During his tenure, Mr. Brady provided interpretative advice and guidance regarding the federal securities laws. In 2004, the Commission awarded Mr. Brady the SEC Law and Policy Award for his role on the Proxy Review Task Force.

Mr. Brady was also an attorney-adviser in the SEC's Division of Corporation Finance where he reviewed registration statements and other filings made under the Securities Act, the Exchange Act and the Trust Indenture Act, including filings pertaining to primary, secondary and shelf offerings, merger and acquisition proxies, issuer and third-party tender offers, going-private transactions, spin-offs, tracking stock offerings, PIPEs and equity lines, resale transactions and rescission offers.

Mergers and acquisitions associate Hagen J. Ganem assisted in the preparation of this memorandum.