Planning for the 2012 Annual Meeting and Reporting Season

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As companies prepare for the 2012 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 the new Dodd-Frank Act rules and others are based on lessons gleaned from the 2011 annual meeting and reporting season. The items included in the checklist 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 2011 voting results, executive compensation plans and programs and shareholder base.

❑ **Ensure compliance with new say-on-pay provisions.** The Securities and Exchange Commission (SEC) adopted rules last year, as dictated by the Dodd-Frank Act, that require all U.S. public companies to give their shareholders a nonbinding vote on the company's executive compensation disclosure at least once every three years. All companies, other than smaller reporting companies,[1] were required to hold an initial say-on-pay vote in 2011. Depending on the company's decision on the frequency of say-on-pay votes, that vote should be included on the ballot again in 2012.

Companies also will need to include new disclosures in the Compensation Disclosure and Analysis section of their proxy statements to discuss "[w]hether and, if so, how the registrant has considered the results of the most recent shareholder advisory vote on executive compensation required by [the SEC's proxy rules] in determining compensation policies and decisions and, if so, how that consideration has affected the registrant's executive compensation decisions and policies."[2] The SEC has not provided any guidance on the type of disclosures it expects to see in response to this new requirement. The disclosures included in the 2011 proxy statements of companies that received funds from the Troubled Asset Recovery Program (TARP), may be instructive, as those companies were required to include this disclosure last season. Otherwise, companies will need to consider how best to respond to this new disclosure requirement and to address shareholder views on compensation decisions generally based on, among other things, the results of the say-on-pay vote and the voting guidelines of the major proxy advisory firms and institutional investors.

Under Institutional Shareholder Services (ISS) voting guidelines, for instance, the voting recommendation on compensation committee members will be based partly on the response to the say-on-pay vote. A higher level of scrutiny will be placed on those companies that received less than 70 percent approval on the vote, with companies receiving less than 50 percent support subject to even greater scrutiny. Companies in this category should evaluate whether a response to the vote would be a factor in voting recommendations from the proxy advisory firms and then decide what response is appropriate. ISS notes that an appropriate response from a company that received a low approval percentage "must include disclosure of its outreach efforts to major institutional investors as well

[1] Smaller reporting companies (basically those companies with a public float of less than $75 million) will be required to comply with the say-on-pay rules beginning with proxy statements used for their first annual meetings occurring on or after January 21, 2013.

[2] Item 402(b)(1)(vii) of Regulation S-K.

as concrete actions that it has taken or will take to address the compensation issue(s) that resulted in significant opposition votes."

In addition, the say-on-frequency rules adopted by the SEC require that shareholders be given the opportunity at least once every six years to advise the company on how often in a three-year period they would like to vote on executive compensation. Because companies were required to include say-on-frequency proposals on last year's ballot, those proposals will not be required again this year. There is a new requirement, however, that companies announce their decision on how often say-on-pay votes will be held. Those announcements must be made no later than 150 calendar days after the annual meeting, but at least 60 calendar days prior to the company's deadline for submission of shareholder proposals under Rule 14a-8 for the next annual meeting. The frequency determination can be disclosed either by amending the Form 8-K filed to report the annual meeting voting results, as required by Item 5.07, or by including the disclosure in a Form 10-Q or Form 10-K, provided the timing deadlines are otherwise satisfied.

Companies that adopted a say-on-pay policy that is less frequent than the one supported by a majority of their shareholders should consider strongly the potential reaction of investors and develop a plan to communicate to shareholders why the decision was made by the company. As an example of one possible negative reaction to this policy choice, in its voting guidelines ISS announced its intent to recommend a vote against or a withhold vote on all director nominees if a company adopts a say-on-pay frequency policy that is less frequent than one supported by a majority of shareholders.

❑ **Consider revising proxy statement disclosures.** Other than as noted above, there are no new SEC disclosure requirements for the upcoming proxy season. There were a number of disclosure developments from last proxy season, however, that are worth considering when preparing this year's proxy statement.

To begin with, some companies included a new summary section in the proxy statement. These summaries were included in the beginning of the proxy statement and highlighted 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. The companies that included these summaries, such as General Electric and Prudential Financial, received positive responses from some of the key corporate governance players. Companies should consider whether including a proxy summary would provide a way to improve communications with shareholders about the company and its key compensation and governance decisions and assist shareholders in making a more informed voting decision.

Next, in response to negative ISS voting recommendations on some of the matters included in last year's proxy statements, companies used additional proxy soliciting materials last season to improve communication with their shareholders. These additional materials generally took the form of a letter to shareholders from the chairman or chief executive officer that attempted to clarify disclosures included in the proxy statement that the company officials believed potentially were misunderstood and to highlight certain key points that companies believed shareholders should focus on when making a voting decision. The use of these additional soliciting materials may have made a difference in a few close votes. One of the key lessons from this development is the importance of ensuring that the disclosures are clear and concise. This is especially important when the company knows it is following a compensation or corporate governance practice that is viewed by certain parties as being problematic. Companies should keep this in mind when reviewing and revising their 2012 proxy statements.

A number of market participants also continue to call on companies to improve and shorten their disclosures in the Compensation Disclosure and Analysis (CD&A). This area remains a focus of SEC staff comments on proxy statements. Many companies have continued to update and revise the CD&A to give shareholders a clearer picture of the company's thinking regarding compensation decisions. These updates have often included providing an executive summary of the CD&A. The CFA Institute issued a CD&A template in January 2011 that it hopes will lead to improved and more consistent disclosures about compensation plans and decisions. It is unclear whether companies will follow the CFA's suggested approach broadly, but it may be helpful guidance when considering ways to improve the CD&A. Either way, companies should pay particular attention to disclosures in the CD&A.

Finally, as a reminder, in the middle of last proxy season the staff of the SEC's Division of Corporation Finance revised a controversial interpretation regarding when biographical information of retiring board members needs to be disclosed. While the requirement to include director biographical information is in the Form 10-K, most issuers satisfy the requirement by incorporating by reference the director biographical information, along with other management, compensation and governance-related disclosures (together, the so-called "Part III information"), from their annual meeting proxy statement. A company that satisfies the Part III information disclosure requirements from the Form 10-K by incorporating by reference from the annual meeting proxy statement will not be required to include biographical information for a non-continuing director in either the Form 10-K or annual meeting proxy statement. A company that directly includes the Part III information in the Form 10-K (in lieu of incorporating by reference from the annual meeting proxy statement), however, will not be permitted to rely on the accommodation under Instruction 3 to Item 401(a) of Regulation S-K [Identification of Directors], and thus must include in the Form 10-K the biographical information for the non-continuing director. Given that most companies include the Part III information in their annual meeting proxy statement, this last point should impact only a limited number of companies.

❑ **Evaluate compensation plans and decisions.** Decisions about compensation plans and policies should be based on a number of factors, including properly incentivizing employees, ensuring company goals and objectives are a key driver of performance, and retaining talented staff. Another factor to consider, however, is the impact of the voting guidelines of major proxy advisory firms and institutional investors on the company's compensation plans and decisions. If the application of those guidelines to a company's compensation plans or decisions will result in a negative voting recommendation, some response should be considered.

One way to respond to a potential negative voting recommendation is to revise the plans or reverse a problematic decision. It is understandable that companies may not want these outside influences to impact decisions that the board members have made about how best to structure their compensation programs. Nevertheless, negative votes on the company's say-on-pay proposal or against members of the board could have implications that are best avoided. Changing a potentially problematic pay practice prior to the beginning of the proxy season will avoid the potential need to make that decision after the proxy statement is prepared and filed — something that a few high-profile companies felt compelled to do last year to avoid a negative say-on-pay vote.

Consideration also should be given to the white paper ISS issued on December 20, 2011, in which it further explains its new model for evaluating pay-for-performance and the methodology it will use to identify companies that have demonstrated a disconnect between executive pay and company performance. According to ISS, a survey of institutional investors confirmed two factors as very important in evaluating a company's pay-for-performance alignment: pay relative to peers and pay increases that are disproportionate to company performance. In response to investor concerns, ISS will use a quantitative approach to measure relative and absolute alignment of pay to performance over time. The relative evaluation looks at rankings of chief executive officer pay and performance relative to peers for one- and three-year periods, and the absolute evaluation looks at chief executive officer pay trends relative to shareholder return trends over five years. The methodology will identify outlier companies that have demonstrated "significant misalignment between CEO pay and company performance over time." According to the white paper, an in-depth qualitative assessment will be done for all companies for which "significant misalignment" of pay-for-performance is identified through the quantitative analysis. Some or all of the steps ISS will take in the qualitative assessment include reviewing the company's time-based versus performance-based equity awards, its peer group benchmarking practice and the rigor of performance goals with respect to any cash payouts. These qualitative and quantitative factors should be considered as part of the evaluation of compensation plans and decisions.

Another approach to a potentially problematic pay issue is to attempt to address the issue through disclosure. It is possible that even though the issue has been identified by a proxy advisory firm or an investor as a concern, shareholders may be convinced to not follow the negative recommendation. Many of the additional proxy soliciting materials used last season in response to negative say-on-pay recommendations followed this approach. Some of the companies that used additional soliciting materials were successful in obtaining shareholder approval. Indeed, almost 90 percent of companies that received a negative ISS vote recommendation on the say-on-pay proposal last season still received majority approval of the matter.

❑ **Comply with IRC Section 162(m).** Internal Revenue Code Section 162(m) generally limits a publicly held 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), that is paid pursuant to a plan or other arrangement that 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 162(m) if (1) 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 (2) 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 re-approval of 162(m) plans approved in 2007 or earlier. Importantly, the 162(m) regulations require that shareholders reapprove their performance goals every five years with respect to which PBC (other than stock options and stock appreciation rights) is paid. This means that companies that obtained shareholder approval of such goals in 2007 or earlier must resubmit their goals for shareholder approval in 2012. 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 as was adopted in 2007 or earlier and used for stock option and stock appreciation right grants. Unless their equity incentive plan's performance goals are reapproved in 2012, equity grants under the plan will not qualify as PBC under 162(m). Likewise, performance goals applicable to cash bonus awards intended to qualify as PBC under 162(m) (which awards may be authorized under omnibus incentive plans or may be paid under separate plans) must also be reapproved every five years.

Consider adopting 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 162(m) and submitting them to shareholders for approval in 2012. If a company is submitting other option equity incentive plan amendments to shareholders for approval in 2012, it should consider adding provisions sufficient to qualify other cash bonuses and equity compensation payable under the plans as PBC under 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 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 truncate the transition period. Companies that went public in 2011 or earlier should check to see whether compliance is now required for 2012 and thereafter.

❑ **Prepare for shareholder proposals.** Each year companies are faced with the possibility that they may receive a proposal that a shareholder would like to include on the annual meeting agenda and in the company's proxy statement. Although the number of shareholder proposals generally has decreased over the last few years, shareholders continue to advance some key proposals. Last season, the most popular proposals related to corporate governance, such as giving shareholders the right to act by written consent, and new disclosure matters, such as the disclosure of political contributions.

It is anticipated that political contributions by companies will remain a focus of shareholder activists this season — especially as we enter the 2012 U.S. presidential election cycle. In a recent cover story titled "Political Contribution Disclosures Stirring Action" from *Corporate Secretary*, a governance, risk and compliance monthly magazine, it was reported that 85 of the S&P 100 companies have agreed to disclose information about their political spending. Companies should carefully consider this issue, including consulting with expert counsel regarding federal and state election, pay-to-play and other applicable rules and regulations.

The 2012 proxy season will be the first during which shareholders will be permitted to require companies to include shareholder proposals related to the process for nominating and disclosing shareholder candidates (commonly referred to as "proxy access") in the company proxy statement because of a change to one of the SEC's rules. This change comes as a result of an amendment to Exchange Act Rule 14a-8 that the SEC adopted in 2010 as part of a broader proxy access initiative. Although a federal appeals court deemed the mandatory proxy access rules adopted by the SEC invalid in July 2011, the amendment to Rule 14a-8 was not impacted by the court's decision.

It is difficult to predict whether the change to Rule 14a-8 will lead to a significant number of shareholder proposals related to proxy access. Some of the key corporate governance players, such as the Council of Institutional Investors, have advised investors to submit proxy access proposals only to companies that have demonstrated governance issues. Still other investors have indicated they are planning to use this new tool more broadly. To date, approximately 16 proxy access-related proposals have been publicly reported as being received this season. Companies should be prepared to consider and respond to additional proxy access and other shareholder proposals that may be submitted this season. There are a number of procedural and substantive bases in Rule 14a-8 that could allow a company to exclude a proxy access proposal.

In connection with the amendments to its proxy rules to require say-on-pay votes, the SEC amended Rule 14a-8 to clarify when a company may exclude a shareholder proposal related to a say-on-pay matter as being "substantially implemented" by the company.

A new note to Rule 14a-8(i)(10) states that:

> [a] company may exclude a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S-K (§229.402 of this chapter) or any successor to Item 402 (a "say-on-pay vote") or that relates to the frequency of say-on-pay votes, provided that in the most recent shareholder vote required by §240.14a-21(b) of this chapter a single year (i.e., one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent shareholder vote required by §240.14a-21(b) of this chapter.

This new note will be helpful in responding to certain shareholder proposals, provided the company adopted a say-on-pay frequency policy that follows the advice of at least a majority of the shareholders.

On October 18, 2011, the SEC staff issued a new staff legal bulletin (No. 14F) on shareholder proposals that includes a few changes to how the staff will handle no-action requests related to shareholder proposals this proxy season. Most prominently, the new bulletin made a significant change to the requirements a shareholder must follow when providing proof of ownership in connection with the submission of a proposal and when proposals may be revised. The staff is also moving to a new electronic system when responding to companies seeking a no-action letter response from the staff related to shareholder proposals. Many of these changes were championed by company advocates, like the Society of Corporate Secretaries and Governance Professionals, and should improve the no-action letter process for shareholder proposals this season. These changes will need to be considered in responding to shareholder proposals submitted in connection with 2012 annual meetings.

❑ **Determine impact of SEC staff disclosure initiatives.** The staff of the SEC's Division of Corporation Finance has been focused on a number of initiatives related to periodic reports over the last few years. 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 risks. On October 13, 2011, the Division of Corporation Finance issued disclosure guidance on cybersecurity risks.[3] The guidance is intended to assist companies in

[3] CF Disclosure Guidance: Topic 2 (cyber security).

assessing what disclosure should be provided with respect to cybersecurity risks and cyber incidents and how cybersecurity risks and their impact should be described in SEC filings. Although there is no disclosure requirement explicitly referring to cybersecurity risks and cyber incidents, the guidance notes that a number of existing disclosure requirements may impose an obligation to disclose such matters. Examples include:

Risk Factors – The risk of cyber incidents should be discussed if such risk is among the most significant risk factors that make an investment in the company speculative or risky. In evaluating the risk, companies should consider prior cyber incidents, the severity and frequency of such incidents, the probability and magnitude of such incidents (including potential costs and consequences resulting from misappropriation of assets or sensitive information, corruption of data or operational disruption) and the adequacy of preventative actions to reduce cybersecurity risks. Appropriate disclosures may also include a discussion of the company's business or operations that give rise to material cybersecurity risks (including outsourced functions), a description of material cyber incidents experienced, a discussion of risks related to cyber incidents that may remain undetected for an extended period and a description of relevant insurance coverage. In some circumstances, it also may be appropriate to discuss specific attacks experienced in order to make investors aware of the potential impact on the company. Companies should provide disclosure tailored specifically to their circumstances and avoid generic risk disclosures.

Management's Discussion and Analysis – Cybersecurity risks and cyber incidents should be addressed in management's discussion and analysis (MD&A) if costs or consequences associated with known incidents or risk of potential incidents present a material event, trend or uncertainty reasonably likely to have a material effect on the company's results of operations, liquidity or financial condition or would cause reported financials not to be necessarily indicative of future operating results or financial condition. The guidance notes that companies that are victims of successful cyber attacks may incur substantial costs and suffer negative consequences, such as remediation costs (*e.g.*, liability for stolen assets or information, repairing system damage and offering customer incentives), increased cybersecurity protection costs, lost revenues, litigation and reputational damage.

Additional Examples – Depending on the circumstances, cybersecurity risks and cyber incidents also may require companies to include disclosure in their "description of business," "legal proceedings" or financial statements.

The Division of Corporation Finance, addressing potential concerns that detailed disclosures might compromise cybersecurity efforts by providing a "roadmap" of a company's network security, emphasized that "disclosures of that nature are not required under federal securities laws" and that "registrants should provide sufficient disclosure to allow investors to appreciate the nature of the risks faced by the particular registrant in a manner that would not have that consequence."

Exposures to European Sovereign Debt. On Friday, January 6, 2012, the Division of Corporation Finance issued the fourth installment in its new Disclosure Guidance Topic series.[4] Topic No. 4 focuses on companies' exposures to the debt of certain European countries. The staff specifically highlighted its concern about "the risks to financial institutions that are SEC registrants from direct and indirect exposures to" European sovereign debt.

The goal of this new guidance is to expand and enhance the disclosures that companies provide related to sovereign debt exposures, to ensure that investors have transparent and

4 See the CF Disclosure Guidance: Topic 4 (European sovereign debt exposures).

comparable information about the uncertainties of these exposures. This information generally is included in companies' disclosures about risk factors, qualitative and quantitative market risks, and management's discussion and analysis. Bank holding companies and other companies engaging in similar lending and deposit activities also are required to make the disclosures required by the SEC's Industry Guide 3 (Statistical Disclosure by Banking Holding Companies).

In particular, the staff is requesting enhanced disclosures, on a country-by-country basis, of the following information:

- gross sovereign, financial institutions and nonfinancial corporations' exposure;
- quantified disclosure explaining how gross exposures are hedged; and
- a discussion of the circumstances under which losses may not be covered by purchased credit protection.

In determining which countries companies should consider covering in their disclosures, the staff stated that the focus should be on countries "experiencing significant economic, fiscal and/or political strains such that the likelihood of default would be higher than would be anticipated when such factors do not exist." The staff acknowledged that the countries covered in the disclosures will change over time. Companies are encouraged to disclose the basis for why particular countries are covered.

The guidance in the new disclosure topic includes a list of detailed factors that companies should consider when determining any additional information that should be disclosed regarding their exposures to sovereign debt, including the gross funded and unfunded exposures, total gross exposures, effects of credit default protection, other risk management considerations and post-reporting date developments.

Loss contingency disclosures. The accounting staff of the SEC's Division of Corporation Finance has recently been very focused on disclosures regarding loss contingencies. Based on public staff statements and comment letters, the SEC 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 coincides with the Financial Accounting Standards Board's (FASB) consideration of changes to the requirements of Accounting Standards Codification Topic 450 (formerly Statement of Financial Accounting Standards No. 5; "Disclosure of Certain Loss Contingencies"). In October 2010, FASB announced a delay in the timing for approval of any amendments to Topic 450 (originally planned to be effective for the 2010 calendar year-end reporting period). FASB originally announced that it intended to begin its deliberations of the amendments in the second half of 2011, but now it appears that its consideration of these amendments has been postponed.

Short-term borrowings. In September 2010, the SEC issued an interpretative release entitled "Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis." The interpretative release was issued in connection with proposed rule amendments that the SEC said it was considering to "enhance the disclosure that registrants present about short-term borrowings." Those proposed rule amendments would have required companies to provide, among other things, a new subsection in the company's MD&A that included comprehensive information about its short-term borrowings. The comment period on the new proposed rules closed on November 29, 2010, and the SEC has not adopted final rules. It is possible that the SEC may not take action on these rules. Nevertheless, companies should consider the guidance in the interpretative release — which is a helpful resource — when preparing and reviewing the liquidity and capital resources section of the MD&A.

Non-GAAP financial measures. The disclosure of non-GAAP financial measures remains a focus of SEC staff comments on company disclosure documents, including the Forms 8-K that companies furnish to report results of operations and financial conditions (Item 2.02). The staff is particularly concerned with tabular non-GAAP presentations that could be viewed as a full non-GAAP income statement.[5] When considering the disclosure of non-GAAP financial measures, companies should:

- ensure the heading/title of the non-GAAP presentation is not confusingly similar to the title used for a GAAP presentation (*e.g.*, by avoiding using the title "Non-GAAP Statement of Income");
- reduce the number of financial statement line items presented in the table;
- reconcile the non-GAAP measures to the most directly comparable GAAP measure within the tabular presentation (rather than by footnote or in a separate tabular presentation); and
- clarify that the detailed tabular presentation is useful to investors by providing investors with context as to how the adjustments impact the company's GAAP financial statements.

Offshore cash reserves. As reported recently in the press, the SEC staff has, with greater regularity, been issuing comments to companies seeking disclosure of the extent of offshore cash holdings and the impact of such offshore holdings on the company's liquidity position. In general, the staff appears to be concerned about the U.S. federal income tax consequences of the repatriation of offshore holdings, especially where it appears those holdings serve as a key source of liquidity for the company on a consolidated basis.

Consistent with the SEC's recent interpretive guidance on the presentation of liquidity and capital resources disclosures in MD&A, the staff appears to be focusing its attention on companies that have significant offshore cash (and cash equivalents) holdings to enhance disclosures in respect of those cash holdings.

In particular, the staff has asked companies to, among other things:

- consider providing enhanced disclosure of the amount of cash and investments held by foreign subsidiaries that would be subject to the potential tax impact associated with the repatriation of undistributed earnings on foreign subsidiaries;

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[5] Question No. 102.10 in the staff's Non-GAAP C&DIs.

- describe (to the extent material) any significant amounts of cash and cash equivalents that may not be available for general corporate use because such amounts are held by foreign subsidiaries where the company considers earnings to be indefinitely invested; and
- disclose whether or not the company would need to accrue and pay taxes if offshore cash holdings were repatriated, and whether or not the company intends to repatriate those funds.

While in some instances companies have agreed to provide the requested disclosure without any objection, other companies have foreclosed further staff comments by responding that they do not expect restrictions or taxes on repatriation of cash held outside of the U.S. to have a material effect on the companies' overall liquidity, financial condition or results of operations.

Companies should consider the impact of any restrictions on repatriation of offshore cash holdings on the company's overall liquidity position and whether enhanced disclosure of the extent of offshore cash holdings and the potential impact on the company's liquidity position should be included.

❑ **Comply with mine safety rules.** The Dodd-Frank Act included specialized disclosure provisions related to conflict minerals, resource extraction payments and mine safety. The mine safety rules went into effect August 20, 2010, 30 days after the Dodd-Frank Act went into effect. In addition, the SEC proposed and adopted more specific mine safety disclosure requirements. The new SEC mine safety rules went into effect on January 27, 2012. As of that date, mining companies will be required to comply with the SEC's disclosure requirements regarding information about mine safety and health standards in their Forms 10-K and to report certain information on Forms 8-K. Those companies should confirm that they are in compliance with the rules. The conflict minerals and resource extraction payments rules have been proposed but not adopted by the SEC. Those rules are not expected to be in effect for the 2012 reporting season.

❑ **Revise reporting schedule to factor leap year.** The date that Forms 10-K are due in 2012 will be impacted as a result of an additional day in February — February 29, 2012. Large accelerated SEC filers will be required to file their Forms 10-K with the SEC by February 29, 2012, accelerated SEC filers will be required to file their Forms 10-K by March 15, 2012, and other filers will be required to file their Forms 10-K by March 30, 2012.

❑ **Note new filing deadline for Form 20-F.** Foreign private issuers should note that beginning with the filing of the Form 20-F for a fiscal year ending after December 15, 2011, the forms must be filed within four months after the end of the fiscal year covered by the Form 20-F (*e.g.*, April 30, 2012, for calendar year companies). The deadline was shortened by 60 days. When the SEC was considering this change a number of constituents voiced concern about the ability of their companies to comply with the new deadlines. Foreign private issuers should consider their reporting schedules carefully to accommodate the timing requirements.

❑ **Comply with the XBRL filing requirements.** The final stage of the SEC's three-year phase-in period for its rules requiring registrants to tag financial statement information using XBRL was reached in July 2011.

As a result of reaching this final phase-in period, 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 (IFRS) as issued by the International Accounting Standards Board also are required to comply with the XBRL filing requirements in connection with annual reports on Forms 20-F or 40-F for fiscal years ending on or after June 15, 2011. The staff of the SEC's Division of Corporation Finance, however, provided relief from the XBRL requirements for foreign private issuers until an SEC-approved XBRL taxonomy for their financial statements is available. This relief is expected to remain in effect for the 2012 reporting season.

As a reminder, the SEC provided two grace periods for first-time XBRL filers. First, the rules provide a 30-day grace period for a company's first XBRL filing and, in the second year of compliance, for a company's first XBRL filing that is required to include detailed tagging of footnotes and schedules (in each case the exhibit containing the interactive data file would be filed as an amendment to the original filing). Thereafter, the XBRL submission must be filed on or before the due date of the applicable filing. Second, during a company's first year of XBRL compliance it may choose to block-text tag each footnote and financial statement schedule. Thereafter, the company must tag more detailed information in its footnotes and financial statement schedules. Companies should confirm if one of the grace periods is still available.

When the SEC adopted the XBRL filing requirements in December 2008, it recognized the concerns that filers had raised about potential liabilities under the securities laws for errors and omissions in interactive data files by limiting certain liabilities for a two-year period. Each group of companies in the three-year phase-in period was provided the benefit of the two-year limited liability provisions. 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 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 available 30-day grace period for first-time filers noted above — for which a company was required to submit XBRL data. For the first group of companies that were required to comply with the XBRL requirements, large accelerated filers with a market cap of over $5 billion, these limited liability provisions ended on August 10, 2011. Because the filing deadline for the Form 10-Q for the period ended June 30, 2011, for large accelerated filers was August 9, 2011, these filers lost the benefits of the limited liability provisions when they filed their Forms 10-Q for the period ended September 30, 2011.

Given the expiration of the limited liability periods, companies should evaluate their disclosure controls and procedures for interactive data files.

❑ **Beware of spiders; other potential Regulation FD issues.** Last season a number of companies were surprised to discover that material information that was posted to their websites had been located before the public launch of those pages and the information was reported in the media. The discovery of those web pages often resulted from the use of "spiders" or software programs that specifically targeted the undisclosed information with a view to unauthorized public distribution. These situations raise potential Regulation FD concerns. Companies should monitor the posting of material information on web pages and adopt security procedures for this process. The use of other new communication techniques, such as Twitter and blogs, also raises other potential Regulation FD concerns that companies and their counsel should consider and address through policies and procedures.

Recently, some companies have reviewed their communication policies to ensure that they apply to both management and members of the board of directors.

❑ **Plan for additional Dodd-Frank Act requirements.** There are a number of corporate governance and disclosure provisions in the Dodd-Frank Act that are not in effect yet because the SEC has not adopted final rules. Those provisions include rules related to the independence of compensation committee members, the use of compensation consultants, mandatory compensation clawback provisions and new disclosure requirements related to compensation matters, such as the ratio of pay between the chief executive officer and the median company employee and the hedging activity of company employees. These rules are not expected to be in effect for the 2012 annual meeting and reporting season. We have included a summary of the status of these provisions and the proposed timing of adoption below. The provisions that are listing standards, such as the compensation clawback provision, will require action by the respective exchanges before the rule is in effect. For this season, companies may want to advise their board committee members about the phase-in of these rules and the expected impact next season.

To be adopted by June 2012:

- Disclosure by Institutional Investment Managers of Votes on Executive Compensation
- Compensation Committees & Consultants
  - Exchange listing standards regarding compensation committee independence and factors affecting compensation adviser independence
  - Disclosure rules regarding compensation consultant conflicts
- Specialized Disclosure
  - Rules regarding disclosure related to "conflict minerals"
  - Rules regarding disclosure by resource extraction issuers

To be proposed by June 2012 and adopted by December 2012:

- Executive Compensation
  - Rules regarding disclosure of pay-for-performance, pay ratios and hedging by employees and directors
  - Rules regarding listing standards related to recovery of "erroneously awarded" executive compensation

❑ **Be mindful of the impact of broker voting.** During the last two proxy seasons, companies had to deal with the potential impact of two significant changes to New York Stock Exchange Rule 452, the rule that dictates when brokers can vote customer shares without instructions. These changes eliminate the discretion of brokers to vote uninstructed customer shares on uncontested director elections and proposals related to executive compensation. On January 24, 2012, the NYSE announced that effective immediately brokers can no longer vote uninstructed customer shares on certain types of corporate governance proposals, including proposals relating to staggered board of directors, majority voting in elections of directors and other anti-takeover proposals. Companies should be mindful of these changes and the potential impact of the changes on the ability to obtain the quorum necessary to hold the annual meeting of shareholders. If obtaining quorum is in doubt, companies should consider whether brokers can vote uninstructed client shares on at least one of the meeting agenda items (*e.g.*, ratifying the appointment of the company's auditors).

Attorney Bios

Brian V. Breheny | Corporate Governance, Mergers & Acquisitions and Securities Regulation
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.

Marc S. Gerber | Corporate Governance, Mergers & Acquisitions and Securities Regulation
Marc Gerber advises numerous clients on a full range of corporate governance and related matters, including advising clients on compliance with the corporate governance provisions of the Dodd-Frank Act and the provisions of the Sarbanes-Oxley Act. He counsels clients on matters concerning their annual meetings and proxy statements, including responding to shareholder proposals and interacting with shareholders and proxy advisory firms. Mr. Gerber has also advises clients on shareholder rights plans, advance notice bylaws and shareholder activism.

Richard J. Grossmann | Corporate Governance, Mergers & Acquisitions and Securities Regulation
Richard Grossman focuses his practice on proxy contests, responding to shareholder activists, corporate governance matters and mergers and acquisitions. He has advised many companies with respect to corporate governance issues and responses to shareholder proposals. Mr. Grossman had also represented companies in contested proxy solicitations and other contests for corporate control. In addition, he has advised several firm clients in designing and implementing shareholder rights plans and other corporate protective measures.

Regina Olshan | Executive Compensation and Benefits
Regina Olshan's practice focuses on advising companies, executives and boards on navigating the regulatory complexities of executive compensation and benefits. She regularly advises 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. Ms. Olshan also advises large public companies and individual senior executives on the adoption, revision, and negotiation of executive employment and severance agreements

Joseph M. Yaffe | Executive Compensation and Benefits
Joseph Yaffe handles tax and securities law matters arising in equity compensation arrangements and employee benefits issues 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.